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DEPARTMENT OF AGRICULTURE

Food Safety and Inspection Service

9 CFR Parts 317, 381, and 412

[Docket No. FSIS–2016–0021]

Food Safety and Inspection Service Labeling Guideline on Documentation Needed To Substantiate Animal Raising Claims for Label Submission

AGENCY: Food Safety and Inspection Service, USDA.

ACTION: Guidance.

SUMMARY: The Food Safety and Inspection Service (FSIS) is announcing the availability of an updated version of the Agency's compliance guideline on documentation needed to support animal-raising claims on product labels that must be submitted for Agency approval before they can be used on product labels. The updated guideline reflects FSIS's current position and procedures for reviewing animal-raising claims and includes explanations of animal-raising claims that FSIS may approve and the types of supporting documentation that the Agency requires to be submitted to support these claims.

DATES: Submit comments on or before December 5, 2016.

ADDRESSES: A downloadable version of the compliance guideline is available to view and print at *http://www.fsis.usda.gov/wps/wcm/connect/6fe3cd56-6809-4239-b7a2-bccb82a30588/RaisingClaims.pdf?MOD=AJPERES* once copies of the guideline have been published.

FSIS invites interested persons to submit comments on this guidance. Comments may be submitted by one of the following methods:

Federal eRulemaking Portal: This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov/*. Follow the on-line instructions at that site for submitting comments.

Mail, including CD–ROMs: Send to Docket Clerk, U.S. Department of Agriculture, Food Safety and Inspection Service, Patriots Plaza 3, 1400 Independence Avenue SW., Mailstop 3782, Room 8–163B, Washington, DC 20250–3700.

Hand- or courier-delivered submittals: Deliver to Patriots Plaza 3, 355 E Street SW., Room 8–163A, Washington, DC 20250–3700.

Instructions: All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2016–0021. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov*.

Docket: For access to background documents or to comment received, go to the FSIS Docket Room at Patriots Plaza 3, 355 E Street SW., Room 164–A, Washington, DC 20250–3700 between 8:00 a.m. and 4:30 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Dr. Daniel L. Engeljohn, Assistant Administrator, Office of Policy and Program Development; Telephone: (202) 205–0495.

SUPPLEMENTARY INFORMATION:

Background

A federally inspected meat or poultry establishment is required to use labels that are in compliance with the Federal Meat Inspection Act (FMIA; 21 U.S.C. 601 *et seq.,* 607), the Poultry Products Inspection Act (PPIA; 21 U.S.C. 451 *et seq.,* 457), and the implementing regulations. Requirements include all mandatory labeling requirements as prescribed in Title 9 of the Code of Federal Regulations section 317.2 and 381 Subpart N.

All labels with special claims, including animal-raising claims, need to be submitted to FSIS prior to being used on the product under 9 CFR 412.1(c)(3). As with all labels with special claims, labels with animal-raising claims must be submitted to the Labeling and Program Delivery Staff, Office of Policy and Program Development in FSIS with specific documentation to support all such claims that appear on that label. Examples of animal-raising claims include, but are not limited to: ''Raised Without Antibiotics,'' ''Organic,'' ''Grass-Fed,'' ''Free-Range,'' and ''Raised without the use of hormones.'' For most animal-raising claims, the documentation typically needed to support these claims includes:

1. A detailed written description explaining the controls used for ensuring that the raising claim is valid from birth to harvest or the period of raising being referenced by the claim;
2. A signed and dated document describing how the animals are raised (*e.g.,* vegetarian-fed, raised without antibiotics, grass-fed), to support that the specific claim made is truthful and not misleading;
3. A written description of the product-tracing and segregation mechanism from time of slaughter or further processing through packaging and wholesale or retail distribution;
4. A written description for the identification, control, and segregation of non-conforming animals or products; and
5. If a third party certifies a claim, a current copy of the certificate.

FSIS previously issued a compliance guideline on animal-raising claims in 2002. The changes included in this version of the guideline include definitions for frequently used animal-raising claims, the detailed supporting documentation required for each specific claim that appears on the label, additional information regarding the claim *grass fed,* information required for duplicating raising claims from purchased product, and examples of labels bearing claims.

This guideline represents FSIS's current position and procedures for approving animal-raising claims, and although FSIS is requesting comments on this guideline and may update it in response to comments, FSIS encourages establishments that wish to submit request for approvals of animal raising claims on product labels to begin using this guideline.

Additional Public Notification

Public awareness of all segments of rulemaking and policy development is important. Consequently, FSIS will announce this **Federal Register** publication on-line through the FSIS Web page located at: *http://www.fsis.usda.gov/federal-register*.

FSIS also will make copies of this publication available through the FSIS Constituent Update, which is used to

provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to our constituents and stakeholders. The Update is available on the FSIS Web page. Through the Web page, FSIS is able to provide information to a much broader, more diverse audience. In addition, FSIS offers an email subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *http://www.fsis.usda.gov/subscribe.* Options range from recalls to export information, regulations, directives, and notices. Customers can add or delete subscriptions themselves, and have the option to password-protect their accounts.

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Send your completed complaint form or letter to USDA by mail, fax, or email:

Mail: U.S. Department of Agriculture, Director, Office of Adjudication, 1400 Independence Avenue SW., Washington, DC 20250–9410.

Fax: (202) 690–7442.

Email: program.intake@usda.gov.

Persons with disabilities who require alternative means for communication (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

Done at Washington, DC on: September 29, 2016.

Alfred V. Almanza,

Acting Administrator.

[FR Doc. 2016–24067 Filed 10–4–16; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9784]

RIN 1545–BM05

Definition of Real Estate Investment Trust Real Property; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correcting amendment.

SUMMARY: This document contains corrections to final regulations (TD 9784) that were published in the **Federal Register** on Wednesday, August 31, 2016 (81 FR 59849). The final regulations that clarify the definition of real property for purposes of real estate investment trust provisions of the Internal Revenue Code (Code).

DATES: This correction is effective October 5, 2016 and is applicable on or after August 31, 2016.

FOR FURTHER INFORMATION CONTACT: Julanne Allen of the Office of Associate Chief Counsel (Financial Institutions and Products) at (202) 317–6945 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The final regulations (TD 9784) that are the subject of this correction are under section 856 of the Internal Revenue Code.

Need for Correction

As published, the final regulations (TD 9784) contain errors that may prove to be misleading and are in need of clarification.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Correction of Publication

Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.856–10(g) is amended by revising the first sentence of *Example 10* paragraph (iv) and revising the fourth sentence of *Example 10* paragraph (v) to read as follows:

§ 1.856–10 Definition of real property.

* * * * *

(g) * * *

Example 10. * * *

* * * * *

(iv) The factors described in this paragraph (g) *Example 10* (iii)(A) through (C) and (iii)(E) through (H) support the conclusion that the isolation valves and vents and pressure control and relief valves are structural components of REIT J's pipelines within the meaning of paragraph (d)(3) of this section and, therefore, are real property. * * *

* * * * *

(v) * * * The meters and compressors do not serve the pipelines in their passive function of providing a conduit for the natural gas, and are used in connection with the production of income from the sale and transportation of natural gas, rather than as consideration for the use or occupancy of space within the pipelines.

* * * * *

Martin V. Franks,

Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration).

[FR Doc. 2016–23991 Filed 10–4–16; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2016–0887]

RIN 1625–AA08

Special Local Regulation; Arkansas River; Little Rock, AR

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary special local regulation controlling movement of vessels for certain waters of the Arkansas River. This rule is necessary to provide for the safety of life on navigable waters during a rowing regatta on October 14 and 15, 2016. This regulation prohibits entry by all vessels, mariners, and persons into the event area, a 1.2 mile stretch of the Arkansas River extending 25-yards from the left descending bank. All vessels transiting the regulated area outside of the 25-yard zone will be limited to slowest speed for safe navigation to minimize wake unless specifically authorized by the Captain of the Port Memphis.

DATES: This rule is effective from 7 a.m. on October 14, 2016 until 7 p.m. on October 15, 2016.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to

http://www.regulations.gov, type USCG–2016–0887 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email Petty Officer Todd Manow, Waterways Management, Sector Lower Mississippi River, U.S. Coast Guard, telephone 901–521–4813, email *Todd.M.Manow@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

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

II. Background Information and Regulatory Hostory

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency, for good cause, finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable. While the Arkansas Boathouse Club notified the Coast Guard that it will be conducting a rowing regatta, the ''Six Bridges Regatta'', from 7 a.m. until 7 p.m. on October 14 and 15, 2016, the final details of this event were not made known to the Coast Guard until early September, leaving an insufficient amount of time remaining to publish an NPRM. It is impracticable to publish an NPRM because we must establish this safety zone by October 14, 2016.

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

III. Legal Authority and Need for a Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1233. The COTP has determined that potential hazards posed to participants of a rowing regatta in this section of river would be a safety concern for anyone transiting the river from mile marker 117.4 to 118.6. The purpose of this rulemaking is to ensure the safety of event participants and other waterway users in U.S. navigable waters from mile marker 117.4 to 118.6 before, during, and after the scheduled event.

IV. Discussion of the Rule

This rule establishes a special local regulation, enforced from 7 a.m. until 7 p.m. each day on October 14 and 15, 2016. In light of the aforementioned hazards, the COTP has determined that a special local regulation is necessary to protect spectators, vessels, and participants. The special local regulation will encompass the following waterway: All waters of the Arkansas River between mile markers 117.4 and 118.6 in the vicinity of Little Rock, AR.

This regulation prohibits entry by all vessels, mariners, and persons into the event area, a 1.2 mile stretch of the Arkansas River extending 25-yards from the left descending bank. All vessels transiting the regulated area outside of the 25-yard zone will be limited to slowest speed for safe navigation to minimize wake unless specifically authorized by the Captain of the Port Memphis.

V. Regulatory Analyses

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

A. Regulatory Planning and Review

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a ''significant regulatory action,'' under E.O. 12866. Accordingly, it has not been reviewed by the Office of Management and Budget.

The Coast Guard's use of this special local regulation will be only 12 hours in duration each day on a Friday and a Saturday, and it is designed to minimize the impact on navigation. Moreover, vessels will be allowed to transit the marked navigation channel outside the 25 yards from left descending bank from mile marker 117.4 to mile marker 118.6 at the slowest speed for safe navigation to minimize wake unless specifically authorized by the Captain of the Port Memphis. Overall, the Coast Guard expects minimal impact to vessel movement from the enforcement of this special local regulation.

B. Impact on Small Entities

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

This rule will affect the following entities, some of which might be small entities: The owners or operators of vessels intending to transit or anchor in this portion of the Arkansas River in the vicinity of Little Rock, AR between 7 a.m. on October 14, 2016 and 7 p.m. on October 15, 2016.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule will affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

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

preemption requirements described in E.O. 13132.

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

E. Unfunded Mandates Reform Act

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

F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a special local regulation lasting 12 hours each day over the course of a Friday and Saturday. Normally such actions are categorically excluded from further review under paragraph 34(h) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist and Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

G. Protest Activities

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

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. Add § 100.35T08–0887 to read as follows:

§ 100.35T08–0887 Special Local Regulation; Arkansas River, Little Rock, AR.

(a) *Regulated area.* (1) A regulated area is established to encompass the following waterway: All waters of the Arkansas River mile 117.4 through mile 118.6.

(2) All vessels are prohibited from entering the event area which extends out 25-yards from the left descending bank within the regulated area. All vessels transiting the regulated area outside of 25 yards from the left descending bank zone are limited to slowest speed for safe navigation to minimize wake unless specifically authorized by the COTP.

(b) *Effective period.* This section is effective from 7 a.m. on October 14, 2016 until 7 p.m. on October 15, 2016 and will be enforced each day from 7 a.m. until 7 p.m.

(c) *Regulations.* (1) In accordance with the general regulations in § 100.801 of this part, all vessels, mariners, and persons are prohibited from entering the event area, without permission of the Captain of the Port Memphis (COTP). All vessel operators desiring to operate in the event area of this special local regulation must contact the COTP or a designated representative to request permission to do so. The COTP or a designated representative may be contacted via VHF Channel 16 or by telephone at 1–866–777–2784.

(2) During enforcement, all vessels transiting the marked navigation channel from mile marker 117.4 to mile marker 118.6 will be limited to slowest speed for safe navigation to minimize wake unless specifically authorized by the COTP.

(d) *Informational broadcasts.* The COTP or a designated representative will inform the public through broadcast notices to mariners of the enforcement period for the regulated area as well as any changes in the dates and times of enforcement.

Dated: September 27, 2016.

T.J. Wendt,

Captain, U.S. Coast Guard, Captain of the Port, Memphis, Tennessee.

[FR Doc. 2016–24071 Filed 10–4–16; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2016–0489; FRL–9953–64–Region 4]

Air Plan Approval; Georgia: Volatile Organic Compounds

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving portions of two revisions to the Georgia State Implementation Plan (SIP) submitted by the Georgia Department of Environmental Protection (GA EPD) on July 25, 2014, and November 1, 2015. These revisions modify the definition of ''volatile organic compounds'' (VOC). Specifically, these revisions add two compounds to the list of those excluded from the VOC definition on the basis that these compounds make a negligible contribution to tropospheric ozone formation. This action is being taken pursuant to the Clean Air Act (CAA or Act).

DATES: This direct final rule is effective December 5, 2016 without further notice, unless EPA receives adverse comment by November 4, 2016. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2016–0489 at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points

you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Mr. Lakeman can be reached by phone at (404) 562–9043 or via electronic mail at *lakeman.sean@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Tropospheric ozone, commonly known as smog, occurs when VOC and nitrogen oxides (NO_X) react in the atmosphere in the presence of sunlight. Because of the harmful health effects of ozone, EPA and state governments limit the amount of VOC and NO_X that can be released into the atmosphere. VOC are those compounds of carbon (excluding carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate) that form ozone through atmospheric photochemical reactions. Compounds of carbon (or organic compounds) have different levels of reactivity; they do not react at the same speed or do not form ozone to the same extent.

Section 302(s) of the CAA specifies that EPA has the authority to define the meaning of ''VOC,'' and hence what compounds shall be treated as VOC for regulatory purposes. It has been EPA's policy that compounds of carbon with negligible reactivity need not be regulated to reduce ozone and should be excluded from the regulatory definition of VOC. *See* 42 FR 35314 (July 8, 1977), 70 FR 54046 (September 13, 2005). EPA determines whether a given carbon compound has ''negligible'' reactivity by comparing the compound's reactivity to the reactivity of ethane. EPA lists these compounds in its regulations at 40 CFR 51.100(s) and excludes them from the definition of VOC. The chemicals on this list are often called ''negligibly reactive.'' EPA may periodically revise the list of negligibly reactive compounds to add or delete compounds.

EPA issued final rules approving the addition of trans-1,3,3,3-tetrafluropropene (also known as HFO–1234ze) and 2-amino-2-methyl-1-propanol (AMP) to the list of those compounds excluded from the regulatory definition of VOC. *See* 77 FR 37610 (June 22, 2012) and 79 FR 17037 (March 27, 2014). Georgia is updating its SIP to be consistent with those changes to federal regulations.

II. Analysis of State's Submittal

On July 25, 2014, and November 1, 2015, Georgia submitted SIP revisions [1] to EPA for review and approval. The revisions modify the definition of VOC found at Georgia's Rule 391–3–1–.01(llll), ''Volatile Organic Compounds.'' Specifically, the revisions add trans-1,3,3,3-tetrafluropropene (also known as HFO-1234ze) and 2-amino-2-methyl-1-propanol (AMP) to the list of compounds excluded from the VOC definition on the basis that each of these compounds makes a negligible contribution to tropospheric ozone formation.

These changes are consistent with section 110 of the CAA and meet the regulatory requirements pertaining to SIPs. Pursuant to CAA section 110(l), the Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in CAA section 171), or any other applicable requirement of the Act. The revisions to Rule 391–3–1–.01(llll), ''Volatile Organic Compounds,'' are approvable under section 110(l) because they reflect changes to federal regulations based on findings that the aforementioned compounds are negligibly reactive.

III. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of Rule 391–3–1–.01 ''Definitions'' effective August 3, 2015, which revised the definition of VOC.[2] Therefore, this material has been approved by EPA for inclusion in the SIP, has been incorporated by reference by EPA into that plan, is fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.[3] EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and/or at the EPA Region 4 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

IV. Final Action

Pursuant to section 110 of the CAA, EPA is approving the aforementioned changes to Georgia's SIP for Rule 391–3–1–.01(llll). EPA has evaluated the relevant portions of Georgia's July 25, 2014, and November 1, 2015, SIP revisions and has determined that they meet the applicable requirements of the CAA and EPA regulations and are consistent with EPA policy.

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this **Federal Register** publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This rule will be effective December 5, 2016 without further notice unless the Agency receives adverse comments by November 4, 2016.

If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All public comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on December 5, 2016 and no further action will be taken on the proposed rule.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting

[1] EPA will consider the other changes included in Georgia's July 25, 2014, and November 5, 2015, SIP revisions in a future rulemaking.

[2] The effective date of the rule change made in Georgia's July 25, 2014, SIP revision is August 1, 2013. However, that change to Georgia's rule is captured and superseded by Georgia's update in the November 1, 2015, SIP revision.

[3] 62 FR 27968 (May 22, 1997).

federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 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).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

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 CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 5, 2016. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes 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. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of today's **Federal Register**, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. 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: September 23, 2016.

V. Anne Heard,

Acting Regional Administrator, Region 4.

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 L—Georgia

■ 2. Section 52.570(c) is amended by revising the entry for ''391–3–1–.01'' to read as follows:

§ 52.570 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED GEORGIA REGULATIONS

State citation	Title/subject	State effective date	EPA approval date	Explanation
391–3–1–.01	Definitions	8/3/2015	10/5/2016, [Insert citation of publication].	only changes to Rule 391–3–1–.01(llll).
*	*	*	*	*

* * * * *

[FR Doc. 2016–23970 Filed 10–4–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2016–0193; FRL–9951–57]

Tolfenpyrad; Pesticide Tolerances for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes time-limited tolerances for residues of tolfenpyrad in or on vegetable, fruiting, group 8–10. This action is in response to EPA's granting of an emergency exemption under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of the pesticide on agricultural commodities in the group ''vegetable, fruiting, group 8–

10.'' This regulation establishes a maximum permissible level for residues of tolfenpyrad in or on these commodities.

The time-limited tolerances expire on December 31, 2019.

DATES: This regulation is effective October 5, 2016. Objections and requests for hearings must be received on or before December 5, 2016, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2016–0193, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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

You may access a frequently updated electronic version of 40 CFR part 180 through the Government Printing Office's e-CFR site at *http://www.ecfr.gov/cgi-bin/text-idx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl.* To access the OCSPP test guidelines referenced in this document electronically, please go to *http://www.epa.gov/ocspp* and select ''Test Methods and Guidelines.''

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

Under section 408(g) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2016–0193 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before December 5, 2016. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2016–0193, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.*

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

II. Background and Statutory Findings

EPA, on its own initiative, in accordance with FFDCA sections 408(e) and 408(l)(6) of, 21 U.S.C. 346a(e) and 346a(1)(6), is establishing time-limited tolerances for residues of tolfenpyrad, 4-chloro-3-ethyl-1-methyl-*N*-[4-(*p*-tolyloxy)benzyl]pyrazole-5-carboxamide, in or on agricultural commodities in the group ''vegetable, fruiting, group 8–10'' at 0.70 parts per million (ppm). These time-limited tolerances expire on December 31, 2019.

Section 408(l)(6) of FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under FIFRA section 18. Such tolerances can be established without providing notice or period for public comment. EPA does not intend for its actions on FIFRA section 18 related time-limited tolerances to set binding precedents for the application of FFDCA section 408 and the safety standard to other tolerances and exemptions. Section 408(e) of FFDCA allows EPA to establish a tolerance or an exemption from the requirement of a tolerance on its own initiative, *i.e.,* without having received any petition from an outside party.

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

Section 18 of FIFRA authorizes EPA to exempt any Federal or State agency from any provision of FIFRA, if EPA determines that ''emergency conditions exist which require such exemption.''

EPA has established regulations governing such emergency exemptions in 40 CFR part 166.

III. Emergency Exemption for Tolfenpyrad on Vegetable, Fruiting, Group 8–10 Commodities and FFDCA Tolerances

The Florida Department of Agriculture and Consumer Services (FDACS) requested an emergency exemption for the use of tolfenpyrad on fruiting vegetables to reduce damage incurred by thrips. Thrips have become a severe problem in Florida on account of their developing resistance to the insecticides currently registered for use on fruiting vegetable crops, combined with the appearance of Tomato Chlorotic Spot Virus, a newly established invasive virus disease vectored by thrips attacking fruiting vegetables. According to FDACS, substantial economic damage is occurring and 30% to 90% yield loss has been documented due to the insufficient efficacy of registered alternatives.

After having reviewed the submission, EPA determined that an emergency condition exists for this State, and that the criteria for approval of an emergency exemption are met. EPA has authorized a specific exemption under FIFRA section 18 for the use of tolfenpyrad on vegetable, fruiting, group 8–10 for control of thrips in Florida.

As part of its evaluation of the emergency exemption application, EPA assessed the potential risks presented by residues of tolfenpyrad in or on vegetable, fruiting, group 8–10. In doing so, EPA considered the safety standard in FFDCA section 408(b)(2), and EPA decided that the necessary tolerances under FFDCA section 408(l)(6) would be consistent with the safety standard and with FIFRA section 18. Consistent with the need to move quickly on the emergency exemption in order to address an urgent, non-routine situation and to ensure that the resulting food is safe and lawful, EPA is issuing these tolerances without notice and opportunity for public comment as provided in FFDCA section 408(l)(6). Although these time-limited tolerances expire on December 31, 2019, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on vegetable, fruiting, group 8–10 after that date will not be unlawful, provided the pesticide was applied in a manner that was lawful under FIFRA, and the residues do not exceed a level that was authorized by these time-limited tolerances at the time of that application. EPA will take action to revoke these time-limited tolerances earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

Because these time-limited tolerances are being approved under emergency conditions, EPA has not made any decisions about whether tolfenpyrad meets FIFRA's registration requirements for use on vegetable, fruiting, group 8–10 or whether permanent tolerances for this use would be appropriate. Under these circumstances, EPA does not believe that this time-limited tolerance decision serves as a basis for registration of tolfenpyrad by a State for special local needs under FIFRA section 24(c), nor does this tolerance by itself serve as the authority for persons in any State other than Florida to use this pesticide on the applicable crops under FIFRA section 18, absent the issuance of an emergency exemption applicable within that State. For additional information regarding the emergency exemption for tolfenpyrad, contact the Agency's Registration Division at the address provided under **FOR FURTHER INFORMATION CONTACT**.

IV. Aggregate Risk Assessment and Determination of Safety

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

Consistent with the factors specified in FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of, and to make a determination on, aggregate exposure expected as a result of this emergency exemption request and the time-limited tolerances for residues of tolfenpyrad on vegetable, fruiting, group 8–10 at 0.70 ppm. EPA's assessment of exposures and risks associated with establishing time-limited tolerances follows.

A. Toxicological Points of Departure/ Levels of Concern

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

A summary of the toxicological profile and endpoints for tolfenpyrad used for human health risk assessment is discussed in Table 1 of the final rule published in the **Federal Register** of January 9, 2014, (79 FR 1599) (FRL–9904–70).

B. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to tolfenpyrad, EPA considered exposure under the time-limited tolerances established by this action as well as all existing tolfenpyrad tolerances in 40 CFR 180.675. EPA assessed dietary exposures from tolfenpyrad in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessment are performed for a food-use pesticide if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure; such effects were identified for tolfenpyrad. In estimating acute

dietary exposure, EPA used food consumption information from the United States Department of Agriculture (USDA) 2003–2008 National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA). For purposes of this acute exposure assessment, EPA assumed 100 percent crop treated (PCT) and tolerance-level residues.

ii. *Chronic exposure.* In conducting the chronic dietary exposure assessment EPA used the food consumption information from the USDA 2003–2008 NHANES/WWEIA. For purposes of this chronic exposure assessment, EPA relied upon average residue levels from crop field trials. EPA also used PCT estimates (discussed further in Unit IV.B.1.iv., below) for certain commodities that were shown to have a high contribution to the overall dietary exposure, while assuming 100 PCT for the rest of the commodities.

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

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

Section 408(b)(2)(F) of FFDCA states that the Agency may use data on the actual percent of food treated for assessing chronic dietary risk only if:

- Condition a: The data used are reliable and provide a valid basis to show what percentage of the food derived from such crop is likely to contain the pesticide residue.
- Condition b: The exposure estimate does not underestimate exposure for any significant subpopulation group.
- Condition c: Data are available on pesticide use and food consumption in a particular area, the exposure estimate does not understate exposure for the population in such area.

In addition, the Agency must provide for periodic evaluation of any estimates used. To provide for the periodic evaluation of the estimate of PCT as required by FFDCA section 408(b)(2)(F), EPA may require registrants to submit data on PCT.

In most cases, EPA uses available data from United States Department of Agriculture/National Agricultural Statistics Service (USDA/NASS), proprietary market surveys, and the National Pesticide Use Database for the chemical/crop combination for the most recent 6–7 years. EPA uses an average PCT for chronic dietary risk analysis. The average PCT figure for each existing use is derived by combining available public and private market survey data for that use, averaging across all observations, and rounding to the nearest 5%, except for those situations in which the average PCT is less than one. In those cases, 1% is used as the average PCT and 2.5% is used as the maximum PCT. EPA uses a maximum PCT for acute dietary risk analysis. The maximum PCT figure is the highest observed maximum value reported within the recent 6 years of available public and private market survey data for the existing use and rounded up to the nearest multiple of 5%.

In this case, EPA used data from the USDA NASS Agricultural Chemical Usage—Fruit Summary (2003, 2005, 2007, 2009), Vegetable Summary (2004, 2006, 2010), along with proprietary data to estimate PCT for four commodities (all others being assumed to be 100 PCT). Based on that data, EPA estimated average PCTs of 40% for oranges, 60% for apples, 65% for table grapes, and 50% for spinach.

The Agency believes that the three conditions discussed in Unit IV.B1.iv. have been met. With respect to Condition a, PCT estimates are derived from Federal and private market survey data, which are reliable and have a valid basis. As to Conditions b and c, regional consumption information and consumption information for significant subpopulations is taken into account through EPA's computer-based model for evaluating the exposure of significant subpopulations including several regional groups. Use of this consumption information in EPA's risk assessment process ensures that EPA's exposure estimate does not understate exposure for any significant subpopulation group and allows the Agency to be reasonably certain that no regional population is exposed to residue levels higher than those estimated by the Agency. Other than the data available through national food consumption surveys, EPA does not have available reliable information on the regional consumption of food to which tolfenpyrad may be applied in a particular area.

2. *Dietary exposure from drinking water.* The Agency used screening level water exposure models in the dietary exposure analysis and risk assessment for tolfenpyrad in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of tolfenpyrad. Further information regarding EPA drinking water models used in pesticide exposure assessment can be found at *http://www.epa.gov/oppefed1/models/water/index.htm.*

Based on the Pesticide Root Zone Model/Exposure Analysis Modeling System (PRZM/EXAMS) and Screening Concentration in Ground Water (SCI–GROW) models, the estimated drinking water concentrations (EDWCs) of tolfenpyrad for acute exposures are estimated to be 26.9 parts per billion (ppb) for surface water and 11 ppb for ground water. For chronic exposures for non-cancer assessments, the EDWCs are estimated to be 12.2 ppb for surface water and 11 ppb for ground water.

Modeled estimates of drinking water concentrations were directly entered into the dietary exposure model.

For acute dietary risk assessment, the water concentration value of 26.9 ppb was used to assess the contribution to drinking water.

For chronic dietary risk assessment, the water concentration value of 12.2 ppb was used to assess the contribution to drinking water.

3. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* for lawn and garden pest control, indoor pest control, termiticides, and flea and tick control on pets). Tolfenpyrad is not registered for any specific use patterns that would result in residential exposure.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at: *http://www.epa.gov/pesticides/trac/science/trac6a05.pdf.*

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

EPA has not found tolfenpyrad to share a common mechanism of toxicity

with any other substances, and tolfenpyrad does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that tolfenpyrad does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

C. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* No evidence of increased quantitative or qualitative susceptibility was observed in developmental toxicity studies in rats or rabbits or a reproduction toxicity study in rats. However, the developmental immunotoxicity study (DIT) in rats suggests increased qualitative susceptibility in the young, since toxicity observed in offspring animals was more pronounced than toxicity seen in maternal animals at the same dose. No evidence of quantitative susceptibility was seen in the study. There is low concern and there are no residual uncertainties regarding the increased qualitative prenatal and/or postnatal susceptibility observed for tolfenpyrad. When the DIT and the reproduction study are considered together, the offspring toxicity in the DIT is comparable in severity to maternal toxicity observed at the same dose in the reproduction study. Since the adverse effects in young occurred at exposure levels that have shown comparable effects in adults, EPA does not consider the DIT persuasive evidence of an increased susceptibility of infants or children to tolfenpyrad. Additionally, the effects observed in the DIT study are well-characterized, a clear NOAEL was identified, and the endpoints chosen for risk assessment are protective of potential offspring effects, since a dermal hazard was not identified for tolfenpyrad, inhalation risk assessments are based on a route specific inhalation study, and the POD used for chronic dietary risk assessment is lower than where offspring effects were seen in the DIT study.

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

i. The toxicity database for tolfenpyrad is complete.

ii. There is no indication that tolfenpyrad is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.

iii. Although there is possibly increased qualitative susceptibility in the young in the DIT study in rats, there are no residual uncertainties regarding increased susceptibility for tolfenpyrad since, (1) comparable maternal toxicity was observed at the same dose in the reproduction study, (2) the offspring effects observed in the DIT study are well characterized and there is a clear NOAEL for the effects seen, (3) no evidence of quantitative susceptibility was seen in the DIT study and susceptibility was not observed (quantitative or qualitative) in rat or rabbit developmental toxicity or reproduction studies tested at similar doses, (4) the endpoints and PODs selected for risk assessment are protective, and (5) direct non-dietary exposure to children is not anticipated since there are no residential uses for tolfenpyrad. Thus, a 10X FQPA safety factor is not necessary to protect infants and children.

iv. There are no residual uncertainties identified in the exposure databases. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to tolfenpyrad in drinking water. EPA used similarly conservative assumptions to assess post-application exposure of children as well as incidental oral exposure of toddlers. These assessments will not underestimate the exposure and risks posed by tolfenpyrad.

D. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water and relevant residential exposure scenarios. Since acute residential exposure is not anticipated, acute aggregate risk from exposure to tolfenpyrad results from exposure to residues in food and drinking water alone. Therefore, acute aggregate risk estimates are equivalent to the acute dietary risk estimates. Using the exposure assumptions discussed in this unit for acute exposure, the acute dietary exposure from food and water to tolfenpyrad will occupy 56% of the aPAD for the U.S. general population. Children 3–5 years old are the highest-exposed population subgroup with an estimated exposure of 81% of the aPAD. Typically, EPA has concerns when estimated exposures exceed 100% of the acute or chronic population-adjusted dose (aPAD or cPAD). Acute dietary risk estimates are below EPA's level of concern for all populations.

2. *Chronic risk.* A chronic aggregate risk assessment takes into account chronic exposure estimates from dietary consumption of food and drinking water and relevant residential exposure scenarios. Since chronic residential exposure is not anticipated for tolfenpyrad, chronic aggregate risk from exposure to tolfenpyrad results from exposure to residues in food and drinking water alone. Therefore, chronic aggregate risk estimates are equivalent to the chronic dietary risk estimates. Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to tolfenpyrad from food and water will utilize 69% of the cPAD for (children 1–2 years old) the population group receiving the greatest exposure. There are no residential uses for tolfenpyrad.

3. *Short-term risk.* Short-term aggregate exposure takes into account short-term residential exposure plus chronic exposure to food and water (considered to be a background (average) exposure level). A short-term adverse effect was identified; however, tolfenpyrad is not registered for any use patterns that would result in short-term residential exposure. Short-term risk is assessed based on short-term residential exposure plus chronic dietary exposure. Because there is no short-term residential exposure and chronic dietary

exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess short-term risk), no further assessment of short-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating short-term risk for tolfenpyrad.

4. *Intermediate-term risk.* Intermediate-term aggregate exposure takes into account intermediate-term non-dietary, non-occupational exposure plus chronic exposure to food and water (considered to be a background exposure level).

An intermediate-term adverse effect was identified; however, tolfenpyrad is not registered for any use patterns that would result in intermediate-term residential exposure. Intermediate-term risk is assessed based on intermediate-term residential exposure plus chronic dietary exposure. Because there is no intermediate-term residential exposure and chronic dietary exposure has already been assessed under the appropriately protective cPAD (which is at least as protective as the POD used to assess intermediate-term risk), no further assessment of intermediate-term risk is necessary, and EPA relies on the chronic dietary risk assessment for evaluating intermediate-term risk for tolfenpyrad.

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

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

V. Other Considerations

A. Analytical Enforcement Methodology

An adequate enforcement methodology (liquid chromatography/tandem mass spectrometry (LC/MS/MS)) is available to enforce the tolerance expression. The method may be requested from: Chief, Analytical Chemistry Branch, Environmental Science Center, 701 Mapes Rd., Ft. Meade, MD 20755–5350; telephone number: (410) 305–2905; email address: *residuemethods@epa.gov.*

B. International Residue Limits

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

The Codex has not established a MRL for tolfenpyrad residues in/on fruiting vegetables.

VI. Conclusion

Therefore, a time-limited tolerance is established for residues of tolfenpyrad, (4-chloro-3-ethyl-1-methyl-*N*-[4-(*p*-tolyloxy)benzyl]pyrazole-5-carboxamide, in or on the agricultural commodity ''vegetable, fruiting, group 8–10'' at 0.70 ppm. This tolerance expires on December 31, 2019.

VII. Statutory and Executive Order Reviews

This action establishes a tolerance under FFDCA sections 408(e) and 408(l)(6). The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established in accordance with FFDCA sections 408(e) and 408(l)(6), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) do not apply.

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

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VIII. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: September 26, 2016.

Michael L. Goodis,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.675, revise paragraph (b) to read as follows:

§ 180.675 Tolfenpyrad; tolerances for residues.

* * * * *

(b) *Section 18 emergency exemptions.* Time-limited tolerances specified in the following table are established for residues of tolfenpyrad, (4-chloro-3-ethyl-1-methyl-*N*-[4-(*p*-tolyloxy)benzyl]pyrazole-5-carboxamide, including its metabolites and degradates, in or on the specified agricultural commodities, resulting from use of the pesticide pursuant to FFIFRA section 18 emergency exemptions. Compliance with the tolerance levels specified below is to be determined by measuring only tolfenpyrad, 4-chloro-3-ethyl-1-methyl-*N*-[4-(*p*-tolyloxy)benzyl]pyrazole-5-carboxamide. The tolerances expire on the date specified in the table.

Commodity	Parts per million	Expiration date
Vegetable, fruiting, group 8–10	0.70	12/31/2019

* * * * *

[FR Doc. 2016–24093 Filed 10–4–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2016–0330; FRL–9952–34]

Acrylic acid-butyl acrylate-styrene copolymer; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of 2-propenoic acid, polymer with butyl 2-propenoate and ethenylbenzene, also known as acrylic acid-butyl acrylate-styrene copolymer, when used as an inert ingredient in a pesticide chemical formulation. Momentive Performance Materials submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of 2-propenoic acid, polymer with butyl 2-propenoate and ethenylbenzene on food or feed commodities.

DATES: This regulation is effective October 5, 2016. Objections and requests for hearings must be received on or before December 5, 2016, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2016–0330, is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

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

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

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

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

C. Can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2016–0330 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing, and must be received by the Hearing Clerk on or before December 5, 2016. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2016–0330, by one of the following methods.

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at *http://www.epa.gov/dockets/contacts.html.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *http://www.epa.gov/dockets.*

II. Background and Statutory Findings

In the **Federal Register** of July 20, 2016 (81 FR 47150) (FRL–9948–45), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the receipt of a pesticide petition (PP IN–10925) filed by

Momentive Performance Materials, 260 Hudson River Rd., Waterford, NY 12188. The petition requested that 40 CFR 180.960 be amended by establishing an exemption from the requirement of a tolerance for residues of acrylic acid-butyl acrylate-styrene copolymer; CAS Reg. No. 25586–20–3. That document included a summary of the petition prepared by the petitioner and solicited comments on the petitioner's request. The Agency did not receive any comments.

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

III. Risk Assessment and Statutory Findings

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be shown that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. In the case of certain chemical substances that are defined as polymers, the Agency has established a set of criteria to identify categories of polymers expected to present minimal or no risk. The definition of a polymer is given in 40 CFR 723.250(b) and the exclusion criteria for identifying these low-risk polymers are described in 40 CFR 723.250(d). Acrylic acid-butyl acrylate-styrene copolymer conforms to the definition of a polymer given in 40 CFR 723.250(b) and meets the following criteria that are used to identify low-risk polymers.

1. The polymer is not a cationic polymer nor is it reasonably anticipated to become a cationic polymer in a natural aquatic environment.

2. The polymer does contain as an integral part of its composition the atomic elements carbon, hydrogen, and oxygen.

3. The polymer does not contain as an integral part of its composition, except as impurities, any element other than those listed in 40 CFR 723.250(d)(2)(ii).

4. The polymer is neither designed nor can it be reasonably anticipated to substantially degrade, decompose, or depolymerize.

5. The polymer is manufactured or imported from monomers and/or reactants that are already included on the TSCA Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.

6. The polymer is not a water absorbing polymer with a number average molecular weight (MW) greater than or equal to 10,000 daltons.

7. The polymer does not contain certain perfluoroalkyl moieties consisting of a CF_3- or longer chain length as listed in 40 CFR 723.250(d)(6).

Additionally, the polymer also meets as required the following exemption criteria specified in 40 CFR 723.250(e).

8. The polymer's number average MW of 5,200 is greater than 1,000 and less than 10,000 daltons. The polymer contains less than 10% oligomeric material below MW 500 and less than 25% oligomeric material below MW 1,000, and the polymer does not contain any reactive functional groups.

Thus, acrylic acid-butyl acrylate-styrene copolymer meets the criteria for a polymer to be considered low risk under 40 CFR 723.250. Based on its conformance to the criteria in this unit, no mammalian toxicity is anticipated from dietary, inhalation, or dermal exposure to acrylic acid-butyl acrylate-styrene copolymer.

IV. Aggregate Exposures

For the purposes of assessing potential exposure under this exemption, EPA considered that acrylic acid-butyl acrylate-styrene copolymer could be present in all raw and processed agricultural commodities and drinking water, and that non-occupational non-dietary exposure was possible. The number average MW of acrylic acid-butyl acrylate-styrene copolymer is 5,200 daltons. Generally, a polymer of this size would be poorly absorbed through the intact gastrointestinal tract or through intact human skin. Since acrylic acid-butyl acrylate-styrene copolymer conforms to the criteria that identify a low-risk polymer, there are no concerns for risks associated with any potential exposure scenarios that are reasonably foreseeable. The Agency has determined that a tolerance is not necessary to protect the public health.

V. Cumulative Effects From Substances With a Common Mechanism of Toxicity

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

EPA has not found acrylic acid-butyl acrylate-styrene copolymer to share a common mechanism of toxicity with any other substances, and acrylic acid-butyl acrylate-styrene copolymer does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that acrylic acid-butyl acrylate-styrene copolymer does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's Web site at *http://www.epa.gov/pesticides/cumulative.*

VI. Additional Safety Factor for the Protection of Infants and Children

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an

additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base unless EPA concludes that a different margin of safety will be safe for infants and children. Due to the expected low toxicity of acrylic acid-butyl acrylate-styrene copolymer, EPA has not used a safety factor analysis to assess the risk. For the same reasons the additional tenfold safety factor is unnecessary.

VII. Determination of Safety

Based on the conformance to the criteria used to identify a low-risk polymer, EPA concludes that there is a reasonable certainty of no harm to the U.S. population, including infants and children, from aggregate exposure to residues of acrylic acid-butyl acrylate-styrene copolymer.

VIII. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

B. International Residue Limits

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

The Codex has not established a MRL for acrylic acid-butyl acrylate-styrene copolymer.

IX. Conclusion

Accordingly, EPA finds that exempting residues of acrylic acid-butyl acrylate-styrene copolymer from the requirement of a tolerance will be safe.

X. Statutory and Executive Order Reviews

This action establishes a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

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

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

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

XI. Congressional Review Act

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

List of Subjects in 40 CFR Part 180

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

Dated: September 26, 2016.

Michael L. Goodis,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180—[AMENDED]

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.960, add alphabetically the polymer ''Acrylic acid-butyl acrylate-styrene copolymer, minimum number average molecular weight (in amu), 5,200'' to the table to read as follows:

§ 180.960 Polymers; exemptions from the requirement of a tolerance.

* * * * *

Polymer	CAS No.
* * * * *	
Acrylic acid-butyl acrylate-styrene copolymer, minimum number average molecular weight (in amu), 5,200	25586–20–3
* * * * *	

[FR Doc. 2016–24083 Filed 10–4–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Parts 405, 412, 413, and 489

[CMS–1655–F; CMS–1664–F; CMS–1632–F2]

RIN 0938–AS77; 0938–AS88; 0938–AS41

Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Policy Changes and Fiscal Year 2017 Rates; Quality Reporting Requirements for Specific Providers; Graduate Medical Education; Hospital Notification Procedures Applicable to Beneficiaries Receiving Observation Services; Technical Changes Relating to Costs to Organizations and Medicare Cost Reports; Finalization of Interim Final Rules With Comment Period on LTCH PPS Payments for Severe Wounds, Modifications of Limitations on Redesignation by the Medicare Geographic Classification Review Board, and Extensions of Payments to MDHs and Low-Volume Hospitals; Correction

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule; correction.

SUMMARY: This document corrects technical and typographical errors in the final rule that appeared in the August 22, 2016 **Federal Register** titled ''Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long-Term Care Hospital Prospective Payment System and Policy Changes and Fiscal Year 2017 Rates; Quality Reporting Requirements for Specific Providers; Graduate Medical Education; Hospital Notification Procedures Applicable to Beneficiaries Receiving Observation Services; Technical Changes Relating to Costs to Organizations and Medicare Cost Reports; Finalization of Interim Final Rules With Comment Period on LTCH PPS Payments for Severe Wounds, Modifications of Limitations on Redesignation by the Medicare Geographic Classification Review Board, and Extensions of Payments to MDHs and Low-Volume Hospitals.''

DATES: This correction is effective October 1, 2016.

FOR FURTHER INFORMATION CONTACT: Donald Thompson, (410) 786–4487.

SUPPLEMENTARY INFORMATION:

I. Background

In FR Doc. 2016–18476 of August 22, 2016 (81 FR 56761) there were a number of technical and typographical errors identified and corrected in the Correction of Errors section of this correcting document. The provisions in this correcting document are effective as if they had been included in the document that appeared in the August 22, 2016 **Federal Register**. Accordingly, the corrections are effective October 1, 2016.

II. Summary of Errors

A. Summary of Errors in the Preamble

On page 56775, we made a typographical error in stating the cost reduction.

On page 56796, we are correcting errors and inadvertent omissions in the summary and response to a comment on the assignment of 18 additional diagnosis codes.

On page 56797, we erroneously referred to the wrong table.

On page 56801, we are correcting errors and inadvertent omissions in our response to comments on our proposal to redesignate four ICD–10–PCS procedure codes.

On page 56803 and in the table on page 56804 describing ICD–10–PCS Endovascular Thrombectomy Procedure Codes Reassigned to MS–DRGs 270, 271, and 272 for FY 2017, we are correcting technical errors in our discussion in response to comments to remove 34 ICD–10–PCS procedure codes describing endovascular thrombectomy of non-lower limbs from the proposed list of codes to be reassigned to MS–DRGs 270, 271 and 272. In this response, we erroneously referred to 34 procedure codes describing non-lower limb procedures (as included in the list submitted by the commenter) rather than 32 non-lower limb procedure codes. Two of the 34 procedure codes identified by the commenter, ICD–10–PCS procedure codes 04CT3ZZ (Extirpation of matter from right peroneal artery, percutaneous approach) and 04CU3ZZ (Extirpation of matter from left peroneal artery, percutaneous approach), describe endovascular thrombectomy of lower limbs. These codes are assigned to MS–DRGs 270, 271 and 272, accurately replicating the logic of ICD–9–CM MS–DRGs Version 32 and supporting clinical and resource use homogeneity as originally proposed and in accordance with the finalized policy to add procedures describing endovascular thrombectomy of lower limbs to ICD–10 Version 34 MS–DRGS 270, 271 and 272.

On page 56804, as a result of our correction of the MS–DRG assignment in Table 6B—New Procedure Codes for 13 ICD–10–PCS procedure codes that describe endovascular thrombectomy procedures of the lower limb, as described in section II.D. of this correction document, we are making additional conforming corrections to the table describing ICD–10–PCS Endovascular Thrombectomy Procedure Codes Reassigned to MS–DRGs 270, 271, and 272 for FY 2017.

On pages 56821 and 56823, we erroneously stated there were 58 additional combination codes for removal and replacement of knee joints. There were 57 additional combination codes.

On pages 56822 and 56823, we erroneously listed the code number for (Replacement of Left Knee Joint, Femoral Surface with Synthetic Substitute, Cemented, Open Approach) as code 0SRU0JA three times within the table. The correct code number should be 0SRU0J9 (Replacement of Left Knee Joint, Femoral Surface with Synthetic Substitute, Cemented, Open Approach).

As a result of the corrections to pages 56803, 56804, 56821, 56822, and 56823, we have made conforming changes to the ICD–10 MS–DRG Definitions Manual Version 34 and ICD–10 MS–DRG Grouper Software Version 34 for FY 2017.

On page 56858, we erroneously omitted MS–DRG 265 from the table of MS–DRGs subject to the policy for replaced devices offered without cost or with a credit.

On pages 56895 and 56897, we inadvertently made an error to the title of ICD–10–PCS procedure code XW03331 and omitted an additional procedure code that describes Idarucizumab. Cases involving Idarucizumab that are eligible for new technology add-on payments will be identified by ICD–10–PCS procedure codes XW03331 (Introduction of Idarucizumab, Dabigatran reversal agent into peripheral vein, percutaneous approach, New Technology Group 1) and XW04331 (Introduction of Idarucizumab, Dabigatran reversal agent into central vein, percutaneous approach, New Technology Group 1).

On page 56927, as a result of the correction of the technical errors described in section II.B of this correction document, we have made conforming changes to the following: The number of hospitals approved for wage index reclassifications by the Medicare Geographic Classification Review Board (MGCRB) starting in FY 2017 and the number of hospitals in a

MGCRB reclassification status for FY 2017.

On page 57002 in the table titled, ''Previously Adopted and Newly Finalized Baseline and Performance Periods for the FY 2021 Program Year'' we erroneously repeated the same information three times, and in the first instance provided incorrect performance period years for the Mortality (MORT–30–AMI, MORT–30–HF, MORT–30–COPD) and THA/TKA measures.

On page 57033, we made a typographical error and omitted a dash within the web link address creating a non-functional link.

On pages 57195, 57196, 57199, 57211, 57213, 57218, and 57220 through 57223 we inadvertently made technical and typographical errors to the Long-Term Care Hospital Quality Reporting Program section and have corrected those errors for clarification.

B. Summary of Errors in the Addendum

As discussed in section II.D. of this correcting document, we made technical errors with regard to the calculation of Factor 3 of the uncompensated care payment methodology. The revisions made to address some of these errors directly affected and required the recalculation of all the budget neutrality factors and final outlier threshold. Factor 3 is used to determine the amount of total uncompensated care payment a hospital is eligible to receive as well as the amount of the uncompensated care payment a hospital receives per discharge. Per discharge uncompensated care payments are then included when determining total payments for purposes of all of the budget neutrality factors and the final outlier threshold. Therefore, we made conforming changes to pages 57278 through 57280, 57286, and 57291 to take into account the updated per-discharge uncompensated care payments determined using revised Factor 3 amounts. We made further conforming corrections to the national outlier adjustment factors on page 57286 and the table on page 57288 as a result of these changes. Finally, we made conforming corrections to the national operating standardized amounts.

We made inadvertent errors related to the MGCRB reclassification status of one provider as well as the status of three providers reclassified as urban to rural under section 1886(d)(8)(E) of the Act (codified in the regulations under § 412.103 and hereinafter referred to as § 412.103).

Specifically, the reclassification status in the FY 2017 IPPS/LTCH PPS final rule did not properly reflect the following:

- Withdrawal of a MGCRB reclassification for FY 2017 for one provider.
- Application of urban to rural reclassification under § 412.103 for three providers.

Therefore, on page 57279, we recalculated the reclassification hospital budget neutrality adjustment.

The reclassification errors also required the recalculation of additional budget neutrality adjustment factors, the fixed-loss cost threshold, the final wage indexes, and the national operating standardized amounts. Therefore, we made conforming changes to the following:

- On page 57280, the rural floor budget neutrality adjustment and the wage index transition budget neutrality adjustment.
- On page 57286, the calculation of the outlier fixed-loss cost threshold and the national outlier adjustment factors.
- On page 57288, the table titled ''Change of FY 2016 Standardized Amounts to the FY 2017 Standardized Amounts''.

On pages 57291 and 57293 through 57295, in our discussion of the determination of the Federal hospital inpatient capital related prospective payment rate update, we have made conforming corrections to the increase in the capital Federal rate, the incremental and cumulative budget neutrality adjustment factors for changes in the GAFs and the MS–DRG relative weights, the GAF/MS–DRG budget neutrality adjustment factor (due to the errors in our calculation of the GAFs, which are computed from the wage index), the capital Federal rate, and the outlier threshold (as discussed previously).

Also, as a result of these errors, on pages 57294 and 57295, we have made conforming corrections in the tables showing the comparison of factors and adjustments for the FY 2016 capital Federal rate and FY 2017 capital Federal rate and the proposed FY 2017 capital Federal rate and final FY 2017 capital Federal rate.

On page 57307, we are making conforming corrections the fixed-loss amount for site neutral discharges due to corrections in the IPPS rates and factors discussed previously.

On page 57312, we have made conforming corrections to the national operating standardized amounts and capital standard Federal payment rate (which also include the rates payable to hospitals located in Puerto Rico) in Tables 1A, 1B, 1C, and 1D as a result of the conforming corrections to certain budget neutrality factors and the outlier threshold (as described previously).

C. Summary of Errors in the Appendices

On pages 57312, 57315 through 57317, 57319 through 57323, 57330 through 57332 in our regulatory impact analyses, we made conforming corrections to the factors, values, and tables and accompanying discussion of the changes in operating and capital IPPS payments for FY 2017 and the effects of certain budget neutrality factors as a result of the technical errors that lead to conforming changes in our calculation of the operating and capital IPPS budget neutrality factors, outlier threshold, final wage indexes, operating standardized amounts, and capital Federal rate (as described in section II.B. of this correction document).

On pages 57324 through 57326, in the table titled ''Modeled Disproportionate Share Hospital Payments for Estimated FY 2017 DSHs by Hospital Type: Model DSH $ (In Millions) From FY 2016 To FY 2017'' and the accompanying discussion, we made corrections to address technical and formatting errors in the estimated impacts resulting from inadvertent errors in the calculation of Factor 3 for certain hospitals.

On pages 57331 through 57332, we made conforming corrections to Table III—Comparison of Total Payments Per Case [FY 2016 Payments Compared to FY 2017 Payments].

On page 57342, we made conforming corrections to the discussion of the estimated changes in operating and capital IPPS payments and the accounting statement and table for acute care hospitals that arose from the corrections of errors and conforming changes as described in sections II.B. and II.D. of this correcting document.

D. Summary of Errors in and Corrections to Files and Tables Posted on the CMS Web Site

We are correcting the errors in the following IPPS tables that are listed on page 57311 of the FY 2017 IPPS/LTCH PPS final rule and are available on the Internet on the CMS Web site at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/FY2017-IPPS-Final-Rule-Home-Page.html.* The tables that are available on the Internet have been updated to reflect the revisions discussed in this correcting document.

Table 2—Case-Mix Index and Wage Index Table—FY 2017. Because the uncompensated care and reclassification errors discussed in section II.B. of this correction document required that we recalculate the rural and imputed floor budget neutrality factor, we are

correcting the values in the column titled FY 2017 Wage Index for all providers. For the three providers for which we are applying urban to rural reclassification under § 412.103, we are correcting the values in the column titled ''FY 2017 Wage Index'', inserting the rural reclassified CBSA in the column titled ''Reclassified/ Redesignated CBSA'', and inserting a ''Y'' in the column titled ''Hospital Reclassified as Rural Under Section 1886(d)(8)(E) of the Act (§ 412.103)''. For the provider that withdrew its MGCRB reclassification for FY 2017, we are revising the wage index in the column titled FY 2017 Wage Index, and we are removing the MGCRB flag in the column titled MGCRB Reclass.

Table 3—Wage Index Table by CBSA—FY 2017. Because the uncompensated care and reclassification errors discussed in section II.B. of this correction document required that we recalculate the rural and imputed floor budget neutrality factor, we are making corresponding changes to the wage indexes and GAFs of all CBSAs listed in Table 3. Specifically, we are correcting the values and flags in the columns titled ''Wage Index'', ''Reclassified Wage Index'', ''GAF'', ''Reclassified GAF'', ''Pre-Frontier and/or Pre-Rural Floor Wage Index'' and ''Eligible for Rural Floor Wage Index''.

Table 6B—New Procedure Codes for FY 2017. In Table 6B—New Procedure Codes, we inadvertently listed the incorrect MS–DRG assignment for 13 ICD–10–PCS procedure codes that describe endovascular thrombectomy procedures of the lower limb involving a bifurcation. We are correcting the MS–DRG assignment of these 13 ICD–10–PCS codes in Table 6B.

Table 10—New Technology Add-On Payment Thresholds for Applications for FY 2018. We are correcting the thresholds in this table as a result of the corrections to the operating standardized amounts discussed in section II.B. of this correcting document.

Table 18—FY 2017 Medicare DSH Uncompensated Care Payment Factor 3 and Projected DSH Eligibility. For the FY 2017 IPPS/LTCH PPS final rule, we published a list of hospitals that we identified to be subsection (d) hospitals and subsection (d) Puerto Rico hospitals eligible to receive empirically justified Medicare DSH payment adjustments and uncompensated care payments for FY 2017. We also published, in the Supplemental Medicare DSH File located in the FY 2017 IPPS/LTCH PPS final rule data files page at *https://www.cms.gov/Medicare/Medicare-Feefor-Service-Payment/AcuteInpatientPPS/FY2017-IPPS-FinalRule-Home-Page-Items/FY2017-IPPSFinal-Rule-Data-Files.html*, the data used to calculate each hospital's Factor 3, total uncompensated care payment, and estimated uncompensated care payment per discharge.

Shortly after the publication of the FY2017 IPPS/LTCH PPS final rule, we discovered that, in calculating Factor 3 of the uncompensated care payment methodology, we had understated the low-income insured days of hospitals that merged after 2011 with one surviving provider number because we inadvertently excluded the low income insured days of acquired hospitals from the low income insured days used in the Factor 3 calculation of surviving hospitals that were projected to receive Medicare DSH in FY 2017. In addition, we discovered that we had calculated a Factor 3 for hospitals that have ceased operations and erroneously calculated Factor 3 using Medicaid days reported on Worksheet S–3 instead of Worksheet S–2 of certain hospitals' FY 2013 cost reports. We are revising Factor 3 for all hospitals to correct these errors. These corrections to the uncompensated care payments impacted the calculation of all the budget neutrality factors as well as the outlier fixed-loss cost threshold for outlier payments.

In addition, we discovered that we had inadvertently excluded the Medicaid days from the 2011 cost report for a provider as well as the Medicaid days from the 2012 cost report for another provider from the calculation of Factor 3. Due to technical errors by our Medicare Administrative Contractors the Medicaid days from these cost reports were not included in the March 2016 update of HCRIS. We projected that both providers would be eligible to receive Medicare DSH in FY 2017. Accordingly, we are revising Factor 3 for all hospitals to reflect these Medicaid days; however, the impact of these revisions is too small to affect other aspects of the IPPS ratesetting, such as the calculation of the fixed-loss threshold for outlier payments.

We are also correcting the errors in the following LTCH PPS table that is listed on page 57311 of the FY 2017 IPPS/LTCH PPS final rule and is available on the Internet on the CMS Web site at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/LongTermCareHospitalPPS/index.html* under the list item for regulation number CMS–1655–F. The table that is available on the Internet has been updated to reflect the revisions discussed in this correcting document.

Table 11—MS–LTC–DRGs, Relative Weights, Geometric Average Length of Stay, Short Stay Outlier (SSO) Threshold, and ''IPPS Comparable Threshold'' for LTCH PPS Discharges Occurring from October 1, 2016 through September 30, 2017. We are correcting this table by correcting typographical errors for MS–LTC–DRGs 627 and 658 in the columns titled ''Relative Weight,'' ''Geometric Average Length of Stay,'' ''Short-Stay Outlier (SSO) Threshold,'' and ''IPPS Comparable Threshold.''

III. Waiver of Proposed Rulemaking and Delay in Effective Date

We ordinarily publish a notice of proposed rulemaking in the **Federal Register** to provide a period for public comment before the provisions of a rule take effect in accordance with section 553(b) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). However, we can waive this notice and comment procedure if the Secretary finds, for good cause, that the notice and comment process is impracticable, unnecessary, or contrary to the public interest, and incorporates a statement of the finding and the reasons therefore in the notice.

Section 553(d) of the APA ordinarily requires a 30-day delay in the effective date of final rules after the date of their publication in the **Federal Register**. This 30-day delay in effective date can be waived, however, if an agency finds for good cause that the delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued.

We believe that this correcting document does not constitute a rule that would be subject to the APA notice and comment or delayed effective date requirements. This correcting document corrects technical and typographic errors in the preamble, addendum, payment rates, tables, and appendices included or referenced in the FY 2017 IPPS/LTCH PPS final rule but does not make substantive changes to the policies or payment methodologies that were adopted in the final rule. As a result, this correcting document is intended to ensure that the information in the FY 2017 IPPS/LTCH PPS final rule accurately reflects the policies adopted in that final rule.

In addition, even if this were a rule to which the notice and comment procedures and delayed effective date requirements applied, we find that there is good cause to waive such requirements. Undertaking further notice and comment procedures to incorporate the corrections in this document into the final rule or delaying the effective date would be contrary to the public interest because it is in the public's interest for providers to receive

appropriate payments in as timely a manner as possible, and to ensure that the FY 2017 IPPS/LTCH PPS final rule accurately reflects our policies. Furthermore, such procedures would be unnecessary, as we are not altering our payment methodologies or policies, but rather, we are simply implementing correctly the policies that we previously proposed, received comment on, and subsequently finalized. This correcting document is intended solely to ensure that the FY 2017 IPPS/LTCH PPS final rule accurately reflects these payment methodologies and policies. Therefore, we believe we have good cause to waive the notice and comment and effective date requirements.

IV. Correction of Errors

In FR Doc. 2016–18476 of August 22, 2016 (81 FR 56761), we are making the following corrections:

A. Corrections of Errors in the Preamble

1. On page 56775, third column, second bulleted paragraph, line 25, the figure ''$50.4 million'' is corrected to read ''$56.4 million''.

2. On page 56796—

a. Top half of the page, third column, third full paragraph,

(1) Lines 4 and 5, the phrase ''describing similar conditions'' is corrected to read ''displayed in Table 6A—New Diagnosis Codes associated with the proposed rule (which is available via the Internet on the CMS Web site at: *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/index.html*) that describe similar conditions''.

(2) Lines 9 and 10, the phrase, ''18 ICD–10–CN diagnosis codes in the following table be reassigned'' is corrected to read ''18 ICD–10–CM diagnosis codes in the following table also be reassigned''.

b. Lower half of the page, first column, last paragraph—

(1) Lines 6 and 7, the phrase ''describing procedures performed on'' is corrected to read ''describing conditions affecting''.

(2) Line 14, the phrase ''MS DRGs 091, 092 and 093.'' is corrected to read ''MS–DRGs 091, 092, and 093 because they are also nervous system codes.''

3. On page 56797, first column, first paragraph, lines 15 and 16, the phrase ''These 18 codes also are reflected in Table 6E'' is corrected to read ''These 18 codes are reflected in Table 6A''.

4. On page 56801, second column, second full paragraph—

a. Lines 11 and 12, the phrase ''performing such procedures because loop'' is corrected to read ''performing such procedures because, as noted in the FY 2017 IPPS/LTCH PPS proposed rule, loop''.

b. Lines 25 and 26, the phrase ''were not able to finalize that specific request.'' is corrected to read ''were not able to replicate that specific request in the ICD–9–CM based MS–DRGs.''.

c. Lines 26 through 29, the sentence ''Rather, we finalized an alternative option, which was to change the designation for four of the six codes requested.'' is corrected to read ''Rather, we proposed an alternative option, which was to change the designation for four of the six codes requested, because we believed that if we limited the change in designation to these four codes, the change would not have any impact.''.

d. Lines 40 through 41, the phrase ''not finalizing the proposal to change the two'' is corrected to read ''not changing the designation of the two''.

5. On page 56803, bottom of the page—

a. First column, last paragraph, lines 7 and 8, the phrase ''removing the 34 codes'' is corrected to read ''removing 32 of the 34 codes''.

b. Second column, first partial paragraph—

(1) Lines 5 and 6, the phrase ''34 non-lower'' is corrected to read ''32 non-lower''.

(2) Lines 8 and 9, the phrase ''These 34 non-lower'' is corrected to read ''These 32 non-lower''.

(3) Line 13, after the phrase ''for FY 2017.'' the paragraph is corrected by adding sentences to read as follows:

''Two of the procedure codes identified by the commenter, ICD–10–PCS procedure codes 04CT3ZZ (Extirpation of matter from right peroneal artery, percutaneous approach) and 04CU3ZZ (Extirpation of matter from left peroneal artery, percutaneous approach) describe endovascular thrombectomy of lower limbs and are not non-lower limb procedure codes.''.

c. Third column, first full paragraph, line 11, the phrase ''34 procedure'' is corrected to read ''32 procedure''.

6. On page 56804, top of page, the table titled ''ICD–10–PCS ENDOVASCULAR THROMBECTOMY PROCEDURE CODES REASSIGNED TO MS–DRGs 270, 271, AND 272 FOR FY 2017'' is corrected by adding the following entries:

04CK3Z6	Extirpation of Matter from Right Femoral Artery, Bifurcation, Percutaneous Approach.
04CL3Z6	Extirpation of Matter from Left Femoral Artery, Bifurcation, Percutaneous Approach.
04CM3Z6	Extirpation of Matter from Right Popliteal Artery, Bifurcation, Percutaneous Approach.
04CN3Z6	Extirpation of Matter from Left Popliteal Artery, Bifurcation, Percutaneous Approach.
04CP3Z6	Extirpation of Matter from Right Anterior Tibial Artery, Bifurcation, Percutaneous Approach.
04CQ3Z6	Extirpation of Matter from Left Anterior Tibial Artery, Bifurcation, Percutaneous Approach.
04CR3Z6	Extirpation of Matter from Right Posterior Tibial Artery, Bifurcation, Percutaneous Approach.
04CS3Z6	Extirpation of Matter from Left Posterior Tibial Artery, Bifurcation, Percutaneous Approach.
04CT3Z6	Extirpation of Matter from Right Peroneal Artery, Bifurcation, Percutaneous Approach.
04CT3ZZ	Extirpation of Matter from Right Peroneal Artery, Percutaneous Approach.
04CU3Z6	Extirpation of Matter from Left Peroneal Artery, Bifurcation, Percutaneous Approach.
04CU3ZZ	Extirpation of Matter from Left Peroneal Artery, Percutaneous Approach.
04CV3Z6	Extirpation of Matter from Right Foot Artery, Bifurcation, Percutaneous Approach.
04CW3Z6	Extirpation of Matter from Left Foot Artery, Bifurcation, Percutaneous Approach.
04CY3Z6	Extirpation of Matter from Lower Artery, Bifurcation, Percutaneous Approach.

7. On page 56821, middle of the page—

a. Second column, first partial paragraph, line 2, the phrase ''identified 58'' is corrected to read ''identified 57''.

b. Third column, first partial paragraph, line 3, the phrase ''following 58'' is corrected to read ''following 57''.

8. On pages 56821 through 56823, in the table titled ''ICD–10–PCS CODE PAIRS PROPOSED TO BE ADDED TO VERSION 34 ICD–10 MS–DRGs 466, 467, and 468: PROPOSED NEW KNEE REVISION ICD–10–PCS COMBINATIONS'', the codes (in the 4th column) for the following entries are corrected to read as follows:

ICD–10–PCS CODE PAIRS PROPOSED TO BE ADDED TO VERSION 34 ICD–10 MS–DRGS 466, 467, AND 468: PROPOSED NEW KNEE REVISION ICD–10–PCS COMBINATIONS

Code	Code description		Code	Code description
0SPD08Z	Removal of Spacer from Left Knee Joint, Open Approach.	and	0SRU0J9	Replacement of Left Knee Joint, Femoral Surface with Synthetic Substitute, Cemented, Open Approach.
0SPD38Z	Removal of Spacer from Left Knee Joint, Percutaneous Approach.	and	0SRU0J9	Replacement of Left Knee Joint, Femoral Surface with Synthetic Substitute, Cemented, Open Approach.
0SPD48Z	Removal of Spacer from Left Knee Joint, Percutaneous Endoscopic Approach.	and	0SRU0J9	Replacement of Left Knee Joint, Femoral Surface with Synthetic Substitute, Cemented, Open Approach.

9. On page 56823, lower half of the page—

a. First column, second paragraph, line 10, the phrase ''58 new'' is corrected to read ''57 new''.

b. Second column—

(1) First partial paragraph, line 11, the phrase ''58 new'' is corrected to read '' new''.

(2) First full paragraph, lines 3 and 4, the phrase ''58 new'' is corrected to read ''57 new''.

10. On page 56858, top of the page, the untitled table is corrected by adding the following entry after line 34 (which is the entry for MDC 5, MS–DRG 262):

MDC	MS–DRG	MS–DRG Title
5	265	AICD Lead Procedures.

11. On page 56895, third column, first partial paragraph—

a. Lines 8 and 9, the phrase ''a unique ICD–10–PCS procedure code'' is corrected to read ''two unique ICD–10–PCS procedure codes''.

b. Lines 10 through 15, the sentence ''The approved procedure code is XW0331 (Introduction of Idarucizumab, Dabigatran reversal agent into central vein, percutaneous approach, New Technology Group 1).'' is corrected to read ''The approved procedure codes are XW0331 (Introduction of Idarucizumab, Dabigatran reversal agent into peripheral vein, percutaneous approach, New Technology Group 1) and XW04331 (Introduction of Idarucizumab, Dabigatran reversal agent into central vein, percutaneous approach, New Technology Group 1).''.

12. On page 56897, third column, third full paragraph, line 11, the phrase ''procedure code XW03331.'' is corrected to read ''procedure codes XW03331 and XW04331.''.

13. On page 56927—

a. Second column, last partial paragraph, line 5 the phrase ''265 hospitals'' is corrected to read ''264 hospitals''.

b. Third column, first partial paragraph, line 12, the phrase ''817 hospitals'' is corrected to read ''816 hospitals''.

14. On page 57002, bottom of the page, the table titled ''PREVIOUSLY ADOPTED AND NEWLY FINALIZED BASELINE AND PERFORMANCE PERIODS FOR THE FY 2021 PROGRAM YEAR'' is corrected to read as follows:

PREVIOUSLY ADOPTED AND NEWLY FINALIZED BASELINE AND PERFORMANCE PERIODS FOR THE FY 2021 PROGRAM YEAR

Domain	Baseline period	Performance period
Clinical Care		
• Mortality (MORT–30–AMI, MORT–30–HF, MORT–30–COPD) *	• July 1, 2011–June 30, 2014	• July 1, 2016–June 30, 2019
• THA/TKA *	• April 1, 2011–March 31, 2014	• April 1, 2016–March 31, 2019
• MORT–30–PN (updated cohort)	• July 1, 2012–June 30, 2015	• September 1, 2017–June 30, 2019
Efficiency and Cost Reduction		
• MSPB	• January 1, 2017–December 31, 2017	• January 1, 2019–December 31, 2019
• Payment (AMI Payment and HF Payment)	• July 1, 2012–June 30, 2015	• July 1, 2017–June 30, 2019

* Previously adopted baseline and performance periods that remain unchanged (80 FR 49562 through 49563).

15. On page 57033, first column, last paragraph, lines 2 through 4, the web link ''*http://www.cms.gov/Medicare/Medicare-Fee-for-ServicePayment/AcuteInpatientPPS/dgme.html*'' is corrected to read ''*http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/dgme.html*.''

16. On page 57195—

a. First column, last partial paragraph, lines 4 and 5, the phrase ''it recommended'' is corrected to read ''the commenters recommended''.

b. Third column, third full paragraph—

(1). Line 14, the phrase ''This measure'' is corrected to read ''The Drug Regimen Review Conducted with Follow-Up for Identified Issues-PAC LTCH QRP quality measure''.

(2) Lines 23 through 25, the phrase '' and Potentially Preventable 30-Day Post-Discharge Readmission Measure for LTCH QRP,'' is corrected to read '', Potentially Preventable 30-Day Post-Discharge Readmission Measure for LTCH QRP and Medicare Spending Per Beneficiary-PAC LTCH QRP,''.

17. On page 57196, third column, first full paragraph, lines 13 through 16, the phrase ''with information more frequently, such as unadjusted counts of potentially preventable readmissions (PPRs) and discharge data.'' is corrected to read ''with information, such as unadjusted counts of potentially preventable readmissions (PPRs) and discharge data, more frequently.''

18. On page 57199, first column, second full paragraph, lines 3 and 4, the phrase ''SES or SDS status.'' is corrected to read ''SES or SDS.''

19. On page 57211, third column, second full paragraph, line 16, the phrase ''to discharge'' is corrected to read ''to be discharged''.

20. On page 57213—

a. Second column, last partial paragraph, lines 6 through 8, the phrase

''and a SNF stay within a 30-day window, the SNF stay is a candidate to for'' is corrected to read ''and then a SNF stay within a 30-day window, the SNF stay is a candidate for''.

b. Third column, after the last paragraph, Footnote 280, lines 1 and 2, the measure name ''Hospital-Wide All-Cause Readmission Measure (HWR) (CMS/Yale).'' is corrected to read ''Hospital-Wide All-Cause Unplanned Readmission Measure (HWR) (CMS/Yale).''

21. On page 57218, third column, first full paragraph, lines 4 and 5, the phrase ''The commenter was correct in its interpretation of'' is corrected to read ''The commenter's interpretation was correct regarding''.

22. On page 57220, second column, second footnoted full paragraph (Footnote 311), lines 1 through 6, the footnote ''[311]Greenwald, J.L., Halasyamani, L., Greene, J., LaCivita, C., *et al.* (2010). Making inpatient medication reconciliation patient centered, clinically relevant and implementable: A consensus statement on key principles and necessary first steps. Journal of Hospital Medicine, 5(8), 477–485.'' is corrected to read ''[311]Institute of Medicine. Preventing Medication Errors. Washington, DC: National Academies Press; 2006.''

23. On page 57221, second column, second full paragraph, lines 3 and 4, the phrase ''cross-setting and quality measure'' is corrected to read ''cross-setting quality measure''.

24. On page 57222—

a. Second column, first full paragraph, lines 11 and 12, the phrase ''however, the adoption of the measure'' is corrected to read ''however, the measure''.

b. Third column, first full paragraph—

(1) Line 4, the word ''facilities'' is corrected to read ''facility's''.

(2) Line 22, the phrase ''collected admission'' is corrected to read ''collected at admission''.

25. On page 57223—

a. First column, second paragraph—

(1) Lines 1 through 4, the phrase ''Since the time of the MAP consideration, with our measure contractor, we tested this measure in a pilot test involving twelve PAC facilities,'' is corrected to read ''Since the time of the NQF-convened MAP consideration we have further tested this measure in a pilot test involving twelve PAC facilities''.

(2) Lines 7 and 8, the phrase, ''record collection system'' is corrected to read ''records system''.

b. Second column, third full paragraph, lines 9 and 10, the phrase ''PAC facility.'' is corrected to read ''PAC facility. We appreciate MedPAC and other commenters' recommendation for a quality measure that assesses post-discharge medication communication with primary care providers for patients discharged to home.''

B. Correction of Errors in the Addendum

1. On page 57278, third column, fifth full paragraph,

a. Line 3, the figure ''0.999079'' is corrected to read ''0.999078''.

b. Line 9, the figure ''0.999079'' is corrected to read ''0.999078''.

2. On page 57279—

a. Second column, first full paragraph, line 9, the figure ''1.000209'' is corrected to read ''1.00021''.

b. Third column, third full paragraph, line 12, the figure ''0.988224'' is corrected to read ''0.988136''.

3. On page 57280—

a. First column, fifth full paragraph, line 4, the figure ''0.993200'' is corrected to read ''0.991987''.

b. Third column, second full paragraph,

(1) Line 3, the figure ''0.999994'' is corrected to read ''0.999997''.

(2) Line 6, the figure ''0.999994'' is corrected to read ''0.999997''.

4. On page 57286—

a. Second column, last paragraph—

(1) Line 6, the figure ''$23,570'' is corrected to read ''$23,573''.

(2) Line 8, the figure ''$83,347,416,971'' is corrected to read ''$83,364,479,923''.

(3) Line 9, the figure ''$4,479,256,519'' is corrected to read ''$4,479,256,368''.

b. Third column—

(1) First partial paragraph, line 11, the figure ''$23,570'' is corrected to read ''$23,573''.

(2) Following the third full paragraph, the untitled table is corrected to read as follows:

	Operating standardized amounts	Capital Federal rate
National	0.948998	0.938602

5. On page 57288, middle of the page, the table titled ''CHANGE OF FY 2016 STANDARDIZED AMOUNTS TO THE FY 2017 STANDARDIZED AMOUNTS'', is corrected to read as follows:

CHANGE OF FY 2016 STANDARDIZED AMOUNTS TO THE FY 2017 STANDARDIZED AMOUNTS

	Hospital submitted quality data and is a meaningful EHR user	Hospital submitted quality data and is NOT a meaningful EHR user	Hospital did NOT submit quality data and is a meaningful EHR user	Hospital did NOT submit quality data and is NOT a meaningful EHR user
FY 2016 Base Rate after removing: 1. FY 2016 Geographic Reclassification Budget Neutrality (0.988169). 2. FY 2016 Rural Community Hospital Demonstration Program Budget Neutrality (0.999837).	If Wage Index is Greater Than 1.0000: Labor (69.6 percent): $4,394.09. Nonlabor (30.4 percent): $1,919.26.	If Wage Index is Greater Than 1.0000: Labor (69.6 percent): $4,394.09. Nonlabor (30.4 percent): $1,919.26.	If Wage Index is Greater Than 1.0000: Labor (69.6 percent): $4,394.09. Nonlabor (30.4 percent): $1,919.26.	If Wage Index is Greater Than 1.0000: Labor (69.6 percent): $4,394.09. Nonlabor (30.4 percent): $1,919.26.

CHANGE OF FY 2016 STANDARDIZED AMOUNTS TO THE FY 2017 STANDARDIZED AMOUNTS—Continued

	Hospital submitted quality data and is a meaningful EHR user	Hospital submitted quality data and is NOT a meaningful EHR user	Hospital did NOT submit quality data and is a meaningful EHR user	Hospital did NOT submit quality data and is NOT a meaningful EHR user
3. Cumulative FY 2008, FY 2009, FY 2012, FY 2013, FY 2014, FY 2015 and FY 2016 Documentation and Coding Adjustments as Required under Sections 7(b)(1)(A) and 7(b)(1)(B) of Public Law 110–90 and Documentation and Coding Recoupment Adjustment as required under Section 631 of the American Taxpayer Relief Act of 2012 (0.9255). 4. FY 2016 Operating Outlier Offset (0.948998). 5. FY 2016 New Labor Market Delineation Wage Index Transition Budget Neutrality Factor (0.999998). 6. FY 2017 2-Midnight Rule Permanent Adjustment (1/0.998).	If Wage Index is less Than or Equal to 1.0000: Labor (62 percent): $3,914.28. Nonlabor (38 percent): $2,399.07.	If Wage Index is less Than or Equal to 1.0000: Labor (62 percent): $3,914.28. Nonlabor (38 percent): $2,399.07.	If Wage Index is less Than or Equal to 1.0000: Labor (62 percent): $3,914.28. Nonlabor (38 percent): $2,399.07.	If Wage Index is less Than or Equal to 1.0000: Labor (62 percent): $3,914.28. Nonlabor (38 percent): $2,399.07.
FY 2017 Update Factor	1.0165	0.99625	1.00975	0.9895.
FY 2017 MS-DRG Recalibration Budget Neutrality Factor.	0.999078	0.999078	0.999078	0.999078.
FY 2017 Wage Index Budget Neutrality Factor.	1.00021	1.00021	1.00021	1.00021.
FY 2017 Reclassification Budget Neutrality Factor.	0.988136	0.988136	0.988136	0.988136.
FY 2017 Operating Outlier Factor.	0.948998	0.948998	0.948998	0.98998.
Cumulative Factor: FY 2008, FY 2009, FY 2012, FY 2013, FY 2014, FY 2015, FY 2016 and FY 2017 Documentation and Coding Adjustment as Required under Sections 7(b)(1)(A) and 7(b)(1)(B) of Public Law 110–90 and Documentation and Coding Recoupment Adjustment as required under Section 631 of the American Taxpayer Relief Act of 2012.	0.9118	0.9118	0.9118	0.9118.
FY 2017 New Labor Market Delineation Wage Index 3-Year Hold Harmless Transition Budget Neutrality Factor.	0.999997	0.999997	0.999997	0.999997.
FY 2017 2-Midnight Rule One-Time Prospective Increase.	1.006	1.006	1.006	1.006.
National Standardized Amount for FY 2017 if Wage Index is Greater Than 1.0000; Labor/Non-Labor Share Percentage (69.6/30.4).	Labor: $3,839.23 Nonlabor: $1,676.91	Labor: $3,762.75 Nonlabor: $1,643.50	Labor: $3,8143.74 Nonlabor: $1,665.77	Labor: $3,737.25. Nonlabor: $1,632.37.

CHANGE OF FY 2016 STANDARDIZED AMOUNTS TO THE FY 2017 STANDARDIZED AMOUNTS—Continued

	Hospital submitted quality data and is a meaningful EHR user	Hospital submitted quality data and is NOT a meaningful EHR user	Hospital did NOT submit quality data and is a meaningful EHR user	Hospital did NOT submit quality data and is NOT a meaningful EHR user
National Standardized Amount for FY 2017 if Wage Index is less Than or Equal to 1.0000; Labor/Non-Labor Share Percentage (62/38).	Labor: $3,420.01 ..... Nonlabor: $2,096.13	Labor: $3,351.88 ..... Nonlabor: $2,054.37	Labor: $3,397.30 ..... Nonlabor: $2,082.21	Labor: $3,329.16. Nonlabor: $2,040.46.

6. On page 57291—

a. First column, second full paragraph, line 15, the figure ''0.999079'' is corrected to read ''0.999078''.

b. Third column, first full paragraph line 6, the figure ''1.84'' is corrected to read ''1.83''.

7. On page 57293, third column—

a. First partial paragraph—

(1) Line 1, the figure ''0.9995'' is corrected to read ''0.9994''.

(2) Line 4, ''0.9855'' is corrected to read ''0.9854''.

b. First full paragraph, line 16, the figure ''0.9851'' is corrected to read ''0.9850''.

c. Last paragraph—

(1) Line 2, the figure ''0.9991''is corrected to read ''0.9990''.

(2) Line 4, ''0.9995'' is corrected to read ''0.9994''.

8. On page 57294—

a. Top of the page—

(1) Second column—

(a) First full paragraph, line 17, the figure ''$446.81'' is corrected to read ''$446.79''.

(b) Second bulleted paragraph, line 6, the figure ''0.9991'' is corrected to read ''0.9990''.

(2) Third column, second full paragraph—

(a) Line 13, the figure, ''0.09'' is corrected to read ''0.10''.

(b) Line 26, the figure, ''1.84'' is corrected to read ''1.832''.

b. Bottom of the page, the table titled ''COMPARISON OF FACTORS AND ADJUSTMENTS: FY 2016 CAPITAL FEDERAL RATE AND FY 2017 CAPITAL FEDERAL RATE'' is corrected to read as follows:

COMPARISON OF FACTORS AND ADJUSTMENTS: FY 2016 CAPITAL FEDERAL RATE AND FY 2017 CAPITAL FEDERAL RATE

	FY 2016	FY 2017	Change	Percent change [3]
Update Factor [1]	1.0130	1.009	1.009	0.9
GAF/DRG Adjustment Factor [1]	0.9976	0.9990	0.9990	−0.10
Outlier Adjustment Factor [2]	0.9365	0.9386	1.0022	0.22
Permanent 2-midnight Policy Adjustment Factor	N/A	1.002	1.002	0.2
One-Time 2-midnight Policy Adjustment Factor	N/A	1.006	1.006	0.6
Capital Federal Rate	$438.75	$446.79	1.0183	1.83

[1] The update factor and the GAF/DRG budget neutrality adjustment factors are built permanently into the capital Federal rates. Thus, for example, the incremental change from FY 2016 to FY 2017 resulting from the application of the 0.9990 GAF/DRG budget neutrality adjustment factor for FY 2017 is a net change of 0.9990 (or −0.10 percent).

[2] The outlier reduction factor is not built permanently into the capital Federal rate; that is, the factor is not applied cumulatively in determining the capital Federal rate. Thus, for example, the net change resulting from the application of the FY 2017 outlier adjustment factor is 0.9386/0.9365, or 1.0022 (or 0.22 percent).

[3] Sum of individual changes may not match percent change in capital rate due to rounding.

9. On page 57295—

a. The top of the page, the table titled ''COMPARISON OF FACTORS AND ADJUSTMENTS: PROPOSED FY 2017 CAPITAL FEDERAL RATE AND FINAL FY 2017 CAPITAL FEDERAL RATE'' is corrected to read as follows:

COMPARISON OF FACTORS AND ADJUSTMENTS: PROPOSED FY 2017 CAPITAL FEDERAL RATE AND FINAL FY 2017 CAPITAL FEDERAL RATE

	Proposed FY 2017	Final FY 2017	Change	Percent change
Update Factor [1]	1.0090	1.0090	1.0000	0.00
GAF/DRG Adjustment Factor [1]	0.9993	0.9990	0.9997	−0.03
Outlier Adjustment Factor [2]	0.9374	0.9386	1.0013	0.13
Permanent 2-midnight Policy Adjustment Factor	1.002	1.002	1.000	0.00
One-Time 2-midnight Policy Adjustment Factor	1.006	1.006	1.000	0.00
Capital Federal Rate	$446.35	$446.79	1.0010	0.10

b. Lower three-fourths of the page, first column, second paragraph, line 21, the figure, ''$23,570.'' is corrected to read ''$23,573.''

10. On page 57307, second column, first full paragraph—

a. Line 15, the figure ''$23,570'' is corrected to read ''$23,573''.

b. Line 35, the figure ''$23,570'' is corrected to read ''$23,573''.

11. On page 57312—

a. Top of the page—

(1) Table 1A titled ''NATIONAL ADJUSTED OPERATING STANDARDIZED AMOUNTS, LABOR/NONLABOR (69.6 PERCENT LABOR SHARE/30.4 PERCENT NONLABOR SHARE IF WAGE INDEX IS GREATER THAN 1)—FY 2017'' is corrected to read as follows:

TABLE 1A—NATIONAL ADJUSTED OPERATING STANDARDIZED AMOUNTS, LABOR/NONLABOR (69.6 PERCENT LABOR SHARE/30.4 PERCENT NONLABOR SHARE IF WAGE INDEX IS GREATER THAN 1)—FY 2017

Hospital submitted quality data and is a meaningful EHR user (update = 1.65 percent)		Hospital submitted quality data and is NOT a meaningful EHR user (update = −0.375 percent)		Hospital did NOT submit quality data and is a meaningful EHR user (update = 0.975 percent)		Hospital did NOT submit quality data and is NOT a meaningful EHR user (update = −1.05 percent)	
Labor	Nonlabor	Labor	Nonlabor	Labor	Nonlabor	Labor	Nonlabor
$3,839.23	$1,677.91	$3,762.75	$1,643.50	$3,813.74	$1,665.77	$3,737.25	$1,632.37

(2) Table 1B titled ''NATIONAL ADJUSTED OPERATING STANDARDIZED AMOUNTS, LABOR/NONLABOR (62 PERCENT LABOR SHARE/38 PERCENT NONLABOR SHARE IF WAGE INDEX IS LESS THAN OR EQUAL TO 1)—FY 2017'' is corrected to read as follows:

TABLE 1B—NATIONAL ADJUSTED OPERATING STANDARDIZED AMOUNTS, LABOR/NONLABOR (62 PERCENT LABOR SHARE/38 PERCENT NONLABOR SHARE IF WAGE INDEX IS LESS THAN OR EQUAL TO 1)—FY 2017

Hospital submitted quality data and is a meaningful EHR user (update = 1.65 percent)		Hospital submitted quality data and is NOT a meaningful EHR user (update = −0.375 percent)		Hospital did NOT submit quality data and is a meaningful EHR user (update = 0.975 percent)		Hospital did NOT submit quality data and is NOT a meaningful EHR user (update = −1.05 percent)	
Labor	Nonlabor	Labor	Nonlabor	Labor	Nonlabor	Labor	Nonlabor
$3,420.01	$2,096.13	$3,351.88	$2,054.37	$3,397.30	$2,082.21	$3,329.16	$2,040.46

b. Middle of the page—

(1) Table 1C titled ''ADJUSTED OPERATING STANDARDIZED AMOUNTS FOR HOSPITALS IN PUERTO RICO, LABOR/NONLABOR (NATIONAL: 62 PERCENT LABOR SHARE/38 PERCENT NONLABOR SHARE BECAUSE WAGE INDEX IS LESS THAN OR EQUAL TO 1);—FY 2017'' is corrected to read as follows:

TABLE 1C—ADJUSTED OPERATING STANDARDIZED AMOUNTS FOR HOSPITALS IN PUERTO RICO, LABOR/NONLABOR (NATIONAL: 62 PERCENT LABOR SHARE/38 PERCENT NONLABOR SHARE BECAUSE WAGE INDEX IS LESS THAN OR EQUAL TO 1)—FY 2017

Standardized amount	Rates if wage index is greater than 1		Rates if wage index is less than or equal to 1	
	Labor	Nonlabor	Labor	Nonlabor
National [1]	Not Applicable	Not Applicable	$3,420.01	$2,096.13

[1] For FY 2017, there are no CBSAs in Puerto Rico with a national wage index greater than 1.

(2) Table 1D titled ''CAPITAL STANDARD FEDERAL PAYMENT RATE—FY 2017'' is corrected as follows:

TABLE 1D—CAPITAL STANDARD FEDERAL PAYMENT RATE—FY 2017

	Rate
National	$446.79

C. Corrections of Errors in the Appendices

1. On page 57312, bottom of the page, third column, first partial paragraph,

a. Line 8, the figure ''$987'' is corrected to read ''$990''.

b. Line 10, the figure ''$66'' is corrected to read ''$72''.

2. On page 57315, upper three-fourths of the page—

a. Second column, third full paragraph,

(1) Line 7, the figure ''1,380'' is corrected to read ''1,369''.

(2) Line 9, the figure ''1,135'' is corrected to read ''1,146''.

b. Third column, first full paragraph, line 13—

(1) The figure ''1,372'' is corrected to read ''1,369''.

(2) The figure ''1,150'' is corrected to read ''1,153''.

3. On pages 57315 through 57317, the table titled ''TABLE I—IMPACT ANALYSIS OF CHANGES TO THE IPPS FOR OPERATING COSTS FOR FY 2017'' is corrected to read as follows:

TABLE I—IMPACT ANALYSIS OF CHANGES TO THE IPPS FOR OPERATING COSTS FOR FY 2017

	Number of hospitals [1]	Hospital rate update and documentation and coding adjustment (1) [2]	FY 2017 weights and DRG changes with application of recalibration budget neutrality (2) [3]	FY 2017 Wage data under new CBSA designations with application of wage budget neutrality (3) [4]	FY 2017 MGCRB reclassifications (4) [5]	Rural and imputed floor with application of national rural and imputed floor budget neutrality (5) [6]	Application of the frontier wage index and out-migration adjustment (6) [7]	All FY 2017 changes (7) [8]
All Hospitals	3,330	1.0	0.0	0.0	0.0	0.0	0.1	0.9
By Geographic Location:								
Urban hospitals	2,515	0.9	0.0	0.0	−0.1	0.0	0.1	0.9
Large urban areas	1,369	0.9	0.1	0.0	−0.3	−0.1	0.0	0.9
Other urban areas	1,146	1.0	0.0	0.0	0.1	0.2	0.2	1.0
Rural hospitals	815	1.6	−0.4	0.1	1.3	−0.2	0.1	1.2
Bed Size (Urban):								
0–99 beds	659	0.9	−0.2	0.2	−0.5	0.1	0.2	0.9
100–199 beds	767	1.0	−0.1	0.0	0.0	0.3	0.2	0.7
200–299 beds	446	1.0	−0.1	−0.1	0.1	0.0	0.1	0.8
300–499 beds	431	1.0	0.1	0.0	−0.2	0.1	0.2	0.9
500 or more beds	212	0.9	0.2	0.0	−0.2	−0.2	0.0	1.1
Bed Size (Rural):								
0–49 beds	317	1.5	−0.5	0.1	0.2	−0.2	0.3	1.0
50–99 beds	292	1.8	−0.6	0.1	0.8	−0.2	0.1	1.2
100–149 beds	120	1.6	−0.4	0.0	1.5	−0.2	0.2	1.0
150–199 beds	46	1.7	−0.2	0.2	1.7	−0.3	0.0	1.3
200 or more beds	40	1.6	−0.1	0.2	2.5	−0.3	0.0	1.5
Urban by Region:								
New England	116	0.8	0.0	−0.5	1.1	0.9	0.1	−0.4
Middle Atlantic	315	0.9	0.1	−0.1	0.8	−0.2	0.1	0.9
South Atlantic	407	1.0	0.0	−0.2	−0.5	−0.3	0.1	0.9
East North Central	390	0.9	0.0	−0.1	−0.2	−0.4	0.0	1.0
East South Central	147	1.0	0.0	−0.1	−0.4	−0.3	0.0	1.2
West North Central	163	1.1	0.1	−0.1	−0.8	−0.4	0.7	1.0
West South Central	385	0.9	0.0	0.2	−0.5	−0.4	0.0	1.2
Mountain	163	1.1	0.0	0.1	−0.3	1.2	0.2	2.2
Pacific	378	0.9	0.0	0.4	−0.4	1.0	0.1	0.5
Puerto Rico	51	0.9	0.1	−0.5	−1.0	0.1	0.1	0.3
Rural by Region:								
New England	21	1.3	−0.2	0.3	1.4	−0.3	0.2	1.6
Middle Atlantic	54	1.7	−0.4	0.1	0.8	−0.2	0.1	1.6
South Atlantic	128	1.7	−0.5	−0.1	2.3	−0.3	0.1	1.0
East North Central	115	1.7	−0.4	0.0	1.0	−0.2	0.1	1.2
East South Central	155	1.1	−0.3	0.4	2.2	−0.4	0.1	1.0
West North Central	98	2.2	−0.4	0.0	0.2	−0.1	0.3	1.5
West South Central	160	1.5	−0.4	0.4	1.3	−0.3	0.1	1.2
Mountain	60	1.7	−0.4	0.1	0.2	−0.1	0.2	1.3
Pacific	24	1.9	−0.4	−0.3	1.3	−0.1	0.0	1.3
By Payment Classification:	0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Urban hospitals	2,522	0.9	0.0	0.0	−0.1	0.0	0.1	0.9
Large urban areas	1,369	0.9	0.1	0.0	−0.3	−0.1	0.0	0.9
Other urban areas	1,153	1.0	0.0	0.0	0.1	0.2	0.2	1.0
Rural areas	808	1.6	−0.4	0.1	1.4	−0.2	0.1	1.2
Teaching Status:								
Nonteaching	2,266	1.1	−0.2	0.0	0.1	0.2	0.1	0.8
Fewer than 100 residents	815	1.0	0.0	0.0	−0.1	0.0	0.2	0.9
100 or more residents	249	0.9	0.2	0.0	−0.1	−0.2	0.0	1.1
Urban DSH:								
Non-DSH	589	0.9	−0.1	−0.2	0.2	0.0	0.2	0.8
100 or more beds	1,642	0.9	0.1	0.0	−0.1	0.0	0.1	0.9
Less than 100 beds	363	1.0	−0.3	0.0	−0.5	0.1	0.1	0.7
Rural DSH:								
SCH	240	2.0	−0.6	0.1	0.1	−0.1	0.0	1.4
RRC	325	1.7	−0.3	0.1	1.8	−0.2	0.0	1.3
100 or more beds	29	0.9	−0.4	0.1	2.9	−0.4	0.1	0.5
Less than 100 beds	142	0.8	−0.4	0.2	1.3	−0.4	0.7	0.2
Urban teaching and DSH:								
Both teaching and DSH	898	0.9	0.1	0.0	−0.2	−0.1	0.1	1.0
Teaching and no DSH	109	0.9	0.0	−0.1	1.1	0.0	0.0	0.7
No teaching and DSH	1,107	1.0	−0.1	0.1	−0.1	0.3	0.1	0.8
No teaching and no DSH	408	0.9	−0.1	−0.2	−0.4	0.0	0.2	0.9
Special Hospital Types:								
RRC	189	0.8	−0.1	0.1	1.9	0.0	0.5	1.2
SCH	324	2.1	−0.3	−0.1	0.0	0.0	0.0	1.7
MDH	148	1.7	−0.6	0.0	0.6	−0.1	0.1	1.3
SCH and RRC	126	2.2	−0.3	0.1	0.4	−0.1	0.0	1.8
MDH and RRC	12	2.1	−0.6	−0.1	1.3	−0.2	0.0	2.2
Type of Ownership:								
Voluntary	1,927	1.0	0.0	0.0	0.0	0.0	0.1	0.9
Proprietary	881	1.0	0.0	0.1	0.0	0.0	0.1	0.9
Government	522	1.0	0.0	−0.1	−0.2	0.0	0.1	0.9

TABLE I—IMPACT ANALYSIS OF CHANGES TO THE IPPS FOR OPERATING COSTS FOR FY 2017—Continued

	Number of hospitals [1]	Hospital rate update and documentation and coding adjustment (1) [2]	FY 2017 weights and DRG changes with application of recalibration budget neutrality (2) [3]	FY 2017 Wage data under new CBSA designations with application of wage budget neutrality (3) [4]	FY 2017 MGCRB reclassifications (4) [5]	Rural and imputed floor with application of national rural and imputed floor budget neutrality (5) [6]	Application of the frontier wage index and out-migration adjustment (6) [7]	All FY 2017 changes (7) [8]
Medicare Utilization as a Percent of Inpatient Days:								
0–25	523	0.8	0.1	0.1	−0.3	0.2	0.0	1.1
25–50	2,122	1.0	0.0	0.0	0.0	−0.1	0.1	0.9
50–65	545	1.2	−0.2	−0.1	0.6	0.0	0.1	0.9
Over 65	89	1.2	−0.3	0.3	−0.4	0.2	0.2	1.0
FY 2017 Reclassifications by the Medicare Geographic Classification Review Board:								
All Reclassified Hospitals	791	1.1	−0.1	0.0	2.3	−0.2	0.0	0.9
Non − Reclassified Hospitals	2,539	1.0	0.0	0.0	−0.8	0.1	0.1	0.9
Urban Hospitals Reclassified	532	1.0	0.0	−0.1	2.3	−0.1	0.0	0.9
Urban Nonreclassified Hospitals	1,936	0.9	0.1	0.0	−0.9	0.1	0.1	0.9
Rural Hospitals Reclassified Full Year	277	1.7	−0.3	0.1	2.2	−0.2	0.0	1.3
Rural Nonreclassified Hospitals Full Year	489	1.6	−0.4	0.2	−0.2	−0.2	0.3	1.1
All Section 401 Reclassified Hospitals:	72	1.7	−0.2	0.0	0.3	−0.1	0.9	1.5
Other Reclassified Hospitals (Section 1886(d)(8)(B))	48	1.2	−0.4	0.1	3.1	−0.4	0.0	0.8

[1] Because data necessary to classify some hospitals by category were missing, the total number of hospitals in each category may not equal the national total. Discharge data are from FY 2015, and hospital cost report data are from reporting periods beginning in FY 2012 and FY 2013.

[2] This column displays the payment impact of the hospital rate update and other adjustments including the 1.65 percent adjustment to the national standardized amount and hospital-specific rate (the estimated 2.7 percent market basket update reduced by 0.3 percentage points for the multifactor productivity adjustment and the 0.75 percentage point reduction under the Affordable Care Act), the −1.5 percent documentation and coding adjustment to the national standardized amount and the adjustment of (1/0.998) to permanently remove the −0.2 percent reduction, and the 1.006 temporary adjustment to address the effects of the 0.2 percent reduction in effect for FYs 2014 through 2016 related to the 2-midnight policy.

[3] This column displays the payment impact of the changes to the Version 34 GROUPER, the changes to the relative weights and the recalibration of the MS DRG weights based on FY 2015 MedPAR data in accordance with section 1886(d)(4)(C)(iii) of the Act. This column displays the application of the recalibration budget neutrality factor of 0.999078 in accordance with section 1886(d)(4)(C)(iii) of the Act.

[4] This column displays the payment impact of the update to wage index data using FY 2013 cost report data and the OMB labor market area delineations based on 2010 Decennial Census data. This column displays the payment impact of the application of the wage budget neutrality factor, which is calculated separately from the recalibration budget neutrality factor, and is calculated in accordance with section 1886(d)(3)(E)(i) of the Act. The wage budget neutrality factor is 1.000210.

[5] Shown here are the effects of geographic reclassifications by the Medicare Geographic Classification Review Board (MGCRB) along with the effects of the continued implementation of the new OMB labor market area delineations on these reclassifications. The effects demonstrate the FY 2017 payment impact of going from no reclassifications to the reclassifications scheduled to be in effect for FY 2017. Reclassification for prior years has no bearing on the payment impacts shown here. This column reflects the geographic budget neutrality factor of 0.988136.

[6] This column displays the effects of the rural and imputed floor based on the continued implementation of the new OMB labor market area delineations. The Affordable Care Act requires the rural floor budget neutrality adjustment to be 100 percent national level adjustment. The rural floor budget neutrality factor (which includes the imputed floor) applied to the wage index is 0.991987. This column also shows the effect of the 3-year transition for hospitals that were located in urban counties that became rural under the new OMB delineations or hospitals deemed urban where the urban area became rural under the new OMB delineations, with a budget neutrality factor of 0.999997.

[7] This column shows the combined impact of the policy required under section 10324 of the Affordable Care Act that hospitals located in frontier States have a wage index no less than 1.0 and of section 1886(d)(13) of the Act, as added by section 505 of Public Law 108–173, which provides for an increase in a hospital's wage index if a threshold percentage of residents of the county where the hospital is located commute to work at hospitals in counties with higher wage indexes. These are not budget neutral policies.

[8] This column shows the estimated change in payments from FY 2016 to FY 2017.

4. On page 57319,

a. First column, second full paragraph,

(1) Line 6, the figure ''0.988224'' is corrected to read ''0.988136''.

(2) Line 13, the figure ''1.4'' is corrected to read ''1.3''.

b. Second column—

(1) First full paragraph—

(a) Line 8, the figure ''0.9930'' is corrected to read ''0.991987''.

(b) Line 9, the figure ''0.7'' is corrected to read ''0.8''.

(2) Third full paragraph—

(a) Line 1, the figure ''397'' is corrected to read ''436''.

(b) Line 5—

(1) The figure ''0.9930'' is corrected to read ''0.991987''.

(2) The figure ''0.7'' is corrected to read ''0.8''.

(c) Line 23, the figure ''1.0'' is corrected to read ''0.9''.

(d) Line 31, the figure ''$24'' is corrected to read ''$22''.

(e) Line 33, the figure ''0.7'' is corrected to read ''0.6''.

c. Third column—

(1) First full paragraph,

(a) Line 7, the figure ''$10'' is corrected to read ''$6.4''.

(b) Line 18, the figure ''$17'' is corrected to read ''$18''.

(2) Second full paragraph, line 28, the figure ''0.999994'' is corrected to read ''0.999997''.

5. On page 57320, the table titled ''FY 2017 IPPS Estimated Payments Due to Rural Floor and Imputed Floor with National Budget Neutrality'' is corrected to read as follows:

FY 2017 IPPS ESTIMATED PAYMENTS DUE TO RURAL AND IMPUTED FLOOR WITH NATIONAL BUDGET NEUTRALITY

State	Number of hospitals (1)	Number of hospitals that will receive the rural floor or imputed floor (2)	Percent change in payments due to application of rural floor and imputed floor with budget neutrality (3)	Difference (in $ millions) (4)
Alabama	83	6	−0.3	−6
Alaska	6	4	2.1	4
Arizona	57	46	3.5	63
Arkansas	44	0	−0.4	−4
California	301	186	1.3	131
Colorado	48	3	0.2	3
Connecticut	31	8	0.2	4
Delaware	6	2	0	0
Washington, DC	7	0	−0.4	−1
Florida	171	16	−0.3	−2
Georgia	105	0	−0.4	−18
Hawaii	12	0	−0.3	−10
Idaho	14	0	−0.3	−1
Illinois	126	3	−0.4	−1
Indiana	89	0	−0.4	−19
Iowa	35	0	−0.4	−11
Kansas	53	0	−0.3	−4
Kentucky	65	0	−0.4	−3
Louisiana	95	2	−0.4	−6
Maine	18	0	−0.4	−5
Massachusetts	58	15	0.6	−2
Michigan	95	0	−0.4	22
Minnesota	49	0	−0.3	−18
Mississippi	62	0	−0.4	−6
Missouri	74	2	−0.3	−4
Montana	12	4	0.3	−8
Nebraska	26	0	−0.3	1
Nevada	24	3	−0.2	−2
New Hampshire	13	9	2.2	−2
New Jersey	64	18	0.2	11
New Mexico	25	0	−0.3	6
New York	154	21	−0.3	−1
North Carolina	84	1	−0.4	−20
North Dakota	6	1	−0.3	−12
Ohio	130	10	−0.4	−1
Oklahoma	86	2	−0.3	−13
Oregon	34	2	−0.4	−4
Pennsylvania	151	5	−0.4	−4
Puerto Rico	51	12	0.1	−20
Rhode Island	11	10	4.7	0
South Carolina	57	5	−0.1	18
South Dakota	18	0	−0.2	−2
Tennessee	92	20	−0.3	−1
Texas	320	3	−0.4	−7
Utah	33	1	−0.3	−26
Vermont	6	0	−0.2	−2
Virginia	76	1	−0.3	−1
Washington	49	6	−0.1	−8
West Virginia	29	3	−0.2	−1
Wisconsin	65	6	−0.3	−5
Wyoming	10	0	−0.1	0

6. On page 57321, second column, first partial paragraph —

a Line 1, the figure ''277'' is corrected to read ''278''.

b Line 7, the figure ''1.0'' is corrected to read ''0.9''.

7. On pages 57321 through 57323, the table titled ''TABLE II—IMPACT ANALYSIS OF CHANGES FOR FY 2017 ACUTE CARE HOSPITAL OPERATING PROSPECTIVE PAYMENT SYSTEM [PAYMENTS PER DISCHARGE]'' is corrected to read as follows:

TABLE II—IMPACT ANALYSIS OF CHANGES FOR FY 2017 ACUTE CARE HOSPITAL OPERATING PROSPECTIVE PAYMENT SYSTEM

[Payments per discharge]

	Number of hospitals	Estimated average FY 2016 payment per discharge	Estimated average FY 2017 payment per discharge	FY 2017 changes
	(1)	(2)	(3)	(4)
All Hospitals	3,330	$11,542	$11,649	0.9
By Geographic Location:				
Urban hospitals	2,515	11,890	11,997	0.9
Large urban areas	1,369	12,690	12,799	0.9
Other urban areas	1,146	10,946	11,051	1.0
Rural hospitals	815	8,602	8,707	1.2
Bed Size (Urban):				
0–99 beds	659	9,392	9,478	0.9
100–199 beds	767	10,050	10,117	0.7
200–299 beds	446	10,757	10,840	0.8
300–499 beds	431	12,092	12,202	0.9
500 or more beds	212	14,613	14,772	1.1
Bed Size (Rural):				
0–49 beds	317	7,208	7,279	1.0
50–99 beds	292	8,192	8,292	1.2
100–149 beds	120	8,434	8,519	1.0
150–199 beds	46	9,243	9,367	1.3
200 or more beds	40	10,171	10,320	1.5
Urban by Region:				
New England	116	12,957	12,901	−0.4
Middle Atlantic	315	13,471	13,593	0.9
South Atlantic	407	10,498	10,595	0.9
East North Central	390	11,190	11,303	1.0
East South Central	147	10,042	10,160	1.2
West North Central	163	11,578	11,692	1.0
West South Central	385	10,693	10,820	1.2
Mountain	163	12,279	12,549	2.2
Pacific	378	15,372	15,452	0.5
Puerto Rico	51	8,491	8,513	0.3
Rural by Region:				
New England	21	11,818	12,009	1.6
Middle Atlantic	54	8,655	8,791	1.6
South Atlantic	128	8,043	8,122	1.0
East North Central	115	8,918	9,023	1.2
East South Central	155	7,639	7,716	1.0
West North Central	98	9,420	9,560	1.5
West South Central	160	7,243	7,328	1.2
Mountain	60	10,100	10,228	1.3
Pacific	24	12,045	12,197	1.3
By Payment Classification:				
Urban hospitals	2,522	11,886	11,993	0.9
Large urban areas	1,369	12,690	12,799	0.9
Other urban areas	1,153	10,940	11,046	1.0
Rural areas	808	8,602	8,706	1.2
Teaching Status:				
Nonteaching	2,266	9,600	9,680	0.8
Fewer than 100 residents	815	11,133	11,231	0.9
100 or more residents	249	16,764	16,949	1.1
Urban DSH:				
Non-DSH	589	10,055	10,140	0.8
100 or more beds	1,642	12,247	12,359	0.9
Less than 100 beds	363	8,853	8,914	0.7
Rural DSH:				
SCH	240	8,584	8,702	1.4
RRC	325	9,006	9,123	1.3
100 or more beds	29	7,018	7,054	0.5
Less than 100 beds	142	6,823	6,838	0.2
Urban teaching and DSH:				
Both teaching and DSH	898	13,344	13,474	1.0
Teaching and no DSH	109	11,361	11,442	0.7
No teaching and DSH	1,107	10,047	10,124	0.8
No teaching and no DSH	408	9,455	9,539	0.9
Special Hospital Types:				
RRC	189	9,709	9,824	1.2

TABLE II—IMPACT ANALYSIS OF CHANGES FOR FY 2017 ACUTE CARE HOSPITAL OPERATING PROSPECTIVE PAYMENT SYSTEM—Continued

[Payments per discharge]

	Number of hospitals (1)	Estimated average FY 2016 payment per discharge (2)	Estimated average FY 2017 payment per discharge (3)	FY 2017 changes (4)
SCH	324	10,344	10,516	1.7
MDH	148	7,321	7,415	1.3
SCH and RRC	126	10,767	10,957	1.8
MDH and RRC	12	8,822	9,019	2.2
Type of Ownership:				
Voluntary	1,927	11,719	11,830	0.9
Proprietary	881	10,130	10,218	0.9
Government	522	12,485	12,596	0.9
Medicare Utilization as a Percent of Inpatient Days:				
0–25	523	14,996	15,160	1.1
25–50	2,122	11,460	11,562	0.9
50–65	545	9,343	9,431	0.9
Over 65	89	6,948	7,019	1.0
FY 2017 Reclassifications by the Medicare Geographic Classification Review Board:				
All Reclassified Hospitals	791	11,399	11,507	0.9
Non-Reclassified Hospitals	2,539	11,595	11,701	0.9
Urban Hospitals Reclassified	532	12,008	12,115	0.9
Urban Nonreclassified Hospitals	1,936	11,849	11,955	0.9
Rural Hospitals Reclassified Full Year	277	8,984	9,101	1.3
Rural Nonreclassified Hospitals Full Year	489	8,173	8,266	1.1
All Section 401 Reclassified Hospitals	72	11,307	11,474	1.5
Other Reclassified Hospitals (Section 1886(d)(8)(B))	48	7,889	7,954	0.8

7. On page 57324, top of the page, third column, last paragraph, line 1, the figure ''2,426'' is corrected to read ''2,419''.

8. On pages 57324 and 57325, the table titled ''Modeled Disproportionate Share Hospital Payments for Estimated FY 2017 DSHs by Hospital Type: Model DSH $ (In Millions) From FY 2016 to FY 2017'' is corrected to read as follows:

MODELED DISPROPORTIONATE SHARE HOSPITAL PAYMENTS FOR ESTIMATED FY 2017 DSHS BY HOSPITAL TYPE: MODEL DSH $ (IN MILLIONS) FROM FY 2016 TO FY 2017

	Number of DSHs (FY 2017) (1)	FY 2016 final rule estimated DSH $* (in millions) (2)	FY 2017 final rule estimated DSH $* (in millions) (3)	Dollar difference: FY 2017–FY 2016 (in millions) (4)	Percent change** (5)
Total	2,419	$9,767	$9,551	−$216	−2.2
By Geographic Location:					
Urban Hospitals	1,921	9,294	9,106	−188	−2.0
Large Urban Areas	1,045	5,885	5,765	−120	−2.0
Other Urban Areas	876	3,408	3,341	−68	−2.0
Rural Hospitals	498	473	445	−28	−5.9
Bed Size (Urban):					
0 to 99 Beds	336	189	185	−4	−2.2
100 to 249 Beds	837	2,211	2,154	−57	−2.6
250+ Beds	748	6,894	6,767	−127	−1.8
Bed Size (Rural):					
0 to 99 Beds	368	206	190	−16	−7.8
100 to 249 Beds	116	211	199	−12	−5.5
250+ Beds	14	56	56	0	−0.2
Urban by Region:					
East North Central	322	1,273	1,252	−22	−1.7
East South Central	129	574	566	−8	−1.4
Middle Atlantic	232	1,614	1,570	−44	−2.7
Mountain	125	448	448	0	−0.1
New England	90	394	385	−9	−2.4
Pacific	312	1,459	1,448	−10	−0.7
Puerto Rico	41	104	116	12	11.3

MODELED DISPROPORTIONATE SHARE HOSPITAL PAYMENTS FOR ESTIMATED FY 2017 DSHS BY HOSPITAL TYPE: MODEL DSH $ (IN MILLIONS) FROM FY 2016 TO FY 2017—Continued

	Number of DSHs (FY 2017)	FY 2016 final rule estimated DSH $* (in millions)	FY 2017 final rule estimated DSH $* (in millions)	Dollar difference: FY 2017–FY 2016 (in millions)	Percent change**
	(1)	(2)	(3)	(4)	(5)
South Atlantic	314	1,777	1,721	−56	−3.2
West North Central	104	451	439	−11	−2.5
West South Central	252	1,200	1,161	−39	−3.2
Rural by Region:					
East North Central	64	49	44	−4	−8.3
East South Central	141	149	141	−8	−5.3
Middle Atlantic	28	34	33	−1	−2.4
Mountain	21	16	15	0	−0.2
New England	11	15	16	1	7.2
Pacific	7	9	7	−3	−27.4
South Atlantic	86	98	92	−6	−6.4
West North Central	31	20	19	−1	−6.3
West South Central	109	83	78	−6	−7.0
By Payment Classification:					
Urban Hospitals	1,886	9,243	9,055	−188	−2.0
Large Urban Areas	1,043	5,884	5,764	−120	−2.0
Other Urban Areas	843	3,359	3,292	−68	−2.0
Rural Hospitals	533	523	496	−28	−5.3
Teaching Status:					
Nonteaching	1,544	3,117	3,053	−64	−2.1
Fewer than 100 residents	637	3,213	3,132	−81	−2.5
100 or more residents	238	3,437	3,366	−71	−2.1
Type of Ownership:					
Voluntary	1,405	6,044	5,913	−131	−2.2
Proprietary	541	1,672	1,629	−43	−2.6
Government	471	2,023	1,983	−40	−2.0
Unknown	2	27	25	−2	−6.1
Medicare Utilization Percent:					
Missing or Unknown	4	1	1	0	0.9
0 to 25	428	3,013	2,974	−39	−1.3
25 to 50	1,617	6,356	6,189	−166	−2.6
50 to 65	319	385	375	−10	−2.5
Greater than 65	51	12	11	−1	−8.2

Source: Dobson | DaVanzo analysis of 2011–2013 Hospital Cost Reports.

*Dollar DSH calculated by [0.25 * estimated section 1886(d)(5)(F) payments] + [0.75 * estimated section 1886(d)(5)(F) payments * Factor 2 * Factor 3]. When summed across all hospitals projected to receive DSH payments, DSH payments are estimated to be $9,767 million in FY 2016 and $9,551 million in FY 2017.

**Percentage change is determined as the difference between Medicare DSH payments modeled for the FY 2017 IPPS/LTCH PPS final rule (column 3) and Medicare DSH payments modeled for the FY 2016 IPPS/LTCH PPS final rule (column 2) divided by Medicare DSH payments modeled for the FY 2016 final rule (column 2) times 100 percent.

9. On page 57325, bottom of the page, third column, last paragraph, line 8, the figure ''6.4'' is corrected to read ''5.9''.

10. On page 57326, first column—

a. First partial paragraph—

(1) Line 7 the figure ''5.2'' is corrected to read ''5.5''.

(2) Line 8, the figure ''5.9'' is corrected to read ''0.2''.

b. First full paragraph, line 12, the figure ''11.4'' is corrected to read ''11.3''.

c. Third full paragraph (last paragraph)—

(1) Line 12, the figure ''11.4'' is corrected to read ''11.3''.

(2) Line 18, the figure ''$9.5 million'' is corrected to read ''$9.4 million''.

11. On page 57330, third column—

a. Fourth bulleted paragraph, line 4, the figure ''0.9991'' is corrected to read ''0.9990''.

b. Last paragraph, line 6, the figure ''1.84'' is corrected to read ''1.83''.

12. On page 57331, top half of the page—

a. First column—

(1) First partial paragraph—

(a) Line 1, the phrase ''Less than half of the hospitals'' is corrected to read ''Most of the hospitals''.

(b) Lines 4 through 6, the phrase ''the effects of changes to the GAFs, while the remainder of these urban area hospitals would experience no change or a decrease in'' is corrected to read ''the effects of changes to the GAFs, while hospitals in one urban area are expected to experience a decrease in''.

(c) Line 11, the phrase ''except for two rural areas where changes in'' is corrected to read, ''except for one rural area where changes in''.

(2) Third paragraph, lines 8 and line 9, the phrase ''0.7 percent, while hospitals in rural areas, on average, are expected to experience a 0.8'' is corrected to read ''0.7 percent, and hospitals in rural areas, on average, are also expected to experience a 0.7''.

b. Second column—

(1) First partial paragraph, lines 2 through 6, the sentence ''The primary factor contributing to the small difference in the projected increase in capital IPPS payments per case for urban hospitals as compared to rural hospitals is the changes to the GAFs.'' is corrected by deleting the sentence.

(2) First full paragraph—

(a) Lines 4 through 8, ''range from a 4.2 percent increase for the Puerto Rico urban hospitals, and a 1.4 percent

increase for the West South Central urban region to a 0.7 percent increase for the Mountain urban region.'' is corrected to read ''range from a 4.1 percent increase for the Puerto Rico urban hospitals, and a 2.1 percent increase for the Mountain urban region to a 0.7 percent increase for several other urban regions.''.

(b) Line 13, the figure ''4.2'' is corrected to read ''4.1''.

(c) Line 23, the figure ''1.6'' is corrected to read ''2.1''.

(d) Line 26, the figure ''0.4'' should read ''0.1''.

c. Third column—

(1) First full paragraph, line 9, the figure ''0.7'' is corrected to read ''0.6''.

(2) Second full paragraph—

(a) Line 13, the figure ''1.0'' is corrected to read ''0.9''.

(b) Line 17, the figure ''1.0'' is corrected to read ''0.9''.

(c) Line 20, the figure ''0.2'' is corrected to read ''0.3''.

13. On pages 57331 and 57332, the table titled ''Table III.—Comparison of Total Payments Per Case [FY 2016 Payments Compared To FY 2017 Payments]'' is corrected to read as follows:

TABLE III—COMPARISON OF TOTAL PAYMENTS PER CASE

[FY 2016 payments compared to FY 2017 payments]

	Number of hospitals	Average FY 2016 payments/case	Average FY 2017 payments/case	Change
By Geographic Location:				
All hospitals	3,330	912	920	0.8
Large urban areas (populations over 1 million)	1,369	1,011	1,019	0.7
Other urban areas (populations of 1 million of fewer)	1,146	871	879	0.9
Rural areas	815	618	623	0.7
Urban hospitals	2,515	947	955	0.8
0–99 beds	659	768	774	0.8
100–199 beds	767	824	829	0.6
200–299 beds	446	865	871	0.7
300–499 beds	431	958	967	0.9
500 or more beds	212	1,139	1,149	0.9
Rural hospitals	815	618	623	0.7
0–49 beds	317	520	524	0.7
50–99 beds	292	577	582	0.8
100–149 beds	120	610	614	0.6
150–199 beds	46	669	673	0.6
200 or more beds	40	738	745	0.9
By Region:				
Urban by Region	2,515	947	955	0.8
New England	116	1,031	1,024	−0.6
Middle Atlantic	315	1,056	1,064	0.7
South Atlantic	407	840	847	0.8
East North Central	390	908	915	0.8
East South Central	147	793	804	1.3
West North Central	163	923	930	0.7
West South Central	385	858	868	1.1
Mountain	163	977	998	2.1
Pacific	378	1,219	1,227	0.7
Puerto Rico	51	435	453	4.1
Rural by Region	815	618	623	0.7
New England	21	868	878	1.1
Middle Atlantic	54	591	603	2.1
South Atlantic	128	584	584	0.0
East North Central	115	638	643	0.9
East South Central	155	562	566	0.9
West North Central	98	666	668	0.4
West South Central	160	536	542	1.2
Mountain	60	718	717	−0.1
Pacific	24	804	812	1.0
By Payment Classification:				
All hospitals	3,330	912	920	0.8
Large urban areas (populations over 1 million)	1,369	1,011	1,019	0.7
Other urban areas (populations of 1 million of fewer)	1,153	870	878	0.9
Rural areas	808	619	623	0.7
Teaching Status:				
Non-teaching	2,266	771	776	0.7
Fewer than 100 Residents	815	885	892	0.8
100 or more Residents	249	1,287	1,298	0.9
Urban DSH:				
100 or more beds	1,642	968	976	0.8
Less than 100 beds	363	696	702	0.8
Rural DSH:				
Sole Community (SCH/EACH)	240	575	581	1.0
Referral Center (RRC/EACH)	325	649	654	0.7
Other Rural:				
100 or more beds	29	538	540	0.4

TABLE III—COMPARISON OF TOTAL PAYMENTS PER CASE—Continued

[FY 2016 payments compared to FY 2017 payments]

	Number of hospitals	Average FY 2016 payments/case	Average FY 2017 payments/case	Change
Less than 100 beds	142	526	528	0.3
Urban teaching and DSH:				
Both teaching and DSH	898	1,043	1,052	0.9
Teaching and no DSH	109	942	948	0.6
No teaching and DSH	1,107	813	820	0.8
No teaching and no DSH	408	815	820	0.6
Rural Hospital Types:				
Non special status hospitals	2,529	948	955	0.7
RRC/EACH	189	772	782	1.4
SCH/EACH	324	706	716	1.4
SCH, RRC and EACH	126	748	756	1.1
Hospitals Reclassified by the Medicare Geographic Classification Review Board:				
FY2017 Reclassifications:				
All Urban Reclassified	532	953	962	0.9
All Urban Non-Reclassified	1,936	948	955	0.7
All Rural Reclassified	277	650	655	0.9
All Rural Non-Reclassified	489	578	580	0.3
Other Reclassified Hospitals (Section 1886(d)(8)(B))	42	599	602	0.5
Type of Ownership:				
Voluntary	1,927	926	934	0.8
Proprietary	881	820	827	0.8
Government	522	963	969	0.6
Medicare Utilization as a Percent of Inpatient Days:				
0–25	523	1,103	1,114	1.0
25–50	2,122	916	923	0.8
50–65	545	745	750	0.7
Over 65	89	529	531	0.4

14. On page 57342—

a. Top of the page—

(1) First column, first full paragraph—

(a) Line 11, the figure ''987'' is corrected to read ''990''.

(b) Line 23, the figure ''809'' is corrected to read ''811''.

(2) Second column, first partial paragraph—

(a) Line 12, the figure ''809'' is corrected to read ''811''.

(b) Line 14, the figure''680'' is corrected to read ''683''.

(c) Line 19, the figure ''66'' is corrected to read ''72''.

(d) Line 23, the figure ''746'' is corrected to read ''755''.

b. Middle of the page, the table titled ''TABLE V—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES UNDER THE IPPS FROM FY 2016 TO FY 2017'' is corrected to read as follows:

TABLE V—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURES UNDER THE IPPS FROM FY 2016 TO FY 2017

Category	Transfers
Annualized Monetized Transfers	$755 million.
From Whom to Whom	Federal Government to IPPS Medicare Providers.

Dated: September 29, 2016.

Madhura Valverde,

Executive Secretary to the Department, Department of Health and Human Services.

[FR Doc. 2016–24042 Filed 9–30–16; 11:15 am]

BILLING CODE 4120–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2015–0132; 4500030113]

RIN 1018–AZ09

Endangered and Threatened Wildlife and Plants; Threatened Species Status for Kentucky Arrow Darter With 4(d) Rule

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine threatened species status under the Endangered Species Act of 1973 (Act), as amended, for Kentucky arrow darter (*Etheostoma spilotum*), a fish species from the upper Kentucky River basin in Kentucky. The effect of this regulation will be to add this species to the List of Endangered and Threatened Wildlife. We are also adopting a rule under section 4(d) of the Act (a ''4(d) rule'') to further provide for the conservation of the Kentucky arrow darter.

DATES: This rule becomes effective November 4, 2016.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov* and *http://www.fws.gov/frankfort/.* Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov.* Comments, materials, and documentation that we considered in this rulemaking will be available by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Kentucky Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Virgil Lee Andrews, Jr., Field Supervisor, U.S. Fish and Wildlife Service, Kentucky Ecological Services Field Office, 330 West Broadway, Suite 265, Frankfort, KY 40601; telephone 502–695–0468, x108; facsimile 502–695–1024. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act (Act), we may list a species if it is endangered or threatened throughout all or a significant portion of its range. Listing a species as an endangered or threatened species can only be completed by issuing a rule.

What this document does. This rule finalizes the listing of the Kentucky arrow darter *(Etheostoma spilotum)* as a threatened species. It also includes provisions published under section 4(d) of the Act that are necessary and advisable for the conservation of the Kentucky arrow darter.

The basis for our action. Under the Act, we may determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. This decision to list the Kentucky arrow darter as threatened is based on three of the five factors (A, D, and E).

Under section 4(d) of the Act, the Secretary of the Interior has discretion to issue such regulations as she deems necessary and advisable to provide for the conservation of threatened species. The Secretary also has the discretion to prohibit by regulation, with respect to a threatened species, any act prohibited by section 9(a)(1) of the Act.

Summary of the major provisions of the 4(d) rule. The regulations in title 50 of the Code of Federal Regulations at 50 CFR 17.31(a) apply to threatened wildlife all the general prohibitions for endangered wildlife set forth at 50 CFR 17.21, and 50 CFR 17.31(c) states that whenever a 4(d) rule applies to a threatened species, the provisions of § 17.31(a) do not apply to that species. The regulations at 50 CFR 17.32 contain permit provisions for threatened species.

Some activities that would normally be prohibited under 50 CFR 17.31 and 17.32 will contribute to the conservation of the Kentucky arrow darter because habitat within some of the physically degraded streams must be improved before they are suitable for the species. Therefore, the Service has authorized certain species-specific exceptions for the Kentucky arrow darter under section 4(d) of the Act that may be appropriate to promote the conservation of this species. This 4(d) rule also exempts from the general prohibitions in 50 CFR 17.32 take that is incidental to the following activities when conducted within habitats currently occupied by the Kentucky arrow darter:

(1) Channel reconfiguration or restoration projects that create natural, physically stable, ecologically functioning streams (or stream and wetland systems) that are reconnected with their groundwater aquifers.

(2) Bank stabilization projects that use bioengineering methods specified by the Kentucky Energy and Environment Cabinet and the Kentucky Transportation Cabinet.

(3) Bridge and culvert replacement/removal projects that remove migration barriers (*e.g.,* collapsing, blocked, or perched culverts) or generally allow for improved upstream and downstream movements of Kentucky arrow darters.

(4) Repair and maintenance of U.S. Forest Service (USFS) concrete plank stream crossings in the Daniel Boone National Forest (DBNF).

Peer review and public comment. We sought comments from independent specialists to ensure that our listing determination is based on scientifically sound data, assumptions, and analyses. We invited these peer reviewers to comment on our listing proposal. We also considered all comments and information received during the comment period.

Elsewhere in this **Federal Register**, we finalize designation of critical habitat for the Kentucky arrow darter under the Act.

Previous Federal Action

Please refer to the proposed listing rule for the Kentucky arrow darter (80 FR 60962, October 8, 2015) for a detailed description of previous Federal actions concerning this species.

Summary of Comments and Recommendations

In the proposed rule published on October 8, 2015 (80 FR 60962), we requested that all interested parties submit written comments on the proposal by December 7, 2015. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. Newspaper notices inviting general public comment were published in the Lexington Herald-Leader and Louisville Courier Journal. We did not receive any requests for a public hearing. During the comment period, we received 47 comment letters in response to the proposed rule: 5 from peer reviewers, 1 from a State agency, and 41 from organizations or individuals. Two comment letters from organizations were accompanied by petitions containing a total of 15,388 signatures of persons supporting the proposed listing. Another organization submitted a separate comment letter on behalf of itself and 14 other organizations. None of the 47 comment letters objected to the proposed rule to list the Kentucky arrow darter as threatened. All substantive information provided during the comment period has either been incorporated directly into this final determination or addressed below.

Peer Reviewer Comments

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinion from seven knowledgeable individuals with scientific expertise that included familiarity with Kentucky arrow darter and its habitat, biological needs, and threats. We received responses from five of the peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding the listing of Kentucky arrow darter. The peer reviewers all generally concurred with our methods and conclusions and provided additional information on the taxonomy, life history, and threats; technical clarifications; and suggestions to improve the final rule. The comments and supplementary information

provided by the peer reviewers improved the final version of this document, and we thank them for their efforts. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

(1) Comment: One peer reviewer stated that the Service should include any new information on growth, feeding, reproduction, or spawning of the Kentucky arrow darter obtained from recent captive-propagation efforts by Conservation Fisheries, Inc. (CFI) in Knoxville, Tennessee.

Our Response: New observations on spawning behavior and the growth and viability of eggs and larvae were made by CFI during recent captive-propagation efforts (2010 to present). We have incorporated language summarizing these findings under the *Background—Habitat and Life History* section of this final listing determination.

(2) Comment: Two of the peer reviewers asked that we discuss the detectability of the Kentucky arrow darter during survey efforts and how this could affect our conclusions regarding the status of the species. More specifically, the peer reviewers raised the issue of imperfect detection, which is the inability of the surveyor to detect a species (even if present) due to surveyor error, low-density or rareness of the target species, or confounding variables such as environmental conditions (*e.g.,* stream flow). The peer reviewers asked the Service to explain how it accounted for imperfect detection when evaluating the species' current distribution and status.

Our Response: We recognize the importance and significance of imperfect detection when conducting surveys for rare or low-density species, and we agree that is possible a species can go undetected within a particular survey reach when it is actually present. However, we are also required, by statute and regulation, to base our determinations solely on the basis of the best scientific and commercial data available. We are confident that the survey data available to us at the time we prepared our proposed listing determination represented the best scientific and commercial data available. These data were collected by well-trained, professional biologists, who employed similar sampling techniques (single-pass electrofishing) across the entire potential range of the Kentucky arrow darter, which included historical darter locations, random locations, and locations associated with regulatory permitting, such as mining or transportation. Nearly 245 surveys were conducted for the species between 2007 and 2015, and the results of these surveys revealed a clear trend of habitat degradation and range curtailment for the species. Kentucky arrow darters may have gone undetected at a few sites (*i.e.,* our detection of the species may have been imperfect at a few collection sites), but the species' overall decline and pattern of associated habitat degradation (*e.g.,* elevated conductivity) was clear based on our review of available survey data.

(3) Comment: One peer reviewer pointed out that some information we included on the reproductive behavior of the Kentucky arrow darter was actually based on research conducted on its closest relative, the Cumberland arrow darter (*Etheostoma sagitta*).

Our Response: We concur with the peer reviewer and have incorporated language to address this topic under the *Background—Habitat and Life History* section of this final listing determination.

(4) Comment: Two peer reviewers suggested we expand our discussion of the effects of elevated conductivity on aquatic communities by including additional information related to the vulnerability of salamanders or other aquatic organisms.

Our Response: We have added language to address this topic under the *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range—Water Quality Degradation* section of this final listing determination.

(5) Comment: One peer reviewer recommended we discuss the potential threat posed by anthropogenic barriers (*e.g.,* perched culverts).

Our Response: We added language to address this topic under the *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence—Restricted Range and Population Size* section of this final listing determination.

(6) Comment: One peer reviewer suggested that the spatial degree of impacts facing the Kentucky arrow darter could be more accurately estimated using the Kentucky Division of Water's probabilistic sampling data from the upper Kentucky River basin, as opposed to relying on data generated from fixed monitoring sites across the species' range.

Our Response: We agree with the peer reviewer and have added language to address this topic under the *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range* section of this final listing determination.

(7) Comment: One peer reviewer offered new information on gill parasites and sewage bacteria, suggesting that these organisms represent potential threats to the Kentucky arrow darter under *Factor C. Disease or Predation.*

Our Response: We agree with the peer reviewer that these organisms have the potential to adversely affect the Kentucky arrow darter, and we have added language to address this topic under the *Factor C. Disease or Predation* section of this final listing determination.

(8) Comment: One peer reviewer commented that generalized natural channel design projects (*i.e.,* Rosgen) may not be sufficient under provisions of the proposed section 4(d) rule, and individual designs would be needed to benefit the Kentucky arrow darter.

Our Response: In the proposed listing determination, we proposed a species-specific section 4(d) rule to further promote the conservation of the Kentucky arrow darter. We concluded that activities such as stream reconfiguration/riparian restoration, bridge and culvert replacement or removal, bank stabilization, and stream crossing repair and maintenance would improve or restore physical habitat quality for the species and would provide an overall conservation benefit to the species. We concur with the peer reviewer that, under the proposed 4(d) rule, generalized stream restoration designs may not be sufficient to benefit the species. For this reason, the Service provided references and detailed descriptions of stream reconfigurations in the proposed rule, with an emphasis on stability, ecological function, and reconnection with groundwater systems.

(9) Comment: One peer reviewer and one other commenter stated that the Service needed to clarify potentially conflicting statements regarding threats under Factor D (the inadequacy of the Surface Mining Control and Reclamation Act (SMCRA) as an existing regulatory mechanism) and our conclusion that surface coal mining and reclamation activities conducted in accordance with the 1996 biological opinion (1996 BO) between the Service and the Office of Surface Mining Reclamation and Enforcement (OSM) are unlikely to result in a violation of section 9 of the Act.

Our Response: The peer reviewer and commenter are correct in stating that we considered existing regulatory mechanisms such as SMCRA to be inadequate in protecting the Kentucky arrow darter and its habitats. Habitats across the species' range have been degraded by water pollution and

sedimentation associated with coal mining (*e.g.,* elevated conductivity), and there is evidence of recent extirpations in watersheds impacted by mining (16 historical streams since the mid-1990s).

In the *Provisions of the 4(d) Rule* section of the proposed listing rule, we also stated that surface coal mining and reclamation activities, if conducted in accordance with existing regulations and permit conditions, would not result in violations of section 9 of the ESA. The 1996 BO is the result of a formal section 7 consultation between OSM and the Service on OSM's approval of State regulatory programs (primacy) under SMCRA. In Kentucky, the State has approved primacy under SMCRA and, therefore, operates under the 1996 BO to address adverse effects to federally listed species. Under the 1996 BO, SMCRA regulatory authorities are exempt from prohibitions of section 9 of the ESA if they comply with the terms and conditions of the 1996 BO. The terms and conditions of the 1996 BO require that each SMCRA regulatory authority implement and comply with species-specific protective measures for federally listed species as developed by the Service and the regulatory authority. These measures may not eliminate all adverse effects (''take'') on the species or its habitat, but they are intended to minimize and avoid impacts to the greatest extent practical and to ensure that the proposed activity will not jeopardize the species' continued existence.

(10) Comment: One peer reviewer stated the Service needs to coordinate with other agencies on protective conductivity levels under Kentucky's narrative aquatic life standards in order to protect the species.

Our Response: We continue to share information with the Kentucky Department of Environmental Protection (KYDEP) on the species' status and threats; however, any future modifications to Kentucky's narrative aquatic life standards will be the responsibility of KYDEP and the U.S. Environmental Protection Agency (USEPA). We will continue to provide technical assistance when requested.

(11) Comment: One peer reviewer commented that the Service should explain if recorded Kentucky arrow darter movements in Elisha Branch, Long Fork, and Hector Branch represent simple movements within home ranges (intrapopulational movements from pool to pool) or dispersal events (interpopulational movements).

Our Response: We can only speculate as to whether the recorded movements in these streams represent simple movements within home ranges or dispersal events. Most are likely intrapopulational (pool to pool within the same stream), but a few observations on Elisha Creek and Long Fork may provide evidence of dispersal events (interpopulational). We have added language to address this topic under the *Background—Habitat and Life History* section of this final listing determination.

(12) Comment: One peer reviewer stated that the Service should explain how we estimated abundance and recruitment of Kentucky arrow darters.

Our Response: Kentucky arrow darter abundance per sampling reach was estimated based on observed captures during single-pass electrofishing surveys. As described in the proposed rule, these surveys typically involved qualitative searches of all available habitats within a 100- to 150-meter survey reach. Evidence of recruitment was based on the presence of multiple age-classes within a survey reach. All captured Kentucky arrow darters were measured (total length in millimeters), allowing for the discrimination of age classes.

(13) Comment: One peer reviewer stated that the Service did not mention or discuss the relationship between land use and instream habitat conditions.

Our Response: We do not specifically mention the influence of land use and how it relates to instream habitat conditions; however, the Factor A discussion offers multiple examples of how differing land uses (*e.g.,* resource extraction, residential development) can affect water quality and physical habitat conditions.

(14) Comment: One peer reviewer asked us to clarify whether the Kentucky arrow darter was sensitive to high light conditions (loss of riparian vegetation and stream canopy).

Our Response: Increased light conditions have been shown to be a threat to other aquatic organisms, but its impact on the Kentucky arrow darter is unknown. We have added language to address this topic under the *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range* section of this final listing determination.

(15) Comment: One peer reviewer commented that nonnative rainbow trout may compete with Kentucky arrow darters for food resources and space.

Our Response: Within Big Double Creek, the only stream occupied by both species, nonnative rainbow trout and Kentucky arrow darters could complete for food and space as both feed on aquatic insects and both occupy similar habitats (pools). However, we do not believe that competition from nonnative trout represents a widespread, high-magnitude threat to the species across its range. Potential competition from nonnative trout is limited to Big Double Creek, and recent surveys in Big Double Creek demonstrate that the Kentucky arrow darter population is healthy and stable (see *Factor C: Disease or Predation*).

(16) Comment: One peer reviewer, the Kentucky Division of Forestry, and several other commenters provided comments on the effectiveness of best management practices (BMP) and compliance issues related to the Kentucky Forest Conservation Act. In general, the peer reviewers and commenters stated that BMPs were effective at preventing sediment runoff from logging sites, thereby protecting water quality and instream habitats. They also explained that BMP implementation rates in the upper Kentucky River basin were higher than those reported in the proposed listing determination. Based on these factors, the reviewers stated the Service should reconsider its claim that the Kentucky Forest Conservation Act is an ineffective regulatory mechanism. To support their request, the reviewers provided updated and revised inspection data and new information related to BMP elements designed to improve BMP effectiveness.

Our Response: We agree with the commenters that BMP implementation rates are relatively high in the upper Kentucky River basin (greater than 70 percent), and forestry BMPs are effective in protecting water quality and instream habitats. However, as we discuss in the *Factor D. The Inadequacy of Existing Regulatory Mechanisms* section of this final listing determination, BMP compliance at inspected sites in the upper Kentucky River basin was only 73 percent between May 2014 and October 2015. Remedial actions were implemented at most noncompliant sites (74 percent) within a few months, but 26 percent of these sites remained noncompliant. The primary reason for noncompliance was related to the inadequate control of sediment laden runoff from skid trails, roads, and landings. Therefore, we agree with the commenters that forestry BMPs are effective in protecting water quality and preventing sedimentation; however, these impacts continue to occur within the upper Kentucky River basin due to BMP noncompliance. We have incorporated new compliance information provided by the commenters under the *Factor D—The Inadequacy of Existing Regulatory Mechanisms* section of this final listing determination. We have also included additional text regarding recent changes

to Kentucky's BMP standards, which will be more protective of stream habitats. We agree with the peer reviewer and other commenters that BMP compliance rates were higher than those reported in the proposed listing rule, and recent changes to Kentucky's BMP standards will be more protective of stream habitats. However, BMP noncompliance continues to occur at some sites (about 26 percent), remedial actions at these sites sometimes take several months to complete, and some of these sites (6.5 percent) are never remediated.

(17) Comment: One peer reviewer recommended that the Service modify the discussion regarding genetic variation and gene flow because a detailed study of these factors is lacking.

Our Response: We concur with the peer reviewer and have modified our text accordingly in the *Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence—Restricted Range and Population Size* section of this final listing determination.

Public Comments

(18) Comment: One commenter stated that the Service failed to consider how the Kentucky arrow darter's habitat is affected by the surrounding human population. This same commenter also suggested that mountaintop mining and fracking were not considered as potential threats to the species in the proposed rule, but should have been.

Our Response: We discussed a variety of human-induced habitat threats under the *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range* section of this listing determination. In that section, we also provided a detailed summary of threats related to fracking and described specific impacts associated with a spill of chemicals used during the drilling process. Mountaintop coal mining is not mentioned within the proposed rule, but any potential impacts associated with mountaintop mining are addressed in our detailed discussion of impacts associated with surface coal mining in the *Factor A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range* section of this listing determination. Surface coal mining is a broad category of coal mining that includes a variety of methods, such as area, auger, contour, and mountaintop mining.

(19) Comment: One commenter had concerns over perceived regulatory gaps associated with oil and gas development (and related infrastructure) on the Redbird Ranger District of the DBNF. Because some oil and gas resources within the Redbird Ranger District are privately owned, the commenter believed resource extraction activities in these areas would be exempt from National Environmental Policy Act (NEPA) requirements, and these projects would not be evaluated as closely for potential adverse effects to natural resources as activities occurring in areas under public ownership.

Our Response: The commenter is correct that mineral resources (*i.e.,* coal, natural gas, oil) underlying much of the Redbird District of the DBNF are in private ownership, and that no Federal nexus exists with regard to actions associated with these minerals (including coal, oil/gas) in the DBNF. Because these mineral resources are in private ownership, oil and gas exploration activities taking place within them would not be subject to NEPA, and there would be no requirement for the DBNF to consult with the Service under section 7 of the ESA or apply standards of the DBNF's Land and Resource Management Plan (Forest Plan) to these privately held areas. The Service recognizes these regulatory gaps (with respect to privately held minerals) on the DBNF and has added language to the *Factor D. The Inadequacy of Existing Regulatory Mechanisms* section in this final listing determination.

(20) Comment: One commenter stated that the recently signed Candidate Conservation Agreement (CCA) between the Service and U.S. Forest Service fails to create new conservation measures that will be implemented on the DBNF to protect the Kentucky arrow darter.

Our Response: The CCA involves several new conservation measures that will benefit the species. Some of these measures include (1) the development and implementation of a long-term management and monitoring program for Kentucky arrow darter populations on the DBNF; (2) an inventory and mapping project of natural gas lines, oil wells, roads, other facilities, land ownership, and mineral ownership within Kentucky arrow darter watersheds on the DBNF; (3) the identification of restoration or enhancement opportunities for Kentucky arrow darter streams in coordination with Forest Plan standards, implementing those opportunities as funding and other resources allow; and (4) the initiation of an annual Kentucky arrow darter conservation meeting between the Service and DBNF to discuss the results of implementing the CCA. These and other conservation measures included in the CCA will benefit the species; however, these actions did not influence our final listing determination. The actions outlined in the CCA apply only to portions of Kentucky arrow streams located within the DBNF. The majority of Kentucky arrow populations (streams) and about 74 percent of the species' occupied habitat are located in areas outside of the DBNF that are not covered by the CCA. These populations will not benefit from specific conservation measures described in the CCA and will continue to be vulnerable to a variety of threats (see *Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range*).

(21) Comment: One commenter disagreed with our description of roads on Robinson Forest, a 59.9-km^2 (14,800-acre (ac)) experimental forest owned and managed by the University of Kentucky (UK). The commenter stated that the roads on Robinson Forest are used for forest access and management and should not be described as logging roads. The same commenter also stated that, in addition to protection from mining provided through the Lands Unsuitable for Mining designation in the Kentucky Administrative Regulations (405 KAR 24:040), habitats within Robinson Forest are protected from potential habitat disturbance associated with private or recreational all-terrain vehicle (ATV) use.

Our Response: We agree with the commenter that roads on Robinson Forest should not be described as logging roads, and we have revised the corresponding text under the *Population Estimates and Status* section of this final rule. Under the *Factor D. The Inadequacy of Existing Regulatory Mechanisms* section of this final listing determination, we have added a description of UK's management guidelines for Robinson Forest. Under these guidelines, public access to Robinson Forest is controlled, and potential impacts from such activities as recreational ATV use are avoided.

Summary of Changes From the Proposed Rule

We have considered all comments and information received during the open comment period for the proposed rule to list the Kentucky arrow darter as threatened. In this final rule, we have added species description and life-history information to the background section, and we have revised and updated the threats discussion (Summary of Factors Affecting the Species section). We added new information on spawning behavior and the development and viability of eggs, based on observations made during captive-propagation efforts by CFI. We

also clarified information related to darter movements, discussing the difference between dispersal (intertributary movement) and simple movements within the same stream (intratributary movement). We added a more detailed description of feeding behavior, relying on observations made for the closely related Cumberland arrow darter in Tennessee. With regard to threats, we:

—Used new probabilistic data generated by the Kentucky Division of Water (KDOW) to demonstrate the spatial degree of threats across the species' range,

—Added new information summarizing the vulnerability of salamanders and other aquatic organisms to elevated conductivity,

—Briefly discussed the potential impact of high light conditions (stream canopy loss),

—Discussed the potential threat posed by sewage bacteria and parasites,

—Incorporated new forestry BMP compliance information and descriptions of new BMP standards in Kentucky, and

—Added text summarizing the threat posed by anthropogenic barriers (*e.g.,* perched culverts).

Background

Species Information

Species Description and Taxonomy

A thorough account of Kentucky arrow darter life history is presented in the preamble to the proposed rule (October 8, 2015, 80 FR 60962), and that information is incorporated here by reference. The following is a summary of that information. We have incorporated new information into the final rule, as appropriate (see Summary of Changes from the Proposed Rule).

The Kentucky arrow darter, *Etheostoma spilotum* Gilbert, is a small and compressed fish, with a background color of straw yellow to pale greenish and a body covered by a variety of stripes and blotches. During the spawning season, breeding males exhibit vibrant coloration. Most of the body is blue-green in color, with scattered scarlet spots and scarlet to orange vertical bars laterally.

The Kentucky arrow darter belongs to the Class Actinopterygii (ray-finned fishes), Order Perciformes, and Family Percidae (perches) (Etnier and Starnes 1993, pp. 18–25; Page and Burr 2011, p. 569). A similar darter species, the Cumberland arrow darter, *E. sagitta* (Jordan and Swain), is restricted to the upper Cumberland River basin in Kentucky and Tennessee, and the Kentucky arrow darter is restricted to the upper Kentucky River basin in Kentucky.

Habitat and Life History

Kentucky arrow darters typically inhabit pools or transitional areas between riffles and pools (glides and runs) in moderate- to high-gradient, first- to third-order streams with rocky substrates (Thomas 2008, p. 6). The species is most often observed near some type of cover in depths ranging from 10 to 45 centimeters (cm) (4 to 18 in) and in streams ranging from 1.5 to 20 meters (m) (4.9 to 65.6 feet (ft)) wide. During spawning (April to June), the species utilizes riffle habitats with moderate flow (Kuehne and Barbour 1983, p. 71). Kentucky arrow darters typically occupy streams with watersheds of 25.9 square kilometers (km^2) (10 square miles (mi^2)) or less, and many of these habitats, especially in first-order reaches, can be intermittent in nature (Thomas 2008, pp. 6–9). During drier periods (late summer or fall), some Kentucky arrow darter streams may cease flowing, but the species appears to survive these conditions by retreating into shaded, isolated pools or by dispersing into larger tributaries (Lotrich 1973, p. 394; Lowe 1979, p. 26; Etnier and Starnes 1993, p. 523; ATS 2011, p. 7; Service unpublished data).

Little information is available on the reproductive behavior of the Kentucky arrow darter; however, general details were provided by Kuehne and Barbour (1983, p. 71), and more specific information can be inferred from studies of the closely related Cumberland arrow darter conducted by Bailey (1948, pp. 82–84) and Lowe (1979, pp. 44–50). Male Kentucky arrow darters establish territories over riffles and defend a fanned out depression in the substrate. After spawning, it is assumed the male continues to defend the nest until the eggs have hatched. The spawning period extends from April to June, but peak activity occurs when water temperatures reach 13 degrees Celsius (°C) (55 degrees Fahrenheit (°F)), typically in mid-April. Females produce between 200 and 600 eggs per season, with tremendous variation resulting from size, age, condition of females, and stream temperature (Rakes 2014, pers. comm.).

Captive-propagation efforts by CFI (2010-present) have yielded observations related to spawning behavior and the development and viability of eggs and larvae (Petty *et al.* 2015, pp. 4–7). The spawning period is dependent on several factors, but laboratory observations suggest that water temperature is likely a significant determinant of when spawning begins and how long it continues (Petty *et al.* 2015, p. 7). The appearance of larvae in the laboratory appeared to be delayed by cool water temperatures (less than 10 °C), suggesting that cooler temperatures may (1) affect egg viability and/or larval survivorship or (2) simply increase development times of eggs and/or larvae. Another potential factor related to spawning period is the age and size of breeding darters. In the laboratory, large, older individuals spawned earlier and terminated earlier, while smaller, younger individuals matured and spawned later. Petty *et al.* (2015, p. 7) cautioned that hatchery observations are necessarily biased by the selection and use of mostly larger individuals in attempts to maximize production, so these larger individuals may not reflect the natural variation in wild populations with greater demographic (and environmental) diversity.

Kentucky arrow darters can reach 50 mm (2 in) in length by the end of the first year (Lotrich 1973, pp. 384–385; Lowe 1979, pp. 44–48; Kuehne and Barbour 1983, p. 71). One-year-olds are generally sexually mature and participate in spawning with older age classes (Etnier and Starnes 1993, p. 523). Juvenile Kentucky arrow darters can be found throughout the channel but are often observed in shallow water along stream margins near root mats, rock ledges, or some other cover. As stream flow lessens and riffles begin to shrink, most Kentucky arrow darters move into pools and tend to remain there even when late autumn and winter rains restore stream flow (Kuehne and Barbour 1983, p. 71).

Limited information exists with regard to upstream or downstream movements of Kentucky arrow darters; however, a movement study at Eastern Kentucky University (EKU) and a reintroduction project in the DBNF suggest that Kentucky arrow darters can move considerable distances (Baxter 2015, entire; Thomas 2015a, pers. comm.), which we summarize below.

The EKU study used PIT-tags (electronic tags placed under the skin) and placed antenna systems (installed in the stream bottom) to monitor intra- and inter-tributary movement of Kentucky arrow darters in Gilberts Big Creek and Elisha Creek, two second-order tributaries of Red Bird River in Clay and Leslie Counties (Baxter 2015, pp. 9–11). PIT-tags were placed in a total of 126 individuals, and Kentucky arrow darter movements were tracked from May 2013 to May 2014 (Baxter 2015, pp. 15, 19–21, 35–36). Recorded movements ranged from 134 m (439 ft) (upstream movement) to 4,078 m

(13,379 ft or 2.5 mi) (downstream movement by a female in Elisha Creek). Intermediate recorded movements included 328 m (1,076 ft) (downstream), 351 m (1,151 ft) (upstream), 900 m (2,952 ft) (upstream/downstream), 950 m (3,116 ft) (downstream), 1,282 m (4,028 ft) (downstream), and 1,708 m (5,603 ft) (downstream). Based on this research, we believe it is likely that most of these documented movements could best be described as intrapopulational and represent individual darters moving between stream pools of Elisha Creek. In the case of the female arrow darter that moved unidirectionally from the headwaters of Elisha Creek to its mouth (a distance of more than 4,000 m (2.5 mi)), this documented movement could represent an interpopulational event (dispersal), where an individual leaves one population and travels to another population (or stream). Further research is needed to differentiate these behaviors.

Since August 2012, the Kentucky Department of Fish and Wildlife Resources (KDFWR) and CFI have been releasing captive-bred Kentucky arrow darters into a 1.5-km (0.9 mi) reach of Long Fork, a DBNF stream and first-order tributary to Hector Branch in eastern Clay County, Kentucky, where the species formerly occurred but has been extirpated. Researchers have tagged and released a total of 1,447 Kentucky arrow darters (about 50–55 mm TL) and have conducted monitoring on 14 occasions since the initial release using visual searches and seining methods. Tagged darters have been observed throughout the Long Fork mainstem, and some individuals have moved considerable distances (up to 1.0 km (0.4 mi)) downstream into Hector Branch. Based on these results, it is clear that young Kentucky arrow darters can disperse both upstream and downstream from their place of origin and can move considerable distances.

Kentucky arrow darters feed primarily on mayflies (Order Ephemeroptera), with larger darters also feeding on small crayfishes. Other food items include larval blackflies, midges, caddisfly larvae, stonefly nymphs, beetle larvae, microcrustaceans, and dipteran larvae (Lotrich 1973, p. 381; Etnier and Starnes 1993, p. 523).

Historical Range and Distribution

A thorough account of the Kentucky arrow darter's historical range is presented in the preamble to the proposed rule (October 8, 2015, 80 FR 60962), and that information is incorporated here by reference. The following is a summary of that information with new information added as appropriate (see Summary of Changes from the Proposed Rule).

The Kentucky arrow darter occurred historically in at least 74 streams in the upper Kentucky River basin of eastern Kentucky (Gilbert 1887, pp. 53–54; Woolman 1892, pp. 275–281; Kuehne and Bailey 1961, pp. 3–4; Kuehne 1962, pp. 608–609; Branson and Batch 1972, pp. 507–514; Lotrich 1973, p. 380; Branson and Batch 1974, pp. 81–83; Harker *et al.* 1979, pp. 523–761; Greenberg and Steigerwald 1981, p. 37; Branson and Batch 1983, pp. 2–13; Branson and Batch 1984, pp. 4–8; Kornman 1985, p. 28; Burr and Warren 1986, p. 316; Measel 1997, pp. 1–105; Kornman 1999, pp. 118–133; Stephens 1999, pp. 159–174; Ray and Ceas 2003, p. 8; Kentucky State Nature Preserves Commission (KSNPC) unpublished data). Its distribution spanned portions of 6 smaller sub-basins or watersheds (North Fork Kentucky River, Middle Fork Kentucky River, South Fork Kentucky River, Silver Creek, Sturgeon Creek, and Red River) in 10 Kentucky counties (Breathitt, Clay, Harlan, Jackson, Knott, Lee, Leslie, Owsley, Perry, and Wolfe) (Thomas 2008, p. 3) (figure 1).

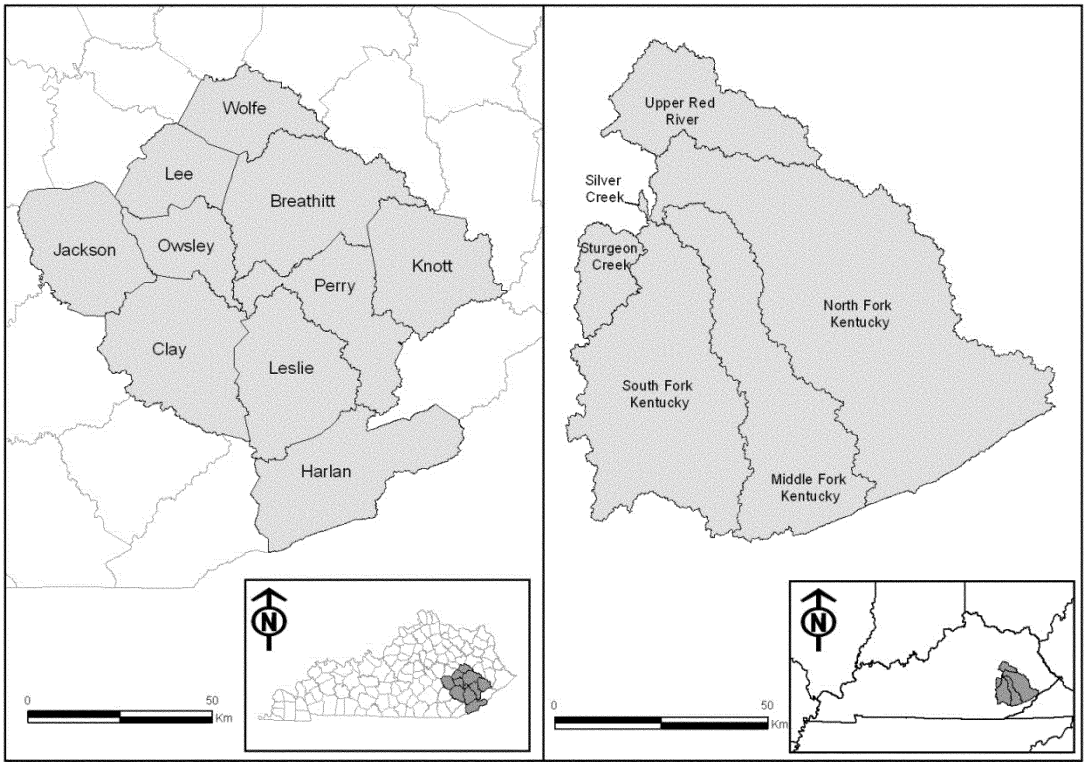

Figure 1. Kentucky counties within the Kentucky arrow darter's historical range (left) and upper Kentucky River sub-basins with historical records of the species (right).

Current Range and Distribution

Based on surveys completed since 2006, extant populations of the Kentucky arrow darter are known from 47 streams in the upper Kentucky River basin in eastern Kentucky. These populations are scattered across 6 sub-basins (North Fork Kentucky River, Middle Fork Kentucky River, South Fork Kentucky River, Silver Creek, Sturgeon Creek, and Red River) in 10 Kentucky counties: Breathitt, Clay, Harlan, Jackson, Knott, Lee, Leslie, Owsley, Perry, and Wolfe Counties (Thomas 2008, pp. 3–6; Service unpublished data). Populations in eight of these streams have been discovered since 2006, and one additional population (Long Fork, Clay County) was reestablished through a reintroduction project led by KDFWR. Current populations occur in the following Kentucky River sub-basins (and smaller watersheds):

- North Fork Kentucky River (Troublesome, Quicksand, Frozen, Holly, Lower Devil, Walker, and Hell Creek watersheds);
- Middle Fork Kentucky River (Big Laurel, Rockhouse, Hell For Certain Creek, and Squabble Creek watersheds);
- South Fork Kentucky River (Red Bird River, Hector Branch, and Goose, Bullskin, Buffalo, and Lower Buffalo Creek watersheds);
- Silver Creek;
- Sturgeon Creek (Travis, Wild Dog, and Granny Dismal Creek watersheds); and
- Red River (Rock Bridge Fork watershed).

Population Estimates and Status

The species' status in all streams of historical or recent occurrence is summarized in table 1, below, which is organized by sub-basin, beginning at the southeastern border (upstream end) of the basin (North Fork Kentucky River) and moving downstream. In this final rule, the term ''population'' is used in a geographical context and not in a genetic context, and is defined as all individuals of the species living in one stream at a given time. Using the term in this way allows the status, trends, and threats to be discussed comparatively across streams where the species occurs. In using this term, we do not imply that the populations are currently reproducing and recruiting or that they are distinct genetic units. We considered populations of the Kentucky arrow darter as extant if live specimens have been observed or collected since 2006, and habitat conditions are favorable for reproduction (*e.g.,* low siltation, water chemistry at normal levels).

We are using the following generalized sets of criteria to categorize the relative status of populations of 83 streams (74 historical and 9 nonhistorical, discovered or established since 2006) included in table 1. Similar criteria have been used by the Service in previous proposed listing rules (76 FR 3392, January 19, 2011; 77 FR 63440, October 16, 2012):

The status of a population is considered ''stable'' if: (1) There is little evidence of significant habitat loss or degradation; (2) darter abundance has remained relatively constant or increased during recent surveys; or (3) evidence of relatively recent recruitment has been documented since 2006.

The status of a population is considered ''vulnerable'' if: (1) There is ample evidence of significant habitat loss or degradation since the species' original capture; (2) there is an obvious decreasing trend in abundance since the historical collection; or (3) no evidence of relatively recent recruitment (since 2006) has been documented.

The status of a population is considered ''extirpated'' if: (1) All known suitable habitat has been

destroyed or severely degraded; (2) no live individuals have been observed since 2006; or (3) live individuals have been observed since 2006, but habitat conditions do not appear to be suitable for reproduction to occur (*e.g.,* elevated conductivity, siltation) and there is supporting evidence that the observed individuals are transients (fishes originating from another stream that occupy a particular habitat for only a short time).

TABLE 1—KENTUCKY ARROW DARTER STATUS IN ALL STREAMS OF HISTORICAL (74) OR RECENT OCCURRENCE [1] (9; NOTED IN BOLD) IN THE UPPER KENTUCKY RIVER BASIN

Sub-basin	Sub-basin tributaries	Stream [1]	County	Current status	Date of last observation
North Fork	Lotts Creek	Lotts Creek	Perry	Extirpated	1890
	Troublesome Creek	Left Fork	Knott	Extirpated	1890
		Troublesome Creek	Perry	Extirpated	1890
		Mill Creek	Knott	Extirpated	1995
		Laurel Fork (of Balls Fork)	Knott	Extirpated	1995
		Buckhorn Creek (Prince Fork)	Knott	Vulnerable	2011
		Eli Fork [1]	Knott	Vulnerable	2011
		Boughcamp Branch	Knott	Extirpated	2011
		Coles Fork	Breathitt, Knott	Stable	2011
		Snag Ridge Fork	Knott	Stable	2008
		Clemons Fork	Breathitt	Stable	2013
		Millseat Branch	Breathitt	Extirpated	1976
		Lewis Fork	Breathitt	Extirpated	1959
		Long Fork	Breathitt	Extirpated	1959
		Bear Branch	Breathitt	Extirpated	2015
		Laurel Fork (of Buckhorn)	Breathitt	Extirpated	1976
		Lost Creek	Breathitt	Extirpated	1997
	Quicksand Creek	Laurel Fork	Knott	Stable	2014
		Baker Branch	Knott	Extirpated	1994
		Middle Fork	Knott	Stable	2015
		Spring Fork [1]	Breathitt	Vulnerable	2013
		Wolf Creek	Breathitt	Extirpated	1995
		Hunting Creek	Breathitt	Vulnerable	2013
		Leatherwood Creek	Breathitt	Extirpated	1982
		Bear Creek	Breathitt	Extirpated	1969
		Smith Branch	Breathitt	Extirpated	1995
	Frozen Creek	Frozen Creek	Breathitt	Stable	2013
		Clear Fork	Breathitt	Vulnerable	2008
		Negro Branch	Breathitt	Vulnerable	2008
		Davis Creek	Breathitt	Vulnerable	2008
		Cope Fork	Breathitt	Extirpated	1995
		Boone Fork	Breathitt	Extirpated	1998
	Holly Creek	Holly Creek	Wolfe	Vulnerable	2007
	Lower Devil Creek	Lower Devil Creek	Lee, Wolfe	Extirpated	1998
		Little Fork [1]	Lee, Wolfe	Vulnerable	2011
	Walker Creek	Walker Creek	Lee, Wolfe	Stable	2013
	Hell Creek	Hell Creek	Lee	Vulnerable	2013
Middle Fork	Greasy Creek	Big Laurel Creek	Harlan	Vulnerable	2009
		Greasy Creek	Leslie	Extirpated	1970
	Cutshin Creek	Cutshin Creek	Leslie	Extirpated	1890
	Middle Fork	Middle Fork	Leslie	Extirpated	1890
	Rockhouse Creek	***Laurel Creek*** [1]	Leslie	Vulnerable	2013
	Hell For Certain Creek	Hell For Certain Creek	Leslie	Stable	2013
	Squabble Creek	Squabble Creek	Perry	Vulnerable	2015
South Fork	Red Bird River	Blue Hole Creek	Clay	Stable	2008
		Upper Bear Creek	Clay	Stable	2013
		Katies Creek	Clay	Stable	2007
		Spring Creek	Clay	Stable	2007
		Bowen Creek	Leslie	Stable	2009
		Elisha Creek	Leslie	Stable	2014
		Gilberts Big Creek	Clay, Leslie	Stable	2013
		Sugar Creek [1]	Clay, Leslie	Stable	2008
		Big Double Creek	Clay	Stable	2014
		Little Double Creek	Clay	Stable	2008
		Big Creek	Clay	Extirpated	1890
		Jacks Creek	Clay	Vulnerable	2009
		Hector Branch	Clay	Extirpated	2015
		Long Fork (of Hector Br.) [1]	Clay	Stable	2014
	Goose Creek	Horse Creek	Clay	Vulnerable	2013
		Laurel Creek	Clay	Extirpated	1970
	Bullskin Creek	Bullskin Creek	Clay, Leslie	Vulnerable	2014
	Buffalo Creek	Laurel Fork	Owsley	Stable	2014
		Cortland Fork [1]	Owsley	Vulnerable	2014
		Lucky Fork	Owsley	Stable	2014
		Left Fork	Owsley	Stable	2014

TABLE 1—KENTUCKY ARROW DARTER STATUS IN ALL STREAMS OF HISTORICAL (74) OR RECENT OCCURRENCE [1] (9; NOTED IN BOLD) IN THE UPPER KENTUCKY RIVER BASIN—Continued

Sub-basin	Sub-basin tributaries	Stream [1]	County	Current status	Date of last observation
		Right Fork	Owsley	Vulnerable	2009
		Buffalo Creek	Owsley	Vulnerable	1969
	Sexton Creek	Bray Creek	Clay	Extirpated	1997
		Robinsons Creek	Clay	Extirpated	1997
		Sexton Creek	Owsley	Extirpated	1978
	Lower Island Creek	Lower Island Creek	Owsley	Extirpated	1997
	Cow Creek	Right Fork Cow Creek	Owsley	Extirpated	1997
	Buck Creek	Buck Creek	Owsley	Extirpated	1978
	Lower Buffalo Creek	Lower Buffalo Creek	Lee, Owsley	Vulnerable	2007
Silver Creek			Lee	Vulnerable	2008
Sturgeon Creek		***Travis Creek*** [1]	Jackson	Vulnerable	2008
		Brushy Creek	Jackson, Owsley	Extirpated	1996
		Little Sturgeon Creek	Owsley	Extirpated	1996
		Wild Dog Creek	Jackson, Owsley	Stable	2007
		Granny Dismal Creek [1]	Lee, Owsley	Vulnerable	2013
		Cooperas Cave Branch	Lee	Extirpated	1996
		Sturgeon Creek	Lee	Extirpated	1998
Red River	Swift Camp Creek	Rockbridge Fork	Wolfe	Vulnerable	2013

[1] Non-historical occurrence discovered or established since 2006.

In the period 2007–2012, the Service, KSNPC, and KDFWR conducted a status review for the Kentucky arrow darter (Thomas 2008, pp. 1–33; Service 2012, pp. 1–4). Surveys were conducted qualitatively using single-pass electrofishing techniques (Smith-Root backpack electrofishing unit) within an approximate 100-m (328-ft) reach. During these efforts, fish surveys were conducted at 69 of 74 historical streams, 103 of 119 historical sites, and 40 new (nonhistorical) sites (sites correspond to individual sampling reaches and more than one may be present on a given stream). Kentucky arrow darters were observed at 36 of 69 historical streams (52 percent), 53 of 103 historical sites (52 percent), and 4 of 40 new sites (10 percent). New sites were visited in an effort to locate additional populations and were specifically selected based on habitat suitability and the availability of previous collection records (sites lacking previous collections were chosen).

From June to September 2013, KSNPC and the Service initiated a study that included quantitative surveys at 80 randomly chosen sites within the species' historical range (Service unpublished data). Kentucky arrow darters were observed at only seven sites, including two new localities (Granny Dismal Creek in Owsley County and Spring Fork Quicksand Creek in Breathitt County) and one historical stream (Hunting Creek, Breathitt County) where the species was not observed during status surveys by Thomas (2008, pp. 1–33) and Service (2012, pp. 1–4).

During 2014–2015, additional qualitative surveys (single-pass electrofishing) were completed at more than 20 sites within the basin. Kentucky arrow darters were observed in Bear Branch, Big Double Creek, Big Laurel Creek, Bullskin Creek, Clemons Fork, Coles Fork, Cortland Fork, Laurel Fork Buffalo Creek, and Squabble Creek. Based on the poor habitat conditions observed in Bear Branch (*e.g.,* elevated conductivity, siltation, and embedded substrates) and its close proximity to Robinson Forest, we suspect that the few individuals observed in Bear Branch were transients originating from Clemons Fork.

Based on historical records and survey data collected at more than 200 sites since 2006, the Kentucky arrow darter has declined significantly rangewide and has been eliminated from large portions of its former range, including 36 of 74 historical streams (figure 2) and large portions of the basin that would have been occupied historically by the species (figure 3). Forty-four percent of the species' extirpations (16 streams) have occurred since the mid-1990s, and the species has disappeared completely from several watersheds (*e.g.,* Sexton Creek, South Fork Quicksand Creek, Troublesome Creek headwaters). Of the species' 47 extant streams, we consider half of these populations (23) to be ''vulnerable'' (table 1), and most remaining populations are isolated and restricted to short stream reaches.

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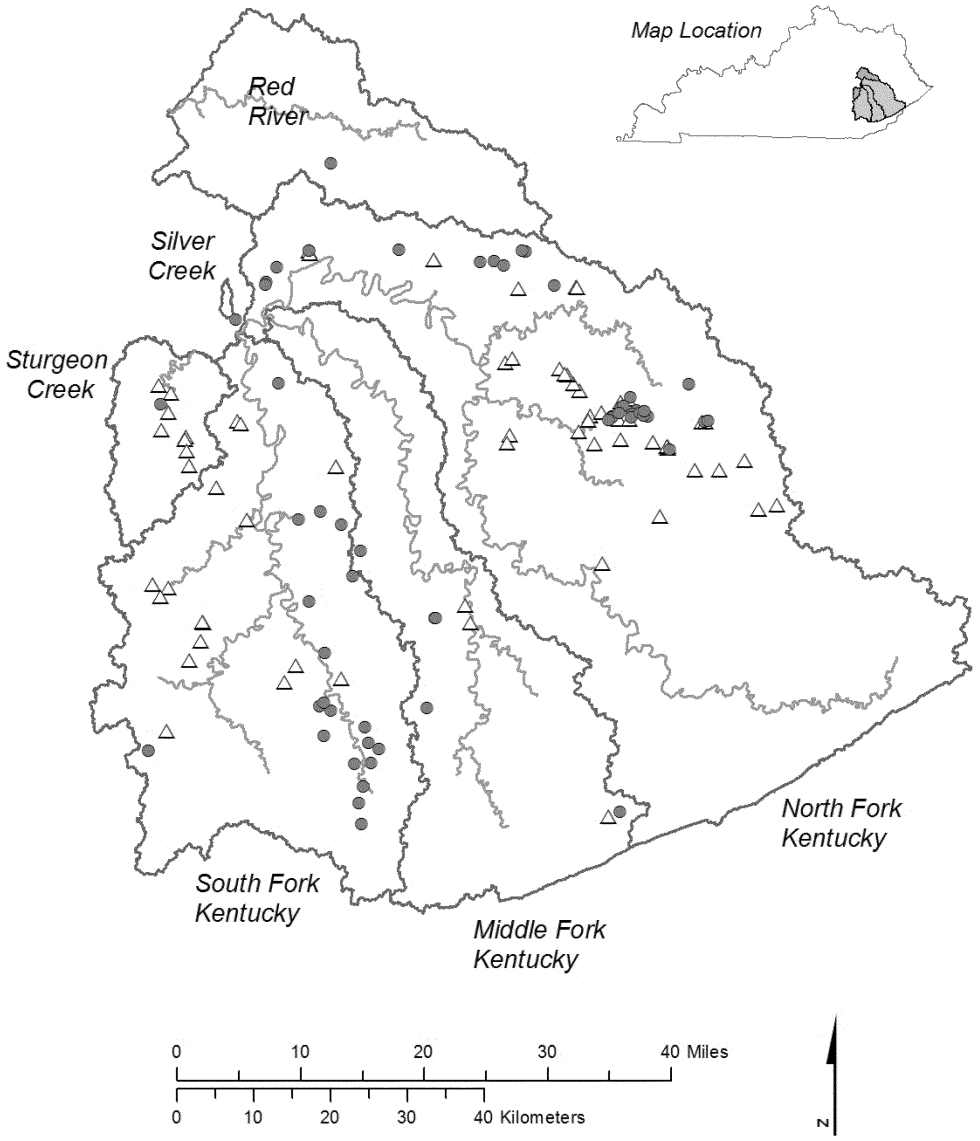

Figure 2. A summary of Kentucky arrow darter survey results at all historical sites visited between 2007 and 2015. Circles indicate survey sites (reaches) where the species was observed. Triangles indicate survey sites (reaches) where the species was not observed. Black lines indicate sub-basin boundaries; grey lines indicate 4th to 6th order streams.

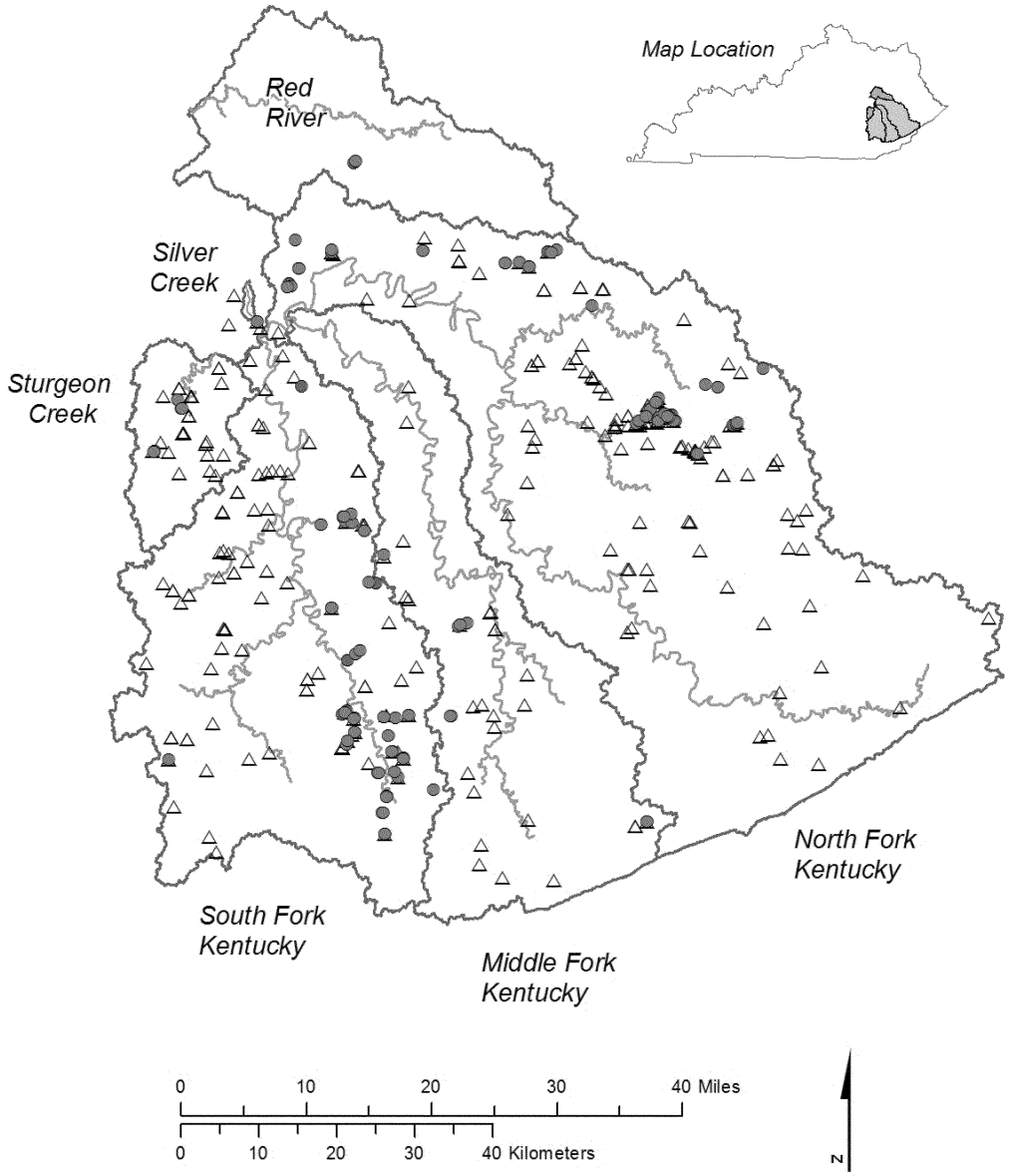

Figure 3. A summary of Kentucky arrow darter survey results at all historical and new sites visited between 2007 and 2014. Circles indicate survey sites (reaches) where the species was observed. Triangles indicate survey sites (reaches) where the species was not observed. Black lines indicate sub-basin boundaries; grey lines indicate 4th to 6th order streams.

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A synopsis of the Kentucky arrow darter's current range and status is provided in the preamble to the proposed rule, and that information is incorporated here by reference.

Our recent survey data (Thomas 2008, pp. 25–27; Service 2012, pp. 1–4) indicate that Kentucky arrow darters occur in low densities. Sampling reaches where arrow darters were observed had an average of only 3 individuals per 100-m (328-ft) reach and a median of 2 individuals per reach (range of 1 to 10 individuals). ATS (2011, pp. 4–6) observed similar densities at occupied sampling reaches in the Buckhorn Creek watershed. Surveys in 2011 by the DBNF from Laurel Fork and Cortland Branch of Left Fork Buffalo Creek (South Fork Kentucky River sub-basin) produced slightly higher capture rates (an average of 5 darters per 100-m (328-ft) sampling

reach) (Mulhall 2014, pers. comm.). The low abundance values (compared to other darters) are not surprising since Kentucky arrow darters generally occur in low densities, even in those streams where disturbance has been minimal (Thomas 2015b, pers. comm.).

Detailed information on population size is generally lacking for the species, but estimates have been completed for three streams: Clemons Fork (Breathitt County), Elisha Creek (Clay and Leslie Counties), and Gilberts Big Creek (Clay and Leslie Counties) (Service unpublished data). Based on field surveys completed in 2013 by EKU, KSNPC, and the Service, population estimates included 986–2,113 individuals (Clemons Fork), 592–1,429 individuals (Elisha Creek), and 175–358 individuals (Gilberts Big Creek) (ranges reflect 95 percent confidence intervals) (Baxter 2015, pp. 14–15, 18–19).

Based on observed catch rates and habitat conditions throughout the upper Kentucky River basin, the most stable and largest populations of the Kentucky arrow darter appear to be located in the following streams:

- Hell For Certain Creek, Leslie County;
- Laurel and Middle Forks of Quicksand Creek, Knott County;
- Frozen and Walker Creeks, Breathitt and Lee Counties;
- Clemons Fork and Coles Fork, Breathitt and Knott Counties;
- Several direct tributaries (*e.g.,* Bowen Creek, Elisha Creek, and Big Double Creek) of the Red Bird River, Clay and Leslie Counties; and
- Wild Dog Creek, Jackson and Owsley Counties.

The Kentucky arrow darter is considered ''threatened'' by the State of Kentucky and has been ranked by KSNPC as a G2G3/S2S3 species (imperiled or vulnerable globally and imperiled or vulnerable within the State) (KSNPC 2014, p. 40). Kentucky's Comprehensive Wildlife Conservation Strategy (KDFWR 2013, pp. 9–11) identified the Kentucky arrow darter as a Species of Greatest Conservation Need (rare or declining species that requires conservation actions to improve its status).

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533), and its implementing regulations at 50 CFR part 424, set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. Listing may be warranted based on any of the above threat factors, singly or in combination.

Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

A thorough discussion of Kentucky arrow darter habitat destruction or modification is presented in the preamble to the proposed rule (October 8, 2015, 80 FR 60962), and that information is incorporated here by reference. The following is a summary of that information.

The Kentucky arrow darter's habitat and range have been destroyed, modified, and curtailed due to a variety of anthropogenic activities in the upper Kentucky River drainage. Resource extraction (*e.g.,* coal mining, logging, oil/gas well development), land development, agricultural activities, and inadequate sewage treatment have all contributed to the degradation of streams within the range of the species (Branson and Batch 1972, pp. 513–516; Branson and Batch 1974, pp. 82–83; Thomas 2008, pp. 6–7; KDOW 2010, pp. 70–84; KDOW 2013a, pp. 189–214, 337–376; KDOW 2013b, pp. 88–94). These land use activities have led to chemical and physical changes to stream habitats that have adversely affected the species. Specific stressors have included inputs of dissolved solids and elevation of instream conductivity, sedimentation/siltation of stream substrates (excess sediments deposited in a stream), turbidity, inputs of nutrients and organic enrichment, and elevation of stream temperatures (KDOW 2010, p. 84; KDOW 2013a, pp. 189–214, 337–376). KDOW (2013a, pp. 337–376) provided a summary of specific threats within the upper Kentucky River drainage, identifying impaired reaches in 21 streams within the Kentucky arrow darter's historical range (table 2). Six of these streams continue to support populations of the species, but only one of these populations (Frozen Creek) is considered to be stable (see table 1, above). Results of probabilistic surveys (*i.e.,* surveys conducted at randomly selected sites with sites selected in a statistically valid way) by KDOW demonstrate the spatial degree of threats across the species' range. Out of 22 probabilistic sites (streams) visited within the upper Kentucky River basin in 2003, 18 were considered to be impaired (Payne 2016, pers. comm.), suggesting habitats across the species' range are impacted by the specific stressors identified above.

TABLE 2—SUMMARY OF 303(d) LISTED STREAM SEGMENTS WITHIN THE HISTORICAL RANGE OF THE KENTUCKY ARROW DARTER (KDOW 2013a, pp. 337–376)

Stream	County	Impacted stream segment(s)—stream km (stream mi)	Pollutant source	Pollutant
Buckhorn Creek	Breathitt	0–10.0 (0–6.8)	Abandoned Mine Lands, Unknown Sources.	Fecal Coliform (FC), Sediment/Siltation, Total Dissolved Solids (TDS).
Cope Fork (of Frozen Creek)	Breathitt	0–3.0 (0–1.9)	Channelization, Riparian Habitat Loss, Logging, Agriculture, Stream Bank Modification, Surface Coal Mining.	Sediment/Siltation, TDS.
Cutshin Creek	Leslie	15.6–17.2 (9.7–10.7)	Riparian Habitat Loss, Stream Bank Modification, Surface Coal Mining.	Sediment/Siltation.
Frozen Creek*	Breathitt	0–22.4 (0–13.9)	Riparian Habitat Loss, Post-Development Erosion and Sedimentation.	Sediment/Siltation.

TABLE 2—SUMMARY OF 303(d) LISTED STREAM SEGMENTS WITHIN THE HISTORICAL RANGE OF THE KENTUCKY ARROW DARTER (KDOW 2013a, pp. 337–376)—Continued

Stream	County	Impacted stream segment(s)—stream km (stream mi)	Pollutant source	Pollutant
Goose Creek	Clay	0–13.4 (0–8.3)	Septic Systems	FC.
Hector Branch	Clay	0–8.8 (0–5.5)	Unknown	Unknown.
Holly Creek*	Wolfe	0–9.8 (0–6.2)	Agriculture, Riparian Habitat Loss, Stream Bank Modification, Surface Coal Mining.	Sediment/Siltation, Unknown.
Horse Creek*	Clay	0–13.4 (0–8.3)	Riparian Habitat Loss, Managed Pasture Grazing, Surface Coal Mining.	Sediment/Siltation.
Laurel Creek	Clay	6.1–7.7 (3.8–4.8)	Managed Pasture Grazing, Crop Production.	Nutrients/Eutrophication.
Left Fork Island Creek	Owsley	0–8.0 (0–5.0)	Crop Production	Sediment/Siltation.
Long Fork	Breathitt	0–7.4 (0–4.6)	Surface Coal Mining	Sediment/Siltation, TDS.
Lost Creek	Breathitt	0–14.3 (0–8.9)	Coal Mining, Riparian Habitat Loss, Logging, Stream Bank Modification.	FC, Sedimentation, TDS, Turbidity.
Lotts Creek	Perry	0.6–1.6, 1.9–9.6 (0.4–1.0, 1.2–6.0)	Riparian Habitat Loss, Land Development, Surface Coal Mining, Logging, Stream Bank Modification.	Sediment/Siltation, TDS, Turbidity.
Quicksand Creek	Breathitt	0–27.4, 34.9–49.6 (0–17.0, 21.7–30.8)	Surface Coal Mining, Riparian Habitat Loss, Logging, Stream Bank Modification.	FC, Turbidity, Sediment/Siltation, TDS.
Sexton Creek	Clay, Owsley.	0–27.7 (0–17.2)	Crop Production, Highway/Road/Bridge Runoff.	Sediment/Siltation, TDS.
South Fork Quicksand Creek	Breathitt	0–27.2 (0–16.9)	Riparian Habitat Loss, Petroleum/Natural Gas Production Activities, Surface Coal Mining.	Sediment/Siltation, TDS.
Spring Fork (Quicksand Creek)*	Breathitt	5.0–11.1 (3.1–6.9)	Abandoned Mine Lands (Inactive), Riparian Habitat Loss, Logging, Stream Bank Modification.	Sediment/Siltation, TDS, Turbidity.
Squabble Creek*	Perry	0–7.6 (0–4.7)	Land Development, Surface Coal Mining.	Sediment/Siltation, TDS.
Sturgeon Creek	Lee	12.9–19.6 (8.0–12.2)	Riparian Habitat Loss, Crop Production, Surface Coal Mining.	Sediment/Siltation.
Swift Camp Creek	Wolfe	0–22.4 (0–13.9)	Unknown	Unknown.
Troublesome Creek	Breathitt	0–72.6 (0–45.1)	Surface Coal Mining, Municipal Point Source Discharges, Petroleum/Natural Gas Activities.	Sediment/Siltation, Specific Conductance, TDS, Turbidity.

* Stream segment still occupied by Kentucky arrow darters.

Water Quality Degradation

One threat to the Kentucky arrow darter is water quality degradation caused by a variety of nonpoint-source pollutants (contaminants from many diffuse and unquantifiable sources). Within the upper Kentucky River drainage, coal mining has been the most significant historical source of these pollutants, and this activity continues to occur throughout the drainage.

Activities associated with coal mining have the potential to contribute high concentrations of dissolved salts, metals, and other solids that (1) elevate stream conductivity (a measure of electrical conductance in the water column that increases as the concentration of dissolved solids increases), (2) increase sulfates (a common dissolved ion with empirical formula of SO_4^{-2}), and (3) cause wide fluctuations in stream pH (a measure of the acidity or alkalinity of water) (Curtis 1973, pp. 153–155; Dyer and Curtis 1977, pp. 10–13; Dyer 1982, pp. 1–16; Hren *et al.* 1984, pp. 5–34; USEPA 2003, pp. 77–84; Hartman *et al.* 2005, p. 95; Pond *et al.* 2008, pp. 721–723; Palmer *et al.* 2010, pp. 148–149; USEPA 2011, pp. 27–44). The coal mining process also results in leaching of metals and other dissolved solids that can result in elevated conductivity, sulfates, and hardness in the receiving stream. Stream conductivity in mined watersheds can be significantly higher compared to unmined watersheds, and conductivity values can remain high for decades (Merricks *et al.* 2007, pp. 365–373; Johnson *et al.* 2010, pp. 1–2).

Elevated levels of metals and other dissolved solids (*i.e.,* elevated conductivity) in Appalachian streams have been shown to negatively impact biological communities, including losses of mayfly and caddisfly taxa (Chambers and Messinger 2001, pp. 34–51; Pond 2004, p. 7; Hartman *et al.* 2005, p. 95; Pond *et al.* 2008, pp. 721–723; Pond 2010, pp. 189–198), reduced

occupancy and conditional abundance of salamanders (Price *et al.* 2015, pp. 6–9), and decreases in fish diversity (Kuehne 1962, pp. 608–614; Branson and Batch 1972, pp. 507–512; Branson and Batch 1974, pp. 81–83; Stauffer and Ferreri 2002, pp. 11–21; Fulk *et al.* 2003, pp. 55–64; Mattingly *et al.* 2005, pp. 59–62; Thomas 2008, pp. 1–9; Service 2012, pp. 1–4; Black *et al.* 2013, pp. 34–45; Hitt 2014, pp. 5–7, 11–13; Hitt and Chambers 2014, pp. 919–924; Daniel *et al.* 2015, pp. 50–61; Hitt *et al.* 2016, pp. 46–52).

There is a pattern of increasing conductivity and loss of arrow darter populations that is evident in the fish and water quality data from the Buckhorn Creek basin (1962 to present) in Breathitt and Knott Counties.

Kentucky arrow darters tend to be less abundant in streams with elevated conductivity levels (Service 2012, pp. 1–4; Service 2013, p. 9), and are typically excluded from these streams as conductivity increases (Branson and Batch 1972, pp. 507–512; Branson and Batch 1974, pp. 81–83; Thomas 2008, pp. 3–6). Recent range-wide surveys of historical sites by Thomas (2008, pp. 3–6) and the Service (2012, pp. 1–4) demonstrated that Kentucky arrow darters are excluded from watersheds when conductivity levels exceed about 250 µS/cm. The species was observed at only two historical sites where conductivity values exceeded 250 µS/cm, and average conductivity values were much lower at sites where Kentucky arrow darters were observed (115 µS/cm) than at sites where the species was not observed (689 µS/cm). Hitt *et al.* (2016, entire) reported that conductivity was a strong predictor of Kentucky arrow darter abundance in the upper Kentucky River drainage, and sharp declines in abundance were observed at 258 µS/cm (95 percent confidence intervals of 155–590 µS/cm). Based on the research presented in the preamble to the proposed rule and incorporated by reference here, we believe it is clear that the overall conductivity level is important in determining the Kentucky arrow darter's presence and vulnerability, but the species' presence is more likely tied to what individual metals or dissolved solids (*e.g.,* sulfate) are present. Determination of discrete conductivity thresholds or the mechanisms through which the Kentucky arrow darter is influenced will require additional study (KSNPC 2010, p. 3; Pond 2015, pers. comm.); however, conductivity thresholds have been evaluated for other aquatic species. Elevated specific conductance has been positively correlated with decreased macroinvertebrate abundance (Pond *et al.* 2008, pp. 725–726; Pond 2012, p. 111), and Johnson *et al.* (2015, pp. 170–171) showed that daily growth rates and development of a mayfly (*Neocleon triagnulifer*) declined with increasing ionic concentrations. Increased levels of specific conductance have been shown to influence the behavior (Karraker *et al.* 2008, pp. 728–732) and corticosterone levels (a hormone secreted by the adrenal cortex that regulates energy, immune reactions, and stress responses) of amphibians (Chambers 2011, pp. 220–222). Embryonic and larval survival of amphibians were reduced significantly at moderate (500 µS/cm) and high (3,000 µS/cm) specific conductance levels (Karraker *et al.* 2008, pp. 728–732).

Mine drainage can also cause chemical (and some physical) effects to streams as a result of the precipitation of entrained metals and sulfate, which become unstable in solution (USEPA 2003, pp. 24–65; Pond 2004, p. 7). Precipitants accumulate on substrates, encrusting and cementing stream sediments, making them unsuitable for colonization by invertebrates and rendering them unsuitable as foraging or spawning habitat for the Kentucky arrow darter.

Oil and gas exploration and drilling activities represent another significant source of harmful pollutants in the upper Kentucky River basin (KDOW 2013a, pp. 189–214). Once used, fluid wastes containing chemicals used in the drilling and fracking process (*e.g.,* hydrochloric acid, surfactants, potassium chloride) are stored in open pits (retention basins) or trucked away to treatment plants or some other storage facility. If spills occur during transport or releases occur due to retention basin failure or overflow, there is a risk for surface and groundwater contamination. Any such release can cause significant adverse effects to water quality and aquatic organisms that inhabit these watersheds (Wiseman 2009, pp. 127–142; Kargbo *et al.* 2010, pp. 5,680–5,681; Osborn *et al.* 2011, pp. 8,172–8,176; Papoulias and Velasco 2013, pp. 92–111).

Other nonpoint-source pollutants common within the upper Kentucky River drainage with potential to affect the Kentucky arrow darter include domestic sewage (through septic tank leakage or straight pipe discharges) and agricultural pollutants such as animal waste, fertilizers, pesticides, and herbicides (KDOW 2013a, pp. 189–214). Nonpoint-source pollutants can cause increased levels of nitrogen and phosphorus, excessive algal growths, oxygen deficiencies, and other changes in water chemistry that can seriously impact aquatic species (KDOW 2010, pp. 70–84; KDOW 2013a, pp. 189–214; KDOW 2013b, pp. 88–94). Nonpoint-source pollution may be correlated with impervious surfaces and storm water runoff (Allan 2004, pp. 266–267) and include sediments, fertilizers, herbicides, pesticides, animal wastes, septic tank and gray water leakage, pharmaceuticals, and petroleum products.

Physical Habitat Disturbance

Sedimentation (siltation) has been listed repeatedly by KDOW as the most common stressor of aquatic communities in the upper Kentucky River basin (KDOW 2010, pp. 70–84; KDOW 2013a, pp. 189–214; KDOW 2013b, pp. 88–94). Sedimentation comes from a variety of sources, but KDOW identified the primary sources of sediment as loss of riparian habitat, surface coal mining, legacy coal extraction, logging, and land development (KDOW 2010, pp. 70–84; KDOW 2013b, pp. 88–94). All of these activities can result in canopy removal, channel disturbance, and increased siltation, thereby degrading habitats used by Kentucky arrow darters for both feeding and reproduction.

Resource extraction activities (*e.g.,* surface coal mining, legacy coal extraction, logging, oil and gas exploration and drilling) are major sources of sedimentation in streams (Paybins *et al.* 2000, p. 1; Wiley *et al.* 2001, pp. 1–16; KDOW 2013a, pp. 189–214). Similarly, logging activities can adversely affect Kentucky arrow darters and other fishes through removal of riparian vegetation, direct channel disturbance, and sedimentation of instream habitats (Allan and Castillo 2007, pp. 332–333). Stormwater runoff from unpaved roads, ATV trails, and driveways represents a significant but difficult to quantify source of sediment that impacts streams in the upper Kentucky River basin.

Sediment has been shown to damage and suffocate fish gills and eggs, larval fishes, bottom-dwelling algae, and other organisms; reduce aquatic insect diversity and abundance; and, ultimately, negatively impact fish growth, survival, and reproduction (Berkman and Rabeni 1987, pp. 285–294; Waters 1995, pp. 5–7; Wood and Armitage 1997, pp. 211–212; Meyer and Sutherland 2005, pp. 2–3).

Invasion of Hemlock Wooly Adelgid

The hemlock woolly adelgid (*Adelges tsugae*), an aphid-like insect native to Asia, represents a potential threat to the Kentucky arrow darter because it has

the potential to severely damage stands of eastern hemlocks (*Tsuga canadensis*) that occur within the species' range. Loss of hemlocks along Kentucky arrow darter streams has the potential to result in increased solar exposure and subsequent elevated stream temperatures, bank erosion, and excessive inputs of woody debris that will clog streams and cause channel instability and erosion (Townsend and Rieske-Kinney 2009, pp. 1–3). We expect these impacts to occur in some Kentucky arrow darter watersheds; however, we do not believe these impacts will be widespread or severe because eastern hemlocks are not abundant in all portions of the Kentucky arrow darter's range, and even where hemlocks are more common, we expect them to be replaced by other tree species.

In summary, habitat loss and modification represent threats to the Kentucky arrow darter. Severe degradation from contaminants, sedimentation, and physical habitat disturbance have contributed to extirpations of Kentucky arrow darter populations, and these threats continue to impact water quality and habitat conditions across the species' range. Contaminants associated with surface coal mining (metals, other dissolved solids), domestic sewage (bacteria, nutrients), and agriculture (fertilizers, pesticides, herbicides, and animal waste) cause degradation of water quality and habitats through increased conductivity and sulfates, instream oxygen deficiencies, excess nutrification, and excessive algal growths. Sedimentation from surface coal mining, logging, agriculture, and land development negatively affect the Kentucky arrow darter by burying or covering instream habitats used by the species for foraging, reproduction, and sheltering. These impacts can cause reductions in growth rates, disease tolerance, and gill function; reductions in spawning habitat, reproductive success, and egg, larval, and juvenile development; modifications of migration patterns; decreased food availability through reductions in prey; and reduction of foraging efficiency. Furthermore, these threats faced by the Kentucky arrow darter are the result of ongoing land uses that are expected to continue indefinitely.

Factor B: Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The Kentucky arrow darter is not believed to be utilized for commercial, recreational, scientific, or educational purposes. Individuals may be collected occasionally in minnow traps by recreational anglers and used as live bait, but we believe these activities are practiced infrequently and do not represent a threat to the species. Our review of the available information does not indicate that overutilization is a threat to the Kentucky arrow darter now or likely to become so in the future.

Factor C: Disease or Predation

No specific information is available suggesting that disease is a threat to the Kentucky arrow darter; however, in marginal Kentucky arrow darter streams (those with impacts from industrial or residential development), the occurrence of sewage-bacteria (*Sphaerotilus*) may a pose a threat with respect to fish condition and health (Pond 2015, pers. comm.). These bacteria are prevalent in many eastern Kentucky streams where straight-pipe sewage discharges exist and can often affect other freshwater organisms. The presence of these bacteria could also indicate the presence of other pathogens. Gill and body parasites such as flukes (flatworms) and nematodes (roundworms) have been noted in other species of *Etheostoma* (Page and Mayden 1981, p. 8), but it is unknown if these parasites infest or harm the Kentucky arrow darter.

Although the Kentucky arrow darter is undoubtedly consumed by native predators (*e.g.,* fishes, amphibians, and birds), this predation is naturally occurring and a normal aspect of the species' population dynamics. Nonnative rainbow trout (*Oncorhynchus mykiss*) represent a potential predation threat (Etnier and Starnes 1993, p. 346) in one Kentucky arrow darter stream, Big Double Creek (Clay County), because KDFWR stocks up to 1,000 trout annually in the stream, with releases occurring in March, April, May, and October. To assess the potential predation of rainbow trout on Kentucky arrow darters or other fishes, the Service and DBNF surveyed a 2.1-km (1.3-mile) reach of Big Double Creek on April 21, 2014, which was 17 days after KDFWR's April stocking event (250 trout). A total of seven rainbow trout were captured, and the gut contents of these individuals were examined. Food items were dominated by Ephemeroptera (mayflies), with lesser amounts of Plecoptera (stoneflies), Trichoptera (caddisflies), Diptera (flies), Decapoda (crayfish), and terrestrial Coleoptera (beetles). No fish remains were observed. Based on all these factors and the absence of rainbow trout from the majority (98 percent) of Kentucky arrow darter streams demonstrates that predation by nonnative rainbow trout does not pose a threat to the species.

In short, our review of available information indicates that neither disease nor predation is currently a threat to the species or likely to become a threat to the Kentucky arrow darter in the future.

Factor D: The Inadequacy of Existing Regulatory Mechanisms

The Kentucky arrow darter has been identified as a threatened species within Kentucky (KSNPC 2014, p. 40), but this State designation conveys no legal protection for the species or its habitat. Kentucky law prohibits the collection of the Kentucky arrow darter (or other fishes) for scientific purposes without a valid State-issued collecting permit (Kentucky Revised Statutes (KRS) sec. 150.183). Kentucky regulations (301 KAR 1:130, sec. 1(3)) also allow persons who hold a valid Kentucky fishing license (obtained from KDFWR) to collect up to 500 minnows per day (a minnow is defined as any nongame fish less than 6 inches in length, with the exception of federally listed species). These existing regulatory mechanisms provide some protections for the species.

Streams within UK's Robinson Forest (Coles Fork, Snag Ridge Fork, and Clemons Fork) are currently protected from the effects of surface coal mining due to a 1990 ''lands unsuitable for mining'' designation (405 KAR 24:040). Streams within Robinson Forest (*e.g.,* Clemons Fork and Coles Fork) are also protected from general disturbance by management guidelines approved by the UK's Board of Trustees in 2004 (Stringer 2015, pers. comm.). These guidelines provide general land use allocations, sustainable allowances for active research and demonstration projects involving overstory manipulation, allocations of net revenues from research and demonstration activities, and management and oversight responsibilities (Stringer 2015, pers. comm.). Under these guidelines, public access to Robinson Forest is controlled and potential impacts from such activities as recreational ATV use are avoided.

A significant portion (about 47 percent) of the species' remaining populations are located on the DBNF and receive management and protection through DBNF's land and resource management plan (LRMP) (USFS 2004, pp. 7–16) and a recently signed CCA between the DBNF and the Service (see Comment and Response #20 in the *Summary of Comments and Recommendations* section). Both of these documents contain conservation

measures and protective standards that are intended to conserve the Kentucky arrow darter on the DBNF. Populations within the DBNF have benefited from management goals, objectives, and protective standards included in the LRMP. Collectively, these streams contain some of the best remaining habitats for the species and support some of the species' most robust populations.

The Kentucky arrow darter and its habitats are afforded some protection from water quality and habitat degradation under the Federal Water Pollution Control Act of 1977, commonly referred to as the Clean Water Act (33 U.S.C. 1251 *et seq.*); the Federal Surface Mining Control and Reclamation Act (SMCRA) (30 U.S.C. 1201 *et seq.*) of 1977; Kentucky's Forest Conservation Act of 1998 (KRS secs. 149.330–355); Kentucky's Agriculture Water Quality Act of 1994 (KRS secs. 224.71–140); and additional Kentucky laws and regulations regarding natural resources and environmental protection (KRS secs. 146.200–360; KRS sec. 224; 401 KAR secs. 5:026, 5:031). While these laws have undoubtedly resulted in some improvements in water quality and stream habitat for aquatic life, including the Kentucky arrow darter, sedimentation and other nonpoint-source pollutants continue to pose a threat to the species.

The KDOW has not established total maximum daily load (TMDLs) pursuant to the Clean Water Act for identified pollutants within portions of the upper Kentucky River basin historically occupied by the Kentucky arrow darter. TMDLs do not address chemical pollutants or sedimentation of aquatic habitats. The Service is also not aware of any other current or future changes to State or Federal water quality or mining laws that will substantially address the currently observed degradation of water quality.

Despite the current laws to prevent sediment and other pollutants from entering waterways, nonpoint-source pollution, originating from mine sites, unpaved roads, ATV trails, driveways, logging skid trails, and other disturbed habitats is considered to be a continuing threat to Kentucky arrow darter habitats.

Kentucky State laws and regulations regarding oil and gas drilling are generally designed to protect fresh-water resources like the Kentucky arrow darter's habitat, but these regulatory mechanisms do not contain specific provisions requiring an analysis of project impacts to fish and wildlife resources (Kentucky Division of Oil and Gas *et al.* 2012, entire). Current regulations also do not contain or provide any formal mechanism requiring coordination with, or input from, the Service or the KDOW regarding the presence of federally endangered, threatened, or candidate species, or other rare and sensitive species.

In July of 2015, the Office of Surface Mining Reclamation and Enforcement published in the **Federal Register** a notice of availability for a draft environmental impact statement regarding a proposed Stream Protection Rule (80 FR 42535, July 17, 2015) and the proposed Stream Protection Rule itself (80 FR 44436, July 27, 2015). The preamble for that proposed rule stated that the rule would better protect streams, fish, wildlife, and related environmental values from the adverse impacts of surface coal mining operations and provide mine operators with a regulatory framework to avoid water pollution and the long-term costs associated with water treatment (80 FR 44436, July 27, 2015; see **SUMMARY**). While the OSM proposed rule may provide benefits for the Kentucky arrow darter in the future, until the rule is finalized and implemented, we are unable to evaluate its potential effectiveness with regard to the Kentucky arrow darter and its habitat.

In summary, degradation of habitat for the Kentucky arrow darter is ongoing despite existing regulatory mechanisms.

Factor E: Other Natural or Manmade Factors Affecting Its Continued Existence

Restricted Range and Population Size

The disjunct nature of some Kentucky arrow darter populations (figures 2 and 3, above) likely restricts the natural exchange of genetic material between populations and could make natural repopulation following localized extirpations of the species unlikely without human intervention. Populations can be further isolated by anthropogenic barriers, such as dams, perched culverts, and fords, which can limit natural dispersal and restrict or eliminate connectivity among populations (Eisenhour and Floyd 2013, pp. 82–83). Such dispersal barriers can prevent reestablishment of Kentucky arrow populations in reaches where they suffer localized extinctions due to natural or human-caused events. The localized nature and small size of many populations also likely makes them vulnerable to extirpation from intentional or accidental toxic chemical spills, habitat modification, progressive degradation from runoff (nonpoint-source pollutants), natural catastrophic changes to their habitat (*e.g.,* flood scour, drought), and other stochastic disturbances (Soulé 1980, pp. 157–158; Hunter 2002, pp. 97–101; Allendorf and Luikart 2007, pp. 117–146). Inbreeding and loss of neutral genetic variation associated with small population size can further reduce the fitness of the population (Reed and Frankham 2003, pp. 230–237), subsequently accelerating population decline (Fagan and Holmes 2006, pp. 51–60).

Species that are restricted in range and population size are more likely to suffer loss of genetic diversity due to genetic drift, potentially increasing their susceptibility to inbreeding depression, decreasing their ability to adapt to environmental changes, and reducing the fitness of individuals (Soulé 1980, pp. 157–158; Hunter 2002, pp. 97–101; Allendorf and Luikart 2007, pp. 117–146). It is likely that some of the Kentucky arrow darter populations are below the effective population size required to maintain long-term genetic and population viability (Soulé 1980, pp. 162–164; Hunter 2002, pp. 105–107). The long-term viability of a species is founded on the conservation of numerous local populations throughout its geographic range (Harris 1984, pp. 93–104). These separate populations are essential for the species to recover and adapt to environmental change (Noss and Cooperrider 1994, pp. 264–297; Harris 1984, pp. 93–104).

Climate Change

The Intergovernmental Panel on Climate Change (IPCC) concluded that warming of the climate system is unequivocal (IPCC 2014, p. 3). Species that are dependent on specialized habitat types, limited in distribution, or at the extreme periphery of their range may be most susceptible to the impacts of climate change (see 75 FR 48911, August 12, 2010); however, while continued change is certain, the magnitude and rate of change is unknown in many cases.

Climate change has the potential to increase the vulnerability of the Kentucky arrow darter to random catastrophic events (McLaughlin *et al.* 2002, pp. 6060–6074; Thomas *et al.* 2004, pp. 145–148) associated with an expected increase in both severity and variation in climate patterns with extreme floods, strong storms, and droughts becoming more common (Cook *et al.* 2004, pp. 1015–1018; Ford *et al.* 2011, p. 2065; IPCC 2014, pp. 58–83). Estimates of the effects of climate change using available climate models typically lack the geographic precision needed to predict the magnitude of effects at a scale small enough to discretely apply to the range of a given

species. However, data on recent trends and predicted changes for Kentucky (Girvetz *et al.* 2009, pp. 1–19), and, more specifically, the upper Kentucky River drainage (Alder and Hostetler 2013, entire), provide some insight for evaluating the potential threat of climate change to the Kentucky arrow darter. These models provide estimates of average annual increases in maximum and minimum temperature, precipitation, snowfall, and other variables.

There is uncertainty about the specific effects of climate change (and their magnitude) on the Kentucky arrow darter; however, climate change is almost certain to affect aquatic habitats in the upper Kentucky River drainage of Kentucky through increased water temperatures and more frequent droughts (Alder and Hostetler 2013, entire), and species with limited ranges, fragmented distributions, and small population size are thought to be especially vulnerable to the effects of climate change (Byers and Norris 2011, p. 18). Thus, we consider climate change to be a threat to the Kentucky arrow darter.

In summary, we have determined that other natural and manmade factors, such as geographical isolation, small population size, and climate change, are threats to remaining populations of the Kentucky arrow darter across its range. The severity of these threats is high because of the species' reduced range and population size, which result in a reduced ability to adapt to environmental change. Further, our review of the best available scientific and commercial information indicates that these threats are likely to continue or increase in the future.

Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Kentucky arrow darter. As described in detail above, the Kentucky arrow darter has been extirpated from about 49 percent of its historical range (36 of 74 historical streams), 16 of these extirpations have occurred since the mid-1990s, populations in nearly half of the species' occupied streams are ranked as vulnerable (see table 1, above), and remaining populations are fragmented and isolated. Despite existing regulatory mechanisms (Factor D) and conservation efforts, the species continues to be at risk throughout all of its range due to the immediacy, severity, and scope of threats from habitat degradation and range curtailment (Factor A and other natural or manmade factors affecting its continued existence (Factor E).

Anthropogenic activities such as surface coal mining, logging, oil/gas development, land development, agriculture, and inadequate sewage treatment have all contributed to the degradation of stream habitats within the species' range (Factor A). These land use activities have led to chemical and physical changes to stream habitats that continue to affect the species. Specific stressors include inputs of dissolved solids and elevation of instream conductivity, sedimentation/siltation of stream substrates, turbidity, and inputs of nutrients and organic enrichment. These high-magnitude stressors, especially the inputs of dissolved solids and sedimentation, have had profound negative effects on Kentucky arrow darter populations and have been the primary factor in the species' decline. Existing regulatory mechanisms (*e.g.,* the Clean Water Act) have provided for some improvements in water quality and habitat conditions across the species' range; however, recent extirpations have occurred (16 streams since the 1990s), and 21 streams within the species' historical range have been added to Kentucky's 303(d) list of impaired streams. The Kentucky arrow darter's vulnerability to these threats is even greater due to its reduced range, fragmented populations, and small or declining population sizes (Factor E) (Primack 2012, pp. 146–150). The effects of certain threats, particularly habitat degradation and loss, increase in magnitude when population size is small (Primack 2012, pp. 150–152).

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' We find that the Kentucky arrow darter meets the definition of a threatened species based on the immediacy, severity, and scope of the threats identified above. The species' overall range has been reduced substantially, most of the species' historical habitat has been degraded, and much of the remaining habitat exists primarily in fragmented patches. Despite existing regulatory mechanisms and conservation efforts, current Kentucky arrow darter habitats continue to be lost or degraded due to surface coal mining, logging, oil/gas development, land development, agriculture, and inadequate sewage treatment, and it appears this trend will continue in the future. Extant populations are known from 47 streams, but these populations continue to be threatened by small population size, isolation, fragmentation, climate change, and the habitat degradation summarized above. All of these factors make the species particularly susceptible to extinction in the future.

We find that endangered status is not appropriate for the Kentucky arrow darter because we do not consider the species' threats to be so severe that extinction is imminent. Although threats to the species are ongoing, often severe, and occurring across the range, populations continue to occupy 47 scattered streams, 23 of which appear to support stable populations (see table 1, above). Additionally, a significant number of extant Kentucky arrow darter populations (49 percent) occur primarily on public lands (*i.e.,* DBNF and Robinson Forest) that are at least partially managed to protect habitats used by the species. For example, the CCA with the U.S. Forest Service (USFS) for DBNF should provide an elevated level of focused management and conservation for portions of 20 streams that support populations of the Kentucky arrow darter. Based on all these factors, the Kentucky arrow darter does not meet the definition of an endangered species. Therefore, on the basis of the best available scientific and commercial information, we are listing the Kentucky arrow darter as a threatened species in accordance with sections 3(19) and 4(a)(1) of the Act.

Under the Act and our implementing regulations, a species may warrant listing if it is an endangered or threatened species throughout all or a significant portion of its range. Because we have determined that the Kentucky arrow darter is a threatened species throughout all of its range, no portion of its range can be ''significant'' for purposes of the definitions of ''endangered species'' and ''threatened species.'' See the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37577, July 1, 2014).

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, Tribal, and local agencies; private organizations; and individuals. The Act encourages

cooperation with the States and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. The plan may be revised to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened or for delisting and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*), or from our Kentucky Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Following publication of this final rule, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Kentucky would be eligible for Federal funds to implement management actions that promote the protection or recovery of the Kentucky arrow darter. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Please let us know if you are interested in participating in recovery efforts for the Kentucky arrow darter. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require consultation as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered by the USFS; issuance of section 404 Clean Water Act permits by the U.S. Army Corps of Engineers; construction and maintenance of gas pipeline and power line rights-of-way by the Federal Energy Regulatory Commission; USEPA pesticide registration; construction and maintenance of roads or highways by the Federal Highway Administration; and projects funded through Federal loan programs, which may include, but are not limited to, roads and bridges, utilities, recreation sites, and other forms of development.

The Service, in cooperation with KDFWR, KSNPC, the U.S. Geological Survey (USGS), KDOW, DBNF, CFI, and The Appalachian Wildlife Foundation, Inc., completed a conservation strategy for the Kentucky arrow darter in 2014 (Service 2014, entire). The strategy was developed as a guidance document that would assist the Service and its partners in their conservation efforts for the species. The strategy is divided into four major sections: (1) Biology and status, (2) listing factors/current threats, (3) current conservation efforts, and (4) conservation objectives/actions. The strategy's first conservation objective addresses current informational needs on the species' biology, ecology, viability, and survey methods, while the remaining three conservation objectives address specific threats facing the species (Factors A and E, respectively).

Several conservation efforts have been completed or are ongoing for the Kentucky arrow darter, and some of these efforts have been described previously in this listing determination. Previously mentioned efforts include the development of a CCA with the USFS (see *Public Comments,* Comment 20), a propagation and reintroduction study by KDFWR and CFI (see *Background—Habitat and Life History*), field investigations to determine the predatory risk posed by nonnative trout (see *Factor C: Disease or Predation*), and a movement and ecological study by EKU, KDFWR, and the Service (Baxter 2015, entire). Other important conservation actions include studies on the species' distribution, status, and population size; movement and microhabitat characteristics; genetics; and response to changes in water quality (*e.g.,* conductivity). Details of these efforts are provided below.

In 2013, KSNPC and the Service initiated a study to investigate the distribution, status, population size, and habitat use of the Kentucky arrow darter within the upper Kentucky River basin. One important aspect of the study was to account for imperfect detection when surveying for the species. Studies that do not account for imperfect detection can often lead to an underestimation of the true proportion of sites occupied by a species and can bias assessments and sampling efforts (MacKenzie *et al.* 2002, entire; MacKenzie *et al.* 2005, entire). From June to September 2013, KSNPC and the Service visited 80 randomly chosen sites (ranging from first- to third-order) across the upper Kentucky River

basin in order to address these concerns and meet project objectives. As expected, Kentucky arrow darters were rare during the study and were observed at only 7 of the 80 sites, including two new localities (Granny Dismal Creek in Owsley County and Spring Fork Quicksand Creek in Breathitt County) and one historical stream (Hunting Creek, Breathitt County) where the species was not observed during status surveys by Thomas (2008, pp. 1–33) and the Service (2012, pp. 1–4). Presently, KSNPC and the Service are in the data analysis stage of this project.

In July 2013, EKU, the Service, and KSNPC initiated a population estimate and microhabitat characterization study on Clemons Fork, Breathitt County. The study was designed to estimate the Kentucky arrow darter's current population size and average density within Clemons Fork and to compare current densities with historical densities reported by Lotrich (1973). Additionally, population densities and habitat parameters will be compared to data from Gilberts Big Creek and Elisha Creek (both DBNF) to aid in delineation of essential habitat characteristics and development and implementation of conservation efforts. Field surveys were completed in August 2013. Data analyses are incomplete, but initial results include a mean density of 9.69 Kentucky arrow darters per sampling reach and a population estimate of 986 to 2,113 darters in Clemons Fork (95 percent confidence intervals). Preliminary findings of this study were presented at the 2013 Southeastern Fishes Council Meeting, Lake Guntersville, Alabama (November 14–15, 2013).

Austin Peay State University is currently working with KDFWR and the Service on the first comprehensive assessment of genetic variation and gene flow patterns across the range of the Kentucky arrow darter (Johansen *et al.* 2013, pp. 1–3). Approximately 25 individuals per population from up to 12 populations across the range of the species will be genotyped using microsatellite markers. Resulting data will be used to generate robust estimates of effective population sizes and overall population and species' variability. This information is essential to the development of effective conservation and recovery measures to ensure the long-term persistence of the species. Funding for this project is being provided through the Service's section 6 program.

Through Service-USGS Quick Response funding, the USGS Leetown Science Center evaluated the relationship between Kentucky arrow darter abundance and stream conductivity in the upper Kentucky River basin (Hitt 2014, entire). Nonlinear regression techniques were used to evaluate significant thresholds and associated confidence intervals for Kentucky arrow darter abundance related to conductivity levels. As a contrast to Kentucky arrow darter, Dr. Hitt also evaluated blackside dace occurrence in this regard. Data for the study were supplied by the Service's Kentucky and Tennessee field offices, KDFWR, and KSNPC. Nonlinear regressions indicated a distinct decline in Kentucky arrow darter abundance at 258 µS/cm (95 percent confidence intervals 155–590 µS/cm), above which abundances were negligible. Nonlinear threshold declines for blackside dace were observed at 343 µS/cm, and 95 percent confidence intervals bounded this relationship between 123–632 µS/cm. Boosted regression results indicated that stream conductivity was the strongest predictor in separate analyses of Kentucky arrow darter and blackside dace abundance. Hitt (2014, pp. 7–8) concluded that the similar responses of these ecologically distinct taxa suggest the general importance of this water quality attribute for stream fish ecology in central Appalachia.

4(d) Rule

Under section 4(d) of the Act, the Service has discretion to issue regulations that we find necessary and advisable to provide for the conservation of threatened wildlife. We may also prohibit by regulation, with respect to threatened wildlife, any act that is prohibited by section 9(a)(1) of the Act for endangered wildlife. Exercising this discretion, the Service has developed general prohibitions that are appropriate for most threatened species at 50 CFR 17.31 and exceptions to those prohibitions at 50 CFR 17.32. While most of the prohibitions of §§ 17.31 and 17.32 are appropriate for the Kentucky arrow darter, we find that some activities that would normally be prohibited under §§ 17.31 and 17.32 are necessary for the conservation of this species because the species could benefit from habitat improvements in first- to third-order streams that are physically degraded (*e.g.,* unstable stream channels, eroding banks, no canopy cover). Therefore, the Service has determined that a species-specific section 4(d) rule is appropriate to promote the conservation of the Kentucky arrow darter. As discussed in the Summary of Factors Affecting the Species section of this rule, the primary threat to the species is the continuing loss and degradation of habitat. Physical habitat degradation is widespread within the species' range, and sediment has been identified as the most common stressor (KDOW 2013a, pp. 189–214; KDOW 2013b, pp. 88–94). Sedimentation may originate from areas outside of the stream channel as a result of land use activities associated with surface coal mining, legacy coal extraction, logging, land development, channel relocations, and riparian clearing. All of these activities can cause sedimentation, but they may also lead to canopy removal, clearing of riparian vegetation, and elevation of stream temperatures, thereby degrading habitats used by Kentucky arrow darters for feeding, sheltering, and reproduction. Sedimentation may also originate from areas within the stream channel as a result of channel instability and bank or stream bed erosion. Numerous streams within the species' current range have been identified as impaired (primarily due to siltation) and have been included on Kentucky's 303(d) list of impaired waters (see table 2, above). Activities such as stream reconfiguration/riparian restoration, bridge and culvert replacement or removal, bank stabilization, and stream crossing repair and maintenance that follow the provisions of the species-specific 4(d) rule below will improve or restore physical habitat quality for the Kentucky arrow darter and will provide an overall conservation benefit to the species.

The 4(d) rule will not remove or alter in any way the consultation requirement under section 7 of the Act. However, we expect the 4(d) rule to provide greater certainty to Federal agencies and any third parties (*e.g.,* permit applicants) in the consultation process for activities conducted in accordance with the provisions of the 4(d) rule. The consultation process may be further streamlined through programmatic consultations between Federal agencies and the Service for these activities.

Provisions of the 4(d) Rule

This 4(d) rule exempts from the general prohibitions in 50 CFR 17.32 take that is incidental to the following activities when conducted within habitats currently occupied by the Kentucky arrow darter. All of the activities listed below must be conducted in a manner that (1) maintains connectivity of suitable Kentucky arrow darter habitats, allowing for dispersal between streams; (2) minimizes instream disturbance by conducting activities during low-flow periods when possible; and (3) maximizes the amount of instream cover that is available for the species:

(1) Channel reconfiguration or restoration projects that create natural, physically stable, ecologically functioning streams (or stream and wetland systems) that are reconnected with their groundwater aquifers (Parola and Biebighauser 2011, pp. 8–13; Parola and Hansen 2011, pp. 2–7; Floyd *et al.* 2013, pp. 129–135). These projects can be accomplished using a variety of methods, but the desired outcome is a natural, sinuous channel with low shear stress (force of water moving against the channel); low bank heights and reconnection to the floodplain; a reconnection of surface and groundwater systems, resulting in perennial flows in the channel; riffles and pools composed of existing soil, rock, and wood instead of large imported materials; low compaction of soils within adjacent riparian areas; and inclusion of riparian wetlands. First- to third-order, headwater streams reconstructed in this way would offer suitable habitats for the Kentucky arrow darter and contain stable channel features, such as pools, glides, runs, and riffles, which could be used by the species for spawning, rearing, growth, feeding, migration, and other normal behaviors.

(2) Bank stabilization projects that utilize bioengineering methods outlined by the Kentucky Energy and Environment Cabinet and Kentucky Transportation Cabinet (Kentucky Environmental and Public Protection Cabinet and Kentucky Transportation Cabinet 2005, pp. 116–128) to replace pre-existing, bare, eroding stream banks with vegetated, stable stream banks, thereby reducing bank erosion and instream sedimentation and improving habitat conditions for the species. Following these methods, stream banks may be stabilized using live stakes (live, vegetative cuttings inserted or tamped into the ground in a manner that allows the stake to take root and grow), live fascines (live branch cuttings, usually willows, bound together into long, cigar-shaped bundles), or brush layering (cuttings or branches of easily rooted tree species layered between successive lifts of soil fill). These methods would not include the sole use of quarried rock (rip-rap) or the use of rock baskets or gabion structures.

(3) Bridge and culvert replacement/removal projects that remove migration barriers (*e.g.,* collapsing, blocked, or perched culverts) or generally allow for improved upstream and downstream movements of Kentucky arrow darters while maintaining normal stream flows, preventing bed and bank erosion, and improving habitat conditions for the species.

(4) Repair and maintenance of USFS concrete plank stream crossings in the DBNF that allow for safe vehicle passage while maintaining instream habitats, reducing bank and stream bed erosion and instream sedimentation, and improving habitat conditions for the species. These concrete plank crossings have been an effective stream crossing structure in the DBNF and have been used for decades. Over time, the planks can be buried by sediment or undercut during storm events, or simply break down and decay. If these situations occur, the DBNF must make repairs or replace the affected plank.

We believe that these actions and activities, while they may have some minimal level of mortality, harm, or disturbance to the Kentucky arrow darter, are not expected to adversely affect the species' conservation and recovery efforts. In fact, we believe that they would have a net beneficial effect on the species. Across the species' range, instream habitats have been degraded physically by sedimentation and by direct channel disturbance. The activities identified in this rule will correct some of these problems, creating more favorable habitat conditions for the species.

Based on the rationale above, the provisions included in this 4(d) rule are necessary and advisable to provide for the conservation of the Kentucky arrow darter. Nothing in this 4(d) rule would change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the Kentucky arrow darter.

We may issue permits to carry out otherwise prohibited activities involving threatened wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for scientific purposes, to enhance the propagation or survival of the species, economic hardship, zoological exhibition, educational purposes, and for incidental take in connection with otherwise lawful activities. There are also certain statutory exemptions from the prohibited activities, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act (for this species, those section 9 prohibitions adopted through the 4(d) rule). The intent of this policy is to increase public awareness of the effect of a final listing on proposed and ongoing activities within the range of a listed species. Based on the best available information, the following actions are unlikely to result in a violation of section 9, if these activities are carried out in accordance with existing regulations and permit requirements, although this list is not comprehensive:

(1) Normal agricultural and silvicultural practices, including herbicide and pesticide use, which are carried out in accordance with any existing regulations, permit and label requirements, and best management practices; and

(2) Surface coal mining and reclamation activities conducted in accordance with the 1996 BO between the Service and OSM.

However, we believe the following activities may potentially result in a violation of section 9 of the Act, although this list is not comprehensive:

(1) Unauthorized collecting or handling of the species.

(2) Destruction or alteration of the habitat of the Kentucky arrow darter (*e.g.,* unpermitted instream dredging, impoundment, water diversion or withdrawal, channelization, discharge of fill material) that impairs essential behaviors such as breeding, feeding, or sheltering, or results in killing or injuring a Kentucky arrow darter.

(3) Discharges or dumping of toxic chemicals, contaminants, or other pollutants into waters supporting the Kentucky arrow darter that kills or injures individuals, or otherwise impairs essential life-sustaining behaviors such as breeding, feeding, or sheltering.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the Kentucky Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act, need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. No tribal lands or other interests are affected by the rule.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* in Docket No. FWS–R4–ES–2015–0132 and upon request from the Kentucky Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are the staff members of the Kentucky Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. Amend § 17.11(h) by adding an entry for ''Darter, Kentucky arrow'' to the List of Endangered and Threatened Wildlife in alphabetical order under FISHES to read as set forth below:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
*	*	*	*	* * *
FISHES				
*	*	*	*	* * *
Darter, Kentucky arrow	*Etheostoma spilotum.*	Wherever found.	T	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; October 5, 2016, 50 CFR 17.44(p)[4d], 50 CFR 17.95(e)[CH].
*	*	*	*	* * *

■ 3. Amend § 17.44 by adding paragraph (p) to read as follows:

§ 17.44 Special rules—fishes.

* * * * *

(p) Kentucky arrow darter (*Etheostoma spilotum*).

(1) *Prohibitions.* Except as noted in paragraph (p)(2) of this section, all prohibitions and provisions of 50 CFR 17.31 and 17.32 apply to the Kentucky arrow darter.

(2) *Exceptions from prohibitions.*

(i) All of the activities listed in paragraph (p)(2)(ii) of this section must be conducted in a manner that:

(A) Maintains connectivity of suitable Kentucky arrow darter habitats, allowing for dispersal between streams;

(B) Minimizes instream disturbance by occurring during low-flow periods when possible; and

(C) Maximizes the amount of instream cover that is available for the species.

(ii) Incidental take of the Kentucky arrow darter will not be considered a violation of section 9 of the Act if the take results from any of the following when conducted within habitats currently occupied by the Kentucky arrow darter:

(A) Channel reconfiguration or restoration projects that create natural, physically stable, ecologically functioning streams (or stream and wetland systems) that are reconnected with their groundwater aquifers. These projects can be accomplished using a variety of methods, but the desired outcome is a natural, sinuous channel with low shear stress (force of water moving against the channel); low bank heights and reconnection to the floodplain; a reconnection of surface and groundwater systems, resulting in perennial flows in the channel; riffles and pools composed of existing soil, rock, and wood instead of large imported materials; low compaction of soils within adjacent riparian areas; and inclusion of riparian wetlands. First- to third-order headwater streams reconstructed in this way would offer suitable habitats for the Kentucky arrow darter and contain stable channel features, such as pools, glides, runs, and riffles, which could be used by the species for spawning, rearing, growth, feeding, migration, and other normal behaviors.

(B) Bank stabilization projects that use State-approved bioengineering methods (specified by the Kentucky Energy and Environment Cabinet and the Kentucky Transportation Cabinet) to replace preexisting, bare, eroding stream banks with vegetated, stable stream banks, thereby reducing bank erosion and instream sedimentation and improving habitat conditions for the species. Following these methods, stream banks may be stabilized using live stakes (live, vegetative cuttings inserted or tamped into the ground in a manner that allows the stake to take root and grow), live fascines (live branch cuttings, usually willows, bound together into long, cigar-shaped bundles), or brush layering (cuttings or branches of easily rooted tree species layered between successive lifts of soil fill). These methods would not include the sole use of quarried rock (rip-rap) or the use of rock baskets or gabion structures.

(C) Bridge and culvert replacement/removal projects that remove migration barriers (*e.g.,* collapsing, blocked, or perched culverts) or generally allow for improved upstream and downstream movements of Kentucky arrow darters while maintaining normal stream flows, preventing bed and bank erosion, and improving habitat conditions for the species.

(D) Repair and maintenance of U.S. Forest Service concrete plank stream crossings on the Daniel Boone National Forest (DBNF) that allow for safe vehicle passage while maintaining instream habitats, reducing bank and stream bed erosion and instream sedimentation, and improving habitat conditions for the species. These concrete plank crossings have been an effective stream crossing structure on the DBNF and have been used for decades. Over time, the planks can be buried by sediment, undercut during storm events, or simply break down and decay. If these situations occur, the DBNF must make repairs or replace the affected plank.

* * * * *

Dated: September 19, 2016.

Stephen Guertin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–23545 Filed 10–4–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2015–0164; 4500030113]

RIN 1018–BA16

Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Miami Tiger Beetle (Cicindelidia floridana)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine endangered species status under the Endangered Species Act of 1973 (Act), as amended, for the Miami tiger beetle (*Cicindelidia floridana*), a beetle species from Miami-Dade County, Florida. The effect of this regulation will be to add this species to the Federal List of Endangered and Threatened Wildlife and extend the Act's protections to this species.

DATES: This rule becomes effective November 4, 2016.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov* and at *http://www.fws.gov/verobeach/.* Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov.* Comments, materials, and documentation that we considered in this rulemaking will be available by appointment, during normal business hours at: U.S. Fish and Wildlife Service, South Florida Ecological Services Office, 1339 20th Street, Vero Beach, FL 32960; telephone 772–562–3909; facsimile 772–562–4288.

FOR FURTHER INFORMATION CONTACT: Roxanna Hinzman, Field Supervisor, U.S. Fish and Wildlife Service, South Florida Ecological Services Office, 1339 20th Street, Vero Beach, FL 32960, by telephone 772–562–3909 or by facsimile 772–562–4288. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act, a species may warrant protection through listing if it is endangered or threatened throughout all or a significant portion of its range. Listing a species as an endangered or threatened species can only be completed by issuing a rule.

The basis for our action. Under the Endangered Species Act, we may determine that a species is an endangered or threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We have determined that the threats to the Miami tiger beetle consist of habitat loss, degradation, and fragmentation, and proposed future development of habitat (Factor A); collection, trade, and sale (Factor B); inadequate protection from existing regulatory mechanisms (Factor D); and a small isolated population with a restricted geographical range, limited genetic exchange, and restricted dispersal potential that is subject to demographic and environmental stochasticity, including climate change and sea level rise (Factor E).

Peer review and public comment. We sought comments from independent specialists to ensure that our designation is based on scientifically sound data, assumptions, and analyses. We invited these peer reviewers to comment on our listing proposal. We also considered all other comments and information received during the comment period.

Previous Federal Action

Please refer to the proposed listing rule for the Miami tiger beetle (80 FR 79533), published on December 22, 2015, for a detailed description of previous Federal actions concerning this species. We will also be proposing a designation of critical habitat for the Miami tiger beetle under the Act in the near future.

Background

The discussion below incorporates revisions to the discussion in the proposed listing rule for the Miami tiger beetle (80 FR 79533; December 22, 2015) on taxonomy, distribution, and population estimates and status based on internal and peer review and public comments. Please refer to the proposed listing rule for discussion of the species' description, habitat, and biology.

Taxonomy

Determining the taxonomy of a plant or animal and the relationship that this plant or animal has with similar, closely related members of its taxon involves the review of comparative morphology and descriptive characteristics, geographic range and separation of members, reproductive capabilities between members, and the genetic distinctiveness between them. Together the available information is assessed to determine the validity of a species.

The Miami tiger beetle (*Cicindelidia floridana* Cartwright) is a described species in the Subfamily Cicindelinae of the Family Carabidae (ground beetles). Previously, tiger beetles were considered a separate family, but are now classified as a subfamily of the family Carabidae on the basis of recent genetic studies and other characters (Bousquet 2012, p. 30). The Miami tiger beetle is in the *C. abdominalis* group that also includes the eastern pinebarrens tiger beetle (*C. abdominalis*), scabrous tiger beetle (*C. scabrosa*), and Highlands tiger beetle (*C. highlandensis*). New treatments of tiger beetles (Bousquet 2012, p. 30; Pearson *et al.* 2015, p. 138) have also elevated most of the previous subgenera of tiger beetles to genera, resulting in a change of the genus of the tiger beetles in the *C. abdominalis* group from *Cicindela* to *Cicindelidia.* These genera were originally proposed by Rivalier (1954,

entire) and are widely used by European scientists (Wiesner 1992, entire), but are considered subgenera by many American scientists. The return to Rivalier's system has also been supported by genetic evidence (Pearson *et al.* 2015, p. 16).

The four species in the *Cicindelidia abdominalis* group all share a small body size (7–11 mm (0.28–0.43 in) long) and orange underside, and they occur in inland sandy habitats. The four beetles maintain separate ranges along the U.S. east coast and exhibit a significant gradient in range size: The eastern pinebarrens tiger beetle occurs from New York south along the coastal plain to north Florida; the scabrous tiger beetle is present throughout much of peninsular Florida, south to Ft. Lauderdale; the Highlands tiger beetle is restricted to the Lake Wales Ridge of Highlands and Polk Counties, Florida; and the Miami tiger beetle is found only in Miami-Dade County, Florida.

The Miami tiger beetle was first documented from collections made in 1934, by Frank Young (see *Distribution,* below). There were no observations after this initial collection, and the species was thought to be extinct until it was rediscovered in 2007, at the Zoo Miami Pine Rockland Preserve in Miami-Dade County. The rediscovery of a Miami tiger beetle population provided additional specimens to the 1934 collection and prompted a full study of its taxonomic status, which elevated it to a full species, *Cicindelidia floridana* (Brzoska *et al.* 2011, entire).

The Miami tiger beetle is distinguished from the three other species of the *abdominalis* group based on: (1) Morphology (color, maculation (spots or markings), and elytral (modified front wing) microsculpture); (2) distribution; (3) habitat requirements; and (4) seasonality (Brzoska *et al.* 2011, entire; Bousquet 2012, p. 313; Pearson *et al.* 2015, p. 138). This array of distinctive characters is comparable to the characters used to separate the other three species of the *C. abdominalis* group.

Although color is often variable and problematic as a sole diagnostic trait in tiger beetles, it is useful when combined with other factors (Brzoska *et al.* 2011, p. 4). In comparison with the closely related scabrous tiger beetle, the Miami tiger beetle has a green or bronze-green elytra, rarely with a post median marginal spot, and without evidence of a middle band, while the scabrous tiger beetle has a black elytra, with a post median marginal spot, usually with a vestige of a middle band (Brzoska *et al.* 2011, p. 6) (see Brzoska *et al.* 2011 for detailed description, including key). There are also noticeable differences in the width of the apical lunule (crescent shape), with the Miami tiger beetle's being thin and the scabrous tiger beetle's medium to thick.

In addition, the Miami tiger beetle has a narrower, restricted range where its distribution does not overlap with the other three species in the *C. abdominalis* group (*i.e.,* the Miami tiger beetle has only been documented in Miami-Dade County). The Miami tiger beetle also occupies a unique habitat type (*i.e.,* pine rockland versus scrub or open sand and barren habitat). These habitats also provide different larval microhabitat, which has been recognized as an important factor that separates species (T. Schultz, 2016, pers. comm.).

Lastly, the Miami tiger beetle has a broader period of adult activity than the ''late spring to mid-summer'' cycle that is observed in the scabrous tiger beetle (Brzoska *et al.* 2011, p. 6) (see also *Distribution, Habitat,* and *Biology* sections, below). Adult Miami tiger beetles have been observed from early May through mid-October; this is an unusually long flight period that suggests either continual emergence or two emergence periods (Brzoska *et al.* 2011, p. 6). In summary, the Miami tiger beetle is recognized as a distinct full species, based upon its differences in morphology, distribution, habitat, and seasonality (Brzoska *et al.* 2011, entire; Bousquet 2012, p. 313; Pearson *et al.* 2015, p. 138).

Genetics information is also commonly used to identify taxonomic relatedness. Genetic analyses for the Miami tiger beetle to date are limited to one non-peer-reviewed study, and available techniques (*e.g.,* genomics, which can better study the process of speciation) are evolving. A limited genetic study using mitochondrial DNA (mtDNA) suggested that the eastern pinebarrens tiger beetle, Highlands tiger beetle, scabrous tiger beetle, and Miami tiger beetle are closely related and recently evolved (Knisley 2011a, p. 14). As with other similar *Cicindela* groups, these three sister species were not clearly separable by mtDNA analysis alone (Knisley 2011a, p. 14). The power of DNA sequencing for species resolution is limited when species pairs have very recent origins, because in such cases new sister species will share alleles for some time after the initial split due to persistence of ancestral polymorphisms, incomplete lineage sorting, or ongoing gene flow (Sites and Marshall 2004, pp. 216–221; McDonough *et al.* 2008, pp. 1312–1313; Bartlett *et al.* 2013, pp. 874–875). Changing sea levels and coincidental changes in the size of the land mass of peninsular Florida during the Pleistocene Era (2.6 million years ago to 10,000 years ago) is thought to be the key factor in the very recent evolutionary divergence and speciation of the three Florida species from *C. abdominalis* (Knisley 2015a, p. 5; Knisley 2015b, p. 4).

Despite the apparent lack of genetic distinctiveness from the one non-peer-reviewed, limited genetic study, tiger beetle experts and peer-reviewed scientific literature agree that, based on the morphological uniqueness, geographic separation, habitat specialization, and extended flight season, the Miami tiger beetle warrants species designation (Brzoska *et al.* 2011, entire; Bousquet 2012, p. 313; Pearson *et al.* 2015, p. 138). The most current peer-reviewed scientific information confirms that *Cicindelidia floridana* is a full species, and this taxonomic change is used by the scientific community (Brzoska *et al.* 2011, entire; Bousquet 2012, p. 313; Pearson *et al.* 2015, p. 138; Integrated Taxonomic Information System (ITIS), 2016, p. 1).

The ITIS was created by a White House Subcommittee on Biodiversity and Ecosystem Dynamics to provide scientifically credible taxonomic information and standardized nomenclature on species. The ITIS is partnered with Federal agencies, including the Service, and is used by agencies as a source for validated taxonomic information. The ITIS recognizes the Miami tiger beetle as a valid species (ITIS, 2016, p. 1). Both the ITIS (2016, p. 1) and Bousquet (2012, p. 313) continue to use the former genus, *Cicindela* (see discussion above). The Florida Natural Areas Inventory (FNAI) (2016, p. 16) and NatureServe (2015, p. 1) also accepts the Miami tiger beetle's taxonomic status as a species; however, FNAI uses the new generic designation, *Cicindelidia.* In summary, although there is some debate about the appropriate generic designation (*Cicindelidia* versus *Cicindela*), based upon the best available scientific information, the Miami tiger beetle is a valid species.

Distribution

Historical Range

The historical range of the Miami tiger beetle is not completely known, and available information is limited based on the single historical observation prior to the species' rediscovery in 2007. It was initially documented from collections made in 1934 by Frank Young within a very restricted range in the northern end of the Miami Rock

Ridge, in a region known as the Northern Biscayne Pinelands. The Northern Biscayne Pinelands, which extend from the city of North Miami south to approximately SW. 216th Street, are characterized by extensive sandy pockets of quartz sand, a feature that is necessary for the Miami tiger beetle (Service 1999, p. 3–162). The type locality (the place where the specimen was found) was likely pine rockland habitat, though the species is now extirpated from the area (Knisley and Hill 1991, pp. 7, 13; Brzoska *et al.* 2011, p. 2; Knisley 2015a, p. 7). The exact location of the type locality in North Miami was determined by Rob Huber, a tiger beetle researcher who contacted Frank Young in 1972. Young recalled collecting the type specimens while searching for land snails at the northeast corner of Miami Avenue and Gratigny Road (119th Street), North Miami. Huber checked that location the same year and found that a school had been built there. A more thorough search for sandy soil habitats throughout that area found no potential habitat (Knisley and Hill 1991, pp. 7, 11–12). Although the contact with Young did not provide habitat information for the type locality, a 1943 map of habitats in the Miami area showed pine rockland with sandy soils reaching their northern limit in the area of the type locality (Knisley 2015a, p. 27), and Young's paper on land snails made reference to pine rockland habitat (Young 1951, p. 6). Recent maps, however, show that the pine rockland habitat has been mostly developed from this area, and remaining pine rockland habitat is mostly restricted to sites owned by Miami-Dade County in south Miami (Knisley 2015a, p. 7).

In summary, it is likely that the Miami tiger beetle historically occurred throughout pine rockland habitat on the Miami Rock Ridge. Given the lack of recorded collection of the species for nearly 70 years, it may have always had a localized distribution (Schultz, 2016, pers. comm.).

Current Range

The Miami tiger beetle was thought to be extinct until 2007, when a population was discovered at the Richmond Heights area of south Miami, Florida, known as the Richmond Pine Rocklands (Brzoska *et al.* 2011, p. 2; Knisley 2011a, p. 26). The Richmond Pine Rocklands is a mixture of publicly and privately owned lands that retain the largest area of contiguous pine rockland habitat within the urbanized areas of Miami-Dade County and outside of the boundaries of Everglades National Park (ENP). Surveys and observations conducted at Long Pine Key in ENP have found no Miami tiger beetles, and habitat conditions are considered unsuitable for the species (Knisley 2015a, p. 42; J. Sadle, 2015, pers. comm.). At this time, the Miami tiger beetle is known to occur in only two separate locations within pine rockland habitat in Miami-Dade County. The Richmond population occurs on four contiguous parcels within the Richmond Pine Rocklands: (1) Zoo Miami Pine Rockland Preserve (Zoo Miami) (293 hectares (ha); 723 acres (ac)), (2) Larry and Penny Thompson Park (121 ha; 300 ac), (3) U.S. Coast Guard property (USCG) (96 ha; 237 ac), and (4) University of Miami's Center for Southeastern Tropical Advanced Remote Sensing property (CSTARS) (31 ha; 76 ac) (see Table 1 in *Supporting Documents* on *http://www.regulations.gov*). The second population, which was recently identified (September 2015) is within approximately 5.0 km (3.1 mi) of the Richmond population and separated by urban development (D. Cook, 2015a, pers. comm.). Based on historical records, current occurrences, and habitat needs of the species (see *Habitat* section, below), the current range of the species is considered to be any pine rockland habitat (natural or disturbed) within the Miami Rock Ridge (Knisley 2015a, p. 7; CBD *et al.* 2014, pp. 13–16, 31–32).

Miami tiger beetles within the four contiguous occupied parcels in the Richmond population are within close proximity to each other. There are apparent connecting patches of habitat and few or no barriers (contiguous and border each other on at least one side) between parcels. Given the contiguous habitat with few barriers to dispersal, frequent adult movement among individuals is likely, and the occupied Richmond parcels probably represent a single population (Knisley 2015a, p. 10). Information regarding Miami tiger beetles at the new location is very limited, but beetles here are within approximately 5.0 km (3.1 mi) of the Richmond population and separated by ample urban development, which likely represents a significant barrier to dispersal, and the Miami tiger beetles at the new location are currently considered a second population.

The Richmond population occurs within an approximate 2-square-kilometer (km^2) (494-ac) block, but currently much of the habitat is overgrown with vegetation, leaving few remaining open patches for the beetle. Survey data documented a decline in the number of open habitat patches, and Knisley (2015a, pp. 9–10) estimated that less than 10 percent of the mostly pine rockland habitat within this area supports the species in its current condition.

Population Estimates and Status

The visual index count is the standard survey method that has been used to determine presence and abundance of the Miami tiger beetle. Using this method, surveyors either walk slowly or stand still in appropriate open habitats, while taking a count of any beetle observations. Although the index count has been the most commonly used method to estimate the population size of adult tiger beetles, various studies have demonstrated it significantly underestimates actual numbers present. As noted earlier, several studies comparing various methods for estimating adult tiger beetle abundance have found numbers present at a site are typically two to three times higher than that produced by the index count (Knisley and Schultz 1997, p. 15; Knisley 2009, entire; Knisley and Hill 2013, pp. 27, 29). Numbers are underestimated because tiger beetles are elusive, and some may fly off before being detected while others may be obscured by vegetation in some parts of the survey area. Even in defined linear habitats like narrow shorelines where there is no vegetation and high visibility, index counts produce estimates that are two to three times lower than the numbers present (Knisley and Schultz 1997, p. 152).

Information on the Richmond population size is limited because survey data are inconsistent, and some sites are difficult to access due to permitting, security, and liability concerns. Of the occupied sites, the most thoroughly surveyed site for adult and larval Miami tiger beetles is the Zoo Miami parcel (over 30 survey dates from 2008 to 2014) (Knisley 2015a, p. 10). Adult beetle surveys at the CSTARS and USCG parcels have been infrequent, and access was not permitted in 2012 through early summer of 2014. In October 2014, access to both the CSTARS and USCG parcels was permitted, and no beetles were observed during October 2014 surveys. As noted earlier, Miami tiger beetles were recently found at Larry and Penny Thompson Park (D. Cook, 2015b, pers. comm.); however, thorough surveys at this location have not been conducted. For details on index counts and larval survey results from the three surveyed parcels (Zoo Miami, USCG, and CSTARS), see Table 2 in *Supporting Documents* on *http://www.regulations.gov*.

Raw index counts found adults in four areas (Zoo A, Zoo B, Zoo C, and

Zoo D) of the Zoo Miami parcel. Two of these patches (Zoo C and Zoo D) had fewer than 10 adults during several surveys at each location. Zoo A, the more northern site where adults were first discovered, had peak counts of 17 and 22 adults in 2008 and 2009, but declined to 0 and 2 adults in six surveys from 2011 to 2014, despite thorough searches on several dates throughout the peak of the adult flight season (Knisley 2015a, pp. 9–10). Zoo B, located south of Zoo A, had peak counts of 17 and 20 adults from 2008 to 2009, 36 to 42 adults from 2011 to 2012, and 13 and 18 adults in 2014 (Knisley 2015a, pp. 9–10). These surveys at Zoo A and Zoo B also recorded the number of suitable habitat patches (occupied and unoccupied). Surveys between 2008 and 2014 documented a decline in both occupied and unoccupied open habitat patches. Knisley (2015, pp. 9–10) documented a decrease at Zoo A from 7 occupied of 23 patches in 2008, to 1 occupied of 13 patches in 2014. At Zoo B, there was a decrease from 19 occupied of 26 patches in 2008, to 7 occupied of 13 patches in 2014 (Knisley 2015a, pp. 9–10). Knisley (2015a, p. 10) suggested this decline in occupied and unoccupied patches is likely the result of the vegetation that he observed encroaching into the open areas that are required by the beetle.

At the CSTARS site, the only survey during peak season was on August 20, 2010, when much of the potential habitat was checked. This survey produced a raw count of 38 adults in 11 scattered habitat patches, with 1 to 9 adults per patch, mostly in the western portion of the site (Knisley 2015a, p. 10). Three surveys at the USCG included only a portion of the potential habitat and produced raw adult counts of two, four, and two adults in three separate patches from 2009, 2010, and 2011, respectively (Knisley 2015a, p. 10). Additional surveys of the CSTARS and the USCG parcels on October 14 to 15, 2014, surveyed areas where adults were found in previous surveys and some new areas; however, no adults were observed. The most likely reasons for the absence of adults were because counts even during the peak of the flight season were low (thus detection would be lower off-peak), and mid-October is recognized as the end of the flight season (Knisley 2014a, p. 2). As was noted for the Zoo Miami sites, habitat patches at the CSTARS and USCG parcels that previously supported adults seemed smaller due to increased vegetation growth, and consequently these patches appeared less suitable for the beetle than in the earlier surveys (Knisley 2015a, p. 10).

Surveys of adult numbers over the years, especially the frequent surveys in 2009, did not indicate a bimodal adult activity pattern (two cohorts of adults emerge during their active season) (Knisley 2015a, p. 10). Knisley (2015a, p. 10) suggests that actual numbers of adult Miami tiger beetles could be two to three times higher than indicated by the raw index counts. Several studies comparing methods for estimating population size of several tiger beetle species, including the Highlands tiger beetle, found total numbers present were usually more than two times that indicated by the index counts (Knisley and Hill 2013, pp. 27–28). The underestimates from raw index counts are likely to be comparable or greater for the Miami tiger beetle, because of its small size and occurrence in small open patches where individuals can be obscured by vegetation around the edges, making detection especially difficult (Knisley 2015a, p. 10).

Surveys for larvae at the Zoo Miami parcel (Zoos A and B) were conducted for several years during January when lower temperatures would result in a higher level of larval activity and open burrows (Knisley and Hill 2013, p. 38) (see Table 2 in *Supporting Documents* on *http://www.regulations.gov*). The January 2010 survey produced a count of 63 larval burrows, including 5 first instars, 36 second instars, and 22 third instars (Knisley 2013, p. 4). All burrows were in the same bare sandy patches where adults were found. In March 2010, a followup survey indicated most second instar larvae had progressed to the third instar (Knisley 2015a, p. 11). Additional surveys to determine larval distribution and relative abundance during January or February in subsequent years detected fewer larvae in section Zoo B: 5 larvae in 2011, 3 larvae in 2012, 3 and 5 larvae in 2013, 3 larvae in 2014, and 15 larvae in 2015 (Knisley 2013, pp. 4–5; Knisley 2015c, p. 1). The reason for this decline in larval numbers (*i.e.,* from 63 in 2010, to 15 or fewer in each survey year from 2011 to 2015) is unknown. Possible explanations are that fewer larvae were present because of reduced recruitment by adults from 2010 to 2014, increased difficulty in detecting larval burrows that were present due to vegetation growth and leaf litter, environmental factors (*e.g.,* temperature, precipitation, predators), or a combination of these factors (Knisley 2015a, pp. 10–11).

Larvae, like adults, also require open patches free from vegetation encroachment to complete their development. The January 2015 survey of Zoo B observed vegetation encroachment, as indicated by several of the numbered tags marking larval burrows in open patches in 2010 covered by plant growth and leaf litter (Knisley 2015c, p. 1). No larvae were observed in the January 2015 survey of Zoo A (Knisley 2015c, p. 1). Knisley (2015c, p. 3) reported that the area had been recently burned (mid-November) and low vegetation was absent, resulting in mostly bare ground with extensive pine needle coverage below trees, which made the identification of previous open patches with adults difficult.

Surveys for the beetle's presence outside of its currently known occupied range found no Miami tiger beetles at a total of 42 sites (17 pine rockland sites and 25 scrub sites) throughout Miami-Dade, Broward, Palm Beach, and Martin Counties (Knisley 2015a, pp. 9, 41–45). The absence of the Miami tiger beetle from sites north of Miami-Dade was probably because it never ranged beyond pine rockland habitat of Miami-Dade County and into scrub habitats to the north (Knisley 2015a, p. 9). Sites without the Miami tiger beetle in Miami-Dade County mostly had vegetation that was too dense and were lacking the open patches of sandy soil that are needed by adults for oviposition and larval habitat (Knisley 2015a, pp. 9, 41–45).

The Miami tiger beetle is considered as one of two tiger beetles in the United States most in danger of extinction (Knisley *et al.* 2014, p. 93). The viability of the remaining population is unknown, as no population viability analysis is available (B. Knisley, 2015d, pers. comm.). The Florida Fish and Wildlife Conservation Commission (FWC) (2012, p. 89) regarded it as a species of greatest conservation need. The Miami tiger beetle is currently ranked S1 and G1 by the FNAI (2016, p.16), meaning it is critically imperiled globally because of extreme rarity (5 or fewer occurrences, or fewer than 1,000 individuals) or because of extreme vulnerability to extinction due to some natural or manmade factor.

In summary, the overall population size of the Miami tiger beetle is exceptionally small and viability is uncertain. Based upon the index count data to date, it appears that the two populations exist in extremely low numbers (Knisley 2015a, pp. 2, 10–11, 24).

Summary of Comments and Recommendations

In the proposed rule published on December 22, 2015 (80 FR 79533), we requested that all interested parties submit written comments on the

proposal by February 22, 2016. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. Newspaper notices inviting general public comment were published in the *Miami Herald.* We held a public hearing on January 13, 2016.

Peer Reviewer Comments

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinion from seven knowledgeable individuals with scientific expertise that included familiarity with tiger beetles and their habitat, biological needs, and threats. We appreciate the responses received from five of the peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding the listing of the Miami tiger beetle. All peer reviewers supported the endangered listing, and four of the five specifically stated that the best available scientific information was used in the proposed listing. The peer reviewers concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve the final rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

(1) *Comment:* One peer reviewer recommended the immediate use of fire management in pine rockland habitat for the Miami tiger beetle.

Our Response: We also recognize, as discussed below (see Summary of Factors Affecting the Species), the need for better land management, including the use of prescribed fire, additional survey and life-history data, further investigation into laboratory rearing for possible reintroduction, more extensive genetic analysis, and designation of critical habitat.

(2) *Comment:* One peer reviewer stated that one of the most relevant ecological factors that separate tiger beetle species is soil type and microhabitat of the larvae, and the limestone substrate of the Miami tiger beetle as opposed to the sandy habitats of the scabrous tiger beetle (*C. scabrosa*) reflect subsequent adaptation to a local habitat following a geographic separation.

Our Response: We have modified the language under *Taxonomy* above to incorporate this statement regarding larval microhabitat.

(3) *Comment:* One peer reviewer stated that the lack of collection of the Miami tiger beetle for decades after its initial discovery may indicate that it has always been very localized in its distribution.

Our Response: We have modified the language under *Distribution* above to incorporate this statement regarding a localized distribution.

(4) *Comment:* One peer reviewer stated that development in and around Miami tiger beetle habitat will present a decline to habitat quality through runoff from structures.

Our Response: We have modified *Factor A* below to incorporate this information.

(5) *Comment:* One peer reviewer stated that the negative impact of pesticides may be increased with the spread of the Zika virus.

Our Response: We have incorporated this information under *Factor E* below.

Comments From States

The Miami tiger beetle occurs only in Florida, and we received one comment letter from the Florida Fish and Wildlife Conservation Commission (FWC). FWC stated its plans to continue working with stakeholders to assess known and potential Miami tiger beetle habitat, conduct surveys, and advise on issues relating to Miami tiger beetle conservation and habitat management.

Comments From the Public

During the comment period for the proposed listing rule, we received a total of 73 comments from local governments, nongovernmental organizations, and private citizens. Of these 73 comments, 65 indicated support of the proposed listing. We appreciate all comments and have incorporated them into the final rule or responded to them below, as appropriate.

(6) *Comment:* Several commenters questioned the taxonomy as a result of Choate's work, use of best scientific and commercial data, morphological characteristics, and seasonality of the Miami tiger beetle.

Our Response: In accordance with section 4 of the Act, we are required to make listing determinations on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards under the Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines (*www.fws.gov/informationquality/*), provide criteria and guidance, and establish procedures to ensure that our decisions are based on the best scientific data and commercial data available.

The *Taxonomy* section above discusses the taxonomic designation of the Miami tiger beetle. The most currently peer-reviewed scientific information confirms that the Miami tiger beetle is a full species, and this taxonomic designation is used by the scientific community (Brzoska *et al.* 2011, entire; Bousquet 2012, p. 313; Pearson *et al.* 2015, p. 138; ITIS, 2016, p. 1; FNAI 2016, p. 16; NatureServe 2015, p. 1). The works referenced by commenters (Choate 1984 and 2003) pre-date the rediscovery of the Miami tiger beetle in 2007 and do not include the most currently accepted taxonomic standing of the species. Prior to the rediscovery, the species had not been observed since its original collection in 1934. Choate did not examine specimens of the Miami tiger beetle when he synonymized it with the scabrous tiger beetle (NatureServe 2015, p. 1).

Brzoska *et al.* (2011, entire) established taxonomic criteria and did not intend for color and other morphological features to be used in isolation as intended in the taxonomic criteria set. Color and maculation are commonly used to identify tiger beetles, especially in combination with geographic range and habitat (Knisley and Schultz 1997, pp. 5–10; Pearson *et al.* 2015, pp. 19–20). Color, morphological features (post median marginal spot, middle band, and apical (apex, the top or highest part forming a point) lunule (crescent-shaped), distribution, seasonality, and habitat type of the Miami tiger beetle are only used in combination to differentiate it from the scabrous tiger beetle (Brzoska *et al.* 2011, entire), so minor overlap in individual features, such as post median marginal spot as noted by the commenters, is not necessarily a uniquely identifying feature until taken into consideration with the other identifying factors.

Regarding color, all specimens of the Miami tiger beetle observed by Brzoska *et al.* (2011, entire) were bright metallic green dorsally on the head, pronotum, and elytron, while the scabrous tiger beetle is metallic black dorsally, with only a few individuals having a greenish head and pronotum (prominent plate-like structure that covers all or part of the thorax). Likewise, no Miami tiger beetles had a thick lunule or a middle band. This suite of characteristics identified by Brzoska *et al.* (2011, entire), clearly differentiate the Miami tiger beetle from the scabrous tiger beetle. Since Brzoska *et al.* (2011, entire), there has been no debate in the

scientific literature about the taxonomic characters used to identify the Miami tiger beetle as a species, and to our knowledge all literature since Brzoska *et al.* (2011, entire) recognize it as a valid species (Bousquet 2012, p. 313; Pearson *et al.* 2015, p. 138; ITIS 2016, p. 1; FNAI 2016, p. 16; NatureServe 2015, p. 1).

Finally, we agree that there is some overlap in the adult activity period between the Miami tiger beetle and its closely related sister species, the scabrous tiger beetle; however, the adult flight season for the Miami tiger beetle extends into October, while that of the scabrous tiger beetle, which is far more widespread and has been collected on a more routine basis, does not. The Miami tiger beetle has been observed during October surveys for three separate years (2008, 2009, and 2011). Seasonality is only one of several factors used to differentiate the Miami tiger beetle from the scabrous tiger beetle.

(7) *Comment:* Three commenters stated that the genetic study on the Miami tiger beetle should not be rejected.

Our Response: We agree that distinct differences in DNA can be helpful in delineating species. The single genetic study that is available on the Miami tiger beetle was used in the listing determination process and is discussed in *Taxonomy* above. This genetic study concluded that the Miami, Highlands, scabrous, and eastern pinebarrens tiger beetles are all closely related, recently evolved, and not clearly separable by the mtDNA analysis conducted. This finding is not uncommon among closely related *Cicindela* groups (Woodcock and Knisley 2009, entire; Knisley 2011a, p. 14). The lack of genetic distinctiveness in the study does show that the mtDNA markers used (cytochrome b and cytochrome oxidase subunit 1) were not in agreement with the morphological, seasonal, ecological, and geographic criteria that have been used to identify the species (Choate 1984, entire; Brzoska *et al.* 2011, entire), but this finding is not necessarily an indication that they are not separate species.

Determining the taxonomy of a species and its evolutionary relationships with similar, closely related members of its taxon involves the review of comparative morphology and descriptive characteristics, geographic range and separation of members, reproductive capabilities between members, and the genetic distinctiveness between them. Together the available information is assessed to determine the validity of a species. This determination is not based on any one single factor in isolation, but rather on the weight of evidence from the suite of factors available. The identifying criteria that clearly define the sister species used in the genetic study (Choate 1984, entire; Brzoska *et al.* 2011, entire) have been peer reviewed and are accepted in the scientific literature (Bousquet 2012, p. 313; Pearson *et al.* 2015, p. 138; ITIS 2016, p. 1; FNAI 2016, p. 16; NatureServe 2015, p. 1). As suggested by one peer reviewer, an analysis using nuclear DNA, with multiple different genes, instead of the two that were used in the genetic analysis, may be more useful in the case of these closely related sister species.

(8) *Comment:* Five commenters provided information on observations of Miami tiger beetles at the following locations: University of Miami, Zoo Miami, Larry and Penny Thompson Park, Gold Coast Railroad Museum, U.S. Coast Guard, and an undisclosed location, miles away from the Richmond Pine Rocklands.

Our Response: The proposed rule listed the Miami tiger beetle as occurring on Zoo Miami, the University of Miami CSTARS Campus, Larry and Penny Thompson Park, the U.S. Coast Guard, and an undisclosed location within approximately 5 km (3 mi) of the Richmond Pine Rocklands. The Gold Coast Railroad Museum was not included in the proposed rule because it is the first reported observation of Miami tiger beetles. Since receiving this information, we have searched scientific and commercial data to validate this location. The Gold Coast Railroad Museum parcel is within close proximity to known occupied sites within the Richmond Pine Rocklands. Because of the contiguous habitat with few barriers to dispersal, many of the parcels within the Richmond Pine Rocklands are suitable or potentially suitable for the Miami tiger beetle.

(9) *Comment:* Two commenters expressed concern that the proposed rule lacked specificity in range or habitat boundaries for the Miami tiger beetle, which presents uncertainty for anyone planning development within the range of the species. So that the economic consequence of the rule can be appropriately evaluated, one commenter requested that the Service collect more survey data to better delineate habitat boundaries and make this data available for review and comment, prior to publication of a final rule.

Our Response: Under the Endangered Species Act, listing determinations must be made based on the best available scientific and commercial information. Economic and other potential impacts are not considered in the listing determination, but rather in the consideration of exclusion of areas from critical habitat under section 4(b)(2) of the Act, when in the process of designating critical habitat for a species. As discussed below (see Critical Habitat), we have found that critical habitat is not determinable at this time.

The *Distribution* section, above, discusses the historical and current range of the Miami tiger beetle. Additionally, we are continuing to study and define the specificity in range and habitat boundaries for the Miami tiger beetle.

(10) *Comment:* One commenter stated that the proposed rule did not appropriately capture the single-season survey data points collected by Miami-Dade County and Fairchild Tropical Botanic Garden, which provide some perspective on the population of the Miami tiger beetle in the Richmond Pine Rocklands.

Our Response: We received the survey data points collected by Miami-Dade County and others on January 29, 2016, after the proposed listing rule publication on December 22, 2015. Our description of the species' extant occurrences within the Richmond Pine Rocklands in the *Distribution* section above is consistent with the new data presented to us by Miami-Dade County (*i.e.,* the Miami tiger beetle is known from four contiguous parcels within the Richmond Pine Rocklands: Zoo Miami Pine Rockland Preserve, Larry and Penny Thompson Park, University of Miami's Center for Southeastern Tropical Advanced Remote Sensing, and U.S. Coast Guard).

(11) *Comment:* One commenter stated that we incorrectly reported that no robber flies have been observed in areas where the Miami tiger beetles occur.

Our Response: We have revised *Factor C* below to include observations of potential predators, such as robber flies.

(12) *Comment:* One commenter recommended 12 pine rockland sites throughout Miami-Dade County be thoroughly surveyed for the Miami tiger beetle.

Our Response: We support further surveys for the species at sites throughout Miami-Dade County and appreciate the list provided of areas to target.

(13) *Comment:* Two commenters stated that the range of the Miami tiger beetle is unknown and improperly assumed to be limited. Both questioned why we did not reference Choate's (2003) field guide, which lists the scabrous tiger beetle as occurring in Miami-Dade County.

Our Response: Since Choate's published work considered the Miami

tiger beetle a synonym for the scabrous tiger beetle, then it is logical that he listed the distribution as within Miami-Dade County. We used the more recent publication by Brzoska *et al.* (2011, entire) that elevated the Miami tiger beetle to species and is widely accepted in the scientific literature (Bousquet 2012, p. 313; Pearson *et al.* 2015, p. 138; ITIS 2016, p. 1; FNAI 2016, p. 16; NatureServe 2015, p. 1).

(14) *Comment:* Two commenters stated that the surveying efforts have been inadequate to conclude that the Miami tiger beetle is rare.

Our Response: Surveys (during the summers of 2008 and 2010) for the Miami tiger beetle have included 42 sites (17 pine rockland sites and 25 scrub sites) throughout Miami-Dade, Broward, Palm Beach, and Martin Counties (Knisley 2015a, pp. 9, 41–45). To date, the Miami tiger beetle is known to occur in only two small populations: The Richmond Pine Rocklands and an undisclosed pine rockland within 5 km (3.1 mi) of the Richmond population and separated by urban development. Limitations to surveys are noted above in *Population Estimates and Status.*

(15) *Comment:* Four of the comments received raised a question about the habitat of the type locality.

Our Response: The original description of the Miami tiger beetle (Cartwright 1939, p. 364) provided no detailed information regarding habitat type, other than being in Miami, Florida. Based on later correspondence between tiger beetle researchers and the collector of the type specimen, the general area of the collection was narrowed down to the vicinity of Gratigny Road and present-day Barry University (Brzoska *et al.* 2011, pp. 1–2). This general area was just north (approximately 2.2 km (1.4 mi)) of the northern extent of the pine rocklands on the Miami Rock Ridge in the 1940s (Davis 1943, entire), approximately 10 years after the collection from the type locality. In the 1980s and 1990s, collectors did look for the species in this general location, but this area was fully developed, with no remaining natural habitat. Based on the habitat types of the other closely related *Cicindelidia* that occur in Florida, it was assumed that the Miami tiger beetle, too, likely occupied scrub habitats. The species was then rediscovered in 2007 from pine rockland habitat. Based on historical photos and documents on Barry University (*http://www.barry.edu/about/history/historic-photo-tour/* [accessed April 27, 2016]; Rice 1989, pp. 7, 10), there is evidence that the land currently occupied by Barry University had pine habitat with abundant pine trees and sandy soils. While this information is not irrefutable proof that it was pine rockland habitat, this area is consistent with the habitat type at the known currently occupied locations.

(16) *Comment:* One commenter stated that data do not support the conclusion that collection is a threat to the Miami tiger beetle.

Our Response: Based on data from other insects, including tiger beetles, we consider collection to be a significant threat to the Miami tiger beetle in light of the few known remaining populations, low abundance, and highly restricted range. Since publication of the proposed rule, we have received information on known unpermitted collection of Miami tiger beetles (Wirth, 2016a, pers. comm.). This new information is incorporated under *Factor B* below.

(17) *Comment:* One commenter expressed concern that disease and predation was not identified as a threat for the Miami tiger beetle.

Our Response: This topic is addressed under *Factor C.* below. We concluded that potential impact from predators or parasites to the Miami tiger beetle is unknown at this time, and, therefore it was not identified as a threat in the listing determination. However, *Factor C* below has been updated to include new observations on potential predators at a location known to have Miami tiger beetles.

(18) *Comment:* One commenter stated that existing regulatory mechanisms are adequate to protect the Miami tiger beetle, citing existing critical habitat for other listed species.

Our Response: These topics are discussed under *Factor D* below. The Miami tiger beetle is far rarer (*i.e.,* fewer populations with fewer individuals within a limited distribution) than any of the other listed species with critical habitat that occur within pine rocklands in Miami-Dade County. As an unlisted species, the Miami tiger beetle is afforded limited protection from sections 7 and 10 of the Act based on its co-occurrence with listed species or their critical habitat; however, effects determinations and minimization and avoidance criteria for any of these listed species are unlikely to be fully protective. Critical habitat designations for other species also would not afford the beetle protections from take.

(19) *Comment:* One commenter stated that Miami-Dade County's regulatory and land protection programs protect Miami tiger beetle habitat. The commenter also specified that county's Environmentally Endangered Lands (EELs) program should be included under *Factor A.*

Our Response: This topic, including EELs, is addressed under *Factor D* below. Because Miami-Dade County's Natural Forested Communities (NFCs) designation allows for partial development of pine rockland habitat and there is known unpermitted development and destruction of pine rockland that continues to occur, the regulation is not fully protective against loss of Miami tiger beetles or their habitat. The county's EELs program funds the acquisition and maintenance of pine rockland habitat. Because these lands are not burned as frequently as needed to maintain suitable beetle habitat, they are not included in the discussion under *Factor A, Conservation Efforts to Reduce the Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range.* We have incorporated this clarification into the final rule under *Factor D* below.

(20) *Comment:* One commenter stated that listing could be counter-productive to conducting valuable prescribed burns and habitat management by the Florida Forest Service.

Our Response: We agree that habitat management, including fire break and trail maintenance, prescribed fire, and mechanical and chemical treatment, is highly valuable for the Miami tiger beetle, but disagree that listing could be counter-productive to implementing prescribed burns or other habitat management activities by the Florida Forest Service. The Act requires us to make a determination using the best available scientific and commercial data after taking into account those efforts, if any, being made by any State, or any political subdivision of a State to protect such species, whether by predatory control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction. Further, the listing of a species does not obstruct the development of conservation agreements or partnerships to conserve the species. Once a species is listed as either endangered or threatened, the Act provides many tools to advance the conservation of listed species. Conservation of listed species in many parts of the United States is dependent upon working partnerships with a wide variety of entities, including the voluntary cooperation of non-Federal landowners.

(21) *Comment:* One commenter stated that the best available science does not indicate that few, small, isolated populations are a threat for the Miami tiger beetle. They concluded that the Miami tiger beetle can persist in the long term with relatively small populations, and that we fail to explain

why the Miami tiger beetle requires a different population target than other beetles.

Our Response: We acknowledge that populations of some tiger beetle species (*e.g.,* northeastern beach, puritan, and Highlands tiger beetles) are able to persist with low population size, while other populations (*e.g.,* Coral Pink Sand Dunes tiger beetles) have been extirpated. One peer reviewer stated that, given the small population sizes, the Miami tiger beetle could be extirpated by environmental fluctuations. Another peer reviewer stated that the vulnerability of the Miami tiger beetle is clearly established in the proposed rule due to the few remaining small populations and little remaining habitat. Given that the Miami tiger beetle is known only from two remaining isolated populations with few individuals, any significant decrease in the population size could easily result in extinction of the species. This issue is discussed under *Factor E,* below.

The proposed rule set no specific population target for the Miami tiger beetle. The species is considered rarer than any of the listed tiger beetle species (Knisley *et al.* 2014, p. 106). In an evaluation on the status of 62 tiger beetles in the United States, the Miami tiger beetle was considered as one of two tiger beetles most in danger of extinction (Knisley *et al.* 2014, p. 93). Florida Natural Areas Inventory (2016, p. 16) considered the species extremely vulnerable to extinction. One peer reviewer stated that the Miami tiger beetle is probably the most endangered species of tiger beetle in North America. Survey data to date indicate that the two populations exist in extremely low numbers. This topic is discussed under *Population Estimates and Status* above.

(22) *Comment:* One commenter stated that pesticide exposure in the Richmond Pine Rocklands is largely mitigated by current efforts to protect the Bartram's scrub-hairstreak butterfly. The commenter states that we fail to present the differing opinion on pesticides from Knisley (2014).

Our Response: We acknowledge that Miami-Dade Mosquito Control's (MDMCs) recent implementation of truck-based spray buffers around critical habitat for the Bartram's scrub-hairstreak butterfly have greatly reduced pesticide exposure to the Miami tiger beetle, and mosquito control is currently not considered a major threat for the known populations at this time. However, the current spray buffers are not regulations and are subject to change based on human health concerns, which is likely with the spread of the Zika virus as pointed out by one peer reviewer (see peer review comment (5) above). In addition, if the Miami tiger beetle was found to occur on habitat that is not protected by the butterfly's critical habitat, then exposure is possible. This topic is discussed under *Factor E,* below.

Regarding the Service not disclosing a differing opinion by Knisley (2014), it is unclear which Knisley (2014) opinion is referenced by the commenter. The supplemental documents provided by the commenter do not include a Knisley (2014) reference that addresses pesticides. Knisley's (2015a, pp. 15–16) species assessment on the Miami tiger beetle, which was modified from a Service species assessment, identified pesticides as a potential threat.

(23) *Comment:* One commenter stated that our analysis on the threat of climate change failed to present evidence on how the Miami tiger beetle is affected, since it has survived operations of a former naval air station, hurricanes, and operations by Zoo Miami. In addition, the commenter stated that, under most climate change predictions, Miami-Dade County's efforts should protect the pine rockland habitat from saltwater intrusion and must be included as the best available data.

Our Response: We agree that the Miami tiger beetle has survived operations of a former naval air station, hurricanes, and operations by Zoo Miami; however, we do not know the impact of these events on the Miami tiger beetle, because no surveys were conducted until after its rediscovery in 2007. All of the projected climate change scenarios indicate negative effects on pine rockland habitat throughout Miami-Dade County. This includes everything from rising temperatures, increased storm frequency and severity, changes in rainfall patterns, rising sea levels, and ''coastal squeeze,'' which occurs when the habitat is pressed between rising sea levels and coastal development. Even before projected inundation, pine rocklands are likely to undergo transitions including increased salinity in the water table and soils, which would cause vegetation shifts and potential impacts to the beetle. This issue is addressed in *Factor E* below. The commenter did not provide a reference to support its statement that Miami-Dade County's efforts should protect the pine rockland habitat from saltwater intrusion. Based on the best available scientific and commercial data available, we consider climate change a threat to the Miami tiger beetle.

(24) *Comment:* One commenter identified an editorial error under *Factor A* of the proposed rule (80 FR 79533, December 22, 2015; page 79540), which states that the two known populations of the Miami tiger beetle occur within the Richmond Pine Rocklands.

Our Response: We acknowledge that this was an editorial error, as the Miami tiger beetle is known from two populations, only one of which is found within the Richmond Pine Rocklands. We have revised this text under *Factor A,* below.

(25) *Comment:* One commenter stated that the proposed listing rule failed to present the positive examples of using prescribed fire in an urban landscape in citations from Snyder and URS. The commenter pointed out that the URS citation discussed the necessity of prescribed fire to avoid catastrophic risk to surrounding property, including homes, and even loss of life.

Our Response: We have incorporated these concepts under *Factor A* below.

(26) *Comment:* One commenter stated that the Service has been presented with the boundary limits of the proposed Miami Wilds development.

Our Response: We agree that the proposed boundary limits of the proposed Miami Wilds development have been presented to us. However, the statement in the proposed rule under *Factor A,* below, that plans have yet to be finalized, is accurate, since no formal review of the project has been initiated by the proposed applicant.

(27) *Comment:* One commenter expressed concern that routine operational maintenance in existing and potential future transmission and distribution right-of-ways (ROW), such as but not limited to vegetation management and power restoration, may be limited or hindered. The commenter requested that ''utilities development'' be excluded from the section 9 prohibited actions and that language be added indicating that permits will not be required for ROW maintenance activities.

Our Response: This type of request can be covered under a rule issued under section 4(d) of the Act, which allows for some ''take'' of a threatened species when the overall outcome of the allowed actions are ''necessary and advisable to provide for the conservation of the species.'' However, a special rule may not be promulgated for species listed as endangered, such as the Miami tiger beetle.

We strongly encourage that anyone conducting activities, including utilities development and maintenance on lands potentially supporting Miami tiger beetles to consult with the Service on their activities to ensure they do not jeopardize the continued survival and

recovery of the beetle and that incidental take may be authorized. The Miami tiger beetle is one of several federally listed species that occurs in Miami-Dade County. Consultation could be done on a programmatic basis for power restoration and routine maintenance of ROWs for all listed species.

(28) *Comment:* Three comments received addressed the FWC's biological status review of the Miami tiger beetle. Two of the comments questioned how the FWC and Service would coordinate efforts. One of the commenters stated that the FWC should take the lead without duplication of efforts at the Federal level.

Our Response: It is our policy to coordinate with the FWC on all proposed and final listings, and we will continue to do so for all future actions. As stated in the Previous Federal Actions section of the proposed rule, the Service was petitioned to list the Miami tiger beetle. The Service's listing process and the Commission's biological status review are two separate and independent actions. However, we have incorporated language under *Factor D* below to reflect that the FWC was requested to undertake a biological status review on the Miami tiger beetle and is currently doing so.

(29) *Comment:* One commenter requested that any underlying data that were used in the proposed rule (*e.g.*, field notes; photographs with notes on use of lighting, equipment, filters, or adjustments; any statistical analyses, collection, and laboratory data from genetic work; and peer review comments from Brzoska *et al.* (2011)) be included in a re-publication of the proposed rule.

Our Response: In rulemaking decisions under the Act, the Service makes available all cited literature used that is not already publicly available. We post grey literature, information from States, or other unpublished resources on *http://www.regulations.gov* concurrent with the **Federal Register** publication.

(30) *Comment:* One commenter stated that it was inappropriate to make references to the Coral Reef Commons proposed development and habitat conservation plan (HCP) in the proposed rule.

Our Response: Under *Factor A* below we discuss the threat of proposed development in the Richmond Pine Rocklands, but we do not directly use the name ''Coral Reef Commons.'' Information about this proposed development was cited using the publicly available draft HCP. This discussion is appropriate and required under section 4 of the Act (16 U.S.C. 1533), because the proposed development of Coral Reef Commons is within suitable Miami tiger beetle habitat and, therefore, must be included in an analysis of the threatened destruction of habitat.

(31) *Comment:* Two commenters questioned the peer review of documents used in the proposed listing rule, the reliance on the work of Dr. Barry Knisley, and the affiliation between Dr. Knisley and one of the petitioners.

Our Response: Dr. Knisley is regarded as one of the nation's foremost experts on tiger beetles generally (*e.g.,* has (co)authored 58 publications including 3 books on tiger beetles) and the Miami tiger beetle specifically, and he has performed the vast majority of research on the Miami tiger beetle, including extensive surveys under contract with the Service. Thus, the heavy reliance on his work in the listing rule is fully appropriate. Christopher Wirth, one of the petitioners, was a former student and research assistant under Dr. Knisley; however, Dr. Knisley is not included as one of the petitioners. As noted by the commenters, Dr. Knisley has stated that his research focuses on the conservation of rare tiger beetles and unique natural areas. There is no basis or evidence to support the commenters' claims of bias on Dr. Knisley's part.

(32) *Comment:* Two commenters claim that photographs published in Brzoska *et al.* (2011, entire) appear to be digitally enhanced and, if so, must be fully disclosed. One of these commenters also presents pictures of the Miami and scabrous tiger beetles from the Florida State Collection of Arthropods (FSCA) and claims there are no discernible differences other than color.

Our Response: Photographs of specimens in Brzoska *et al.* (2011, entire) were taken by Christopher Wirth. He has informed us that the photographs were not digitally enhanced, and rely only on reflected flash lighting (Wirth, 2016b, pers. comm.). In regard to the photographs taken from the FSCA, it appears that the Miami and scabrous tiger beetles not only differ in coloration, but also the presence of a medial spot and thicker apical lunule (crescent shape) in the scabrous tiger beetle.

Summary of Changes From the Proposed Rule

Based on information we received in peer review and public comments, we made the following changes:

In the Background section:

(1) We included larval microhabitat as an important factor to differentiate species.

(2) We revised the historical range of the Miami tiger beetle as possibly localized considering the lack of collection for nearly 70 years.

(3) We updated literature citations to those most currently available and replaced and removed citations from Duran and Gwiazdowski (in preparation) and Spomer (2014, pers. comm.), respectively.

In the Summary of Factors Affecting the Species section:

(4) We included run-off from potential development as a threat to habitat quality.

(5) We included discussion of the Zika virus under the potential for pesticide exposure.

(6) We included new observations of robber fly species in Miami tiger beetle habitat.

(7) We revised wording related to the location of the two known Miami tiger beetle populations.

(8) We added a citation and text pertaining to the necessity of fire to maintain pine rockland habitat.

(9) We included the State of Florida's biological status review of the Miami tiger beetle.

(10) We included new information on known collection of the Miami tiger beetle.

(11) We included text regarding maintenance of EELs lands within Miami-Dade County.

(12) We made minor editorial changes in verb tense, language clarification, and redundant word usage.

Summary of Factors Affecting the Species

Section 4 of the Act and its implementing regulations at 50 CFR part 424 set forth the procedures for adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants. Under section 4(a)(1) of the Act, we may list a species based on any of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors affecting its continued existence. Listing actions may be warranted based on any of the above threat factors, singly or in combination. Each of these factors is discussed below:

Factor A. The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The Miami tiger beetle is threatened by habitat loss and modification caused by changes in land use and inadequate land management, including the lack of prescribed burns and vegetation (native and nonnative) encroachment (discussed separately below). Habitat loss and modification are expected to continue and increase, affecting any populations on private lands as well as those on protected lands that depend on management actions (*i.e.,* prescribed fire) where these actions could be precluded by surrounding development.

Habitat Loss

The Miami tiger beetle has experienced substantial destruction, modification, and curtailment of its habitat and range (Brzoska *et al.* 2011, pp. 5–6; Knisley 2013, pp. 7–8; Knisley 2015a, p. 11). The pine rockland community of south Florida, on which the beetle depends, is critically imperiled globally (FNAI 2013, p. 3). Destruction of the pinelands for economic development has reduced this habitat by 90 percent on mainland south Florida (O'Brien 1998, p. 208). Outside of ENP, only about 1 percent of the Miami Rock Ridge pinelands have escaped clearing, and much of what is left is in small remnant blocks isolated from other natural areas (Herndon 1998, p. 1).

One of the two known populations of the Miami tiger beetle occurs within the Richmond Pine Rocklands, on parcels of publicly or privately owned lands that are partially developed, yet retain some undeveloped pine rockland habitat. In the 1940s, the Naval Air Station Richmond was built largely on what is currently the Zoo Miami parcel. Much of the currently occupied Miami tiger beetle habitat on the Zoo Miami parcel was scraped for the creation of runways and blimp hangars (Wirth 2015, entire). The fact that this formerly scraped pine rockland area now provides suitable habitat for the Miami tiger beetle demonstrates the restoration potential of disturbed pine rockland habitat (Possley 2015, entire; Wirth 2015, entire).

Any current known or unknown, extant Miami tiger beetle populations or potentially suitable habitat that may occur on private lands or non-conservation public lands, such as elsewhere within the Richmond Pine Rocklands or surrounding pine rocklands, are vulnerable to habitat loss. Miami-Dade County leads the State in gross urban density at 8,343 people per square mile (*https://www.bebr.ufl.edu/population/publications/measuring-population-density-counties-florida* [accessed May 18, 2016]), and development and human population growth are expected to continue in the future. By 2025, Miami-Dade County is predicted to near or exceed a population size of 3 million people (Rayer and Wang 2016, p. 7). This predicted economic and population growth will further increase demands for land, water, and other resources, which will undoubtedly exacerbate the threats to the survival and recovery of the Miami tiger beetle.

Remaining habitat is at risk of additional losses and degradation. Of high and specific concern are proposed development projects within the Richmond Pine Rocklands (CBD *et al.* 2014, pp. 19–24). In 2013, plans for potential development on portions of the Zoo Miami and USCG parcels were announced in local newspapers (Munzenrieder 2013, entire) and subsequently advertised through other mechanisms (*https://www.miamidade.gov/dpmww/SolicitationDetails.aspx?Id=Invitation%20To%20Negotiate%20(ITN)* [accessed April 24, 2014]). The proposed development includes the following: Theme park rides; a seasonally opened water park; a 400-room hotel with a Sony Music Theatre performance venue; a 2,900-square meter (30,000-square feet) retail and restaurant village; an entertainment center with movie theaters and bowling; an outdoor area for sports; a landscaped pedestrian and bike path; parking; and a 2.4-km (1.5-mi) transportation link that unifies the project's parts (Dinkova 2014a, p. 1). The proposed development will require at least a portion of the USCG parcel, which would occur through purchase or a land swap (Dinkova 2014b, p. 1).

The Service notified Miami-Dade County in a December 2, 2014, letter about proposed development concerns with potential impacts to listed, candidate, and imperiled species, including the Miami tiger beetle. Plans for the proposed development on the Zoo Miami and USCG parcels have yet to be finalized, so potential impacts to the Miami tiger beetle and its habitat cannot be fully assessed. However, based upon available information provided to date, it appears that the proposed development will impact suitable or potentially suitable beetle habitat.

In July 2014, the Service became aware of another proposed development project on privately owned lands within the Richmond Pine Rocklands. In a July 15, 2014, letter to the proposed developer, the Service named the Miami tiger beetle (along with other federally listed and proposed species and habitats) as occurring within the project footprint, and expressed concern over indirect impacts (*e.g.,* the ability to conduct prescribed fire within the Richmond Pine Rocklands). Based upon applicant plans received in May 2015, the proposed project will contain a variety of commercial, residential, and other development within approximately 56 ha (138 ac) (Ram 2015, p. 4). It is unknown if the Miami tiger beetle occurs on the proposed development site, as only one limited survey has been conducted on a small portion (approximately 1.7 ha (4.3 ac)) of the proposed development area and more surveys are needed. Based upon available information, it appears that the proposed developments will likely impact suitable or potentially suitable beetle habitat, because roughly 13 ha (33 ac) of the proposed development are planned for intact and degraded pine rocklands (Ram 2015, p. 91). The Service has met with the developers to learn more about their plans and how they will address listed, candidate, and imperiled species issues; negotiations are continuing, and a draft habitat conservation plan has been developed (Ram 2015, entire).

Given the species' highly restricted range and uncertain viability, any additional losses are significant. Additional development might further limit the ability to conduct prescribed burns or other beneficial management activities that are necessary to maintain the open areas within pine rockland habitat that are required by the beetle. The pattern of public and private ownership presents an urban wildland interface, which is a known constraint for implementing prescribed fire in similar pine rockland habitats (*i.e.,* at National Key Deer Refuge and in southern Miami-Dade County) (Snyder *et al.* 2005, p. 2; Service 2009, p. 50; 79 FR 47180, August 12, 2014; 79 FR 52567, September 4, 2014). The Florida Department of Forestry has limited staff in Miami-Dade County, and they have been reluctant to set fires for liability reasons (URS 2007, p. 39) (see ''Land Management,'' below). In addition to constraints with fire management, run-off from development (*e.g.,* structures, asphalt, concrete) into adjacent pine rockland habitat will likely increase and further alter the habitat quality (Schultz, 2016, pers. comm.).

In summary, given the Miami tiger beetle's highly restricted range and uncertain viability, any additional losses of habitat within its current range present substantial threats to its survival and recovery.

Land Management

The threat of habitat destruction or modification is further exacerbated by a lack of adequate fire management (Brzoska *et al.* 2011, pp. 5–6; Knisley 2013, pp. 7–8; Knisley 2015a, p. 2). Historically, lightning-induced fires were a vital component in maintaining native vegetation within the pine rockland ecosystem, as well as for opening patches in the vegetation required by the beetles (Loope and Dunevitz 1981, p. 5; Slocum *et al.* 2003, p. 93; Snyder *et al.* 2005, p. 1; Knisley 2011a, pp. 31–32). Open patches in the landscape, which allow for ample sunlight for thermoregulation, are necessary for Miami tiger beetles to perform their normal activities, such as foraging, mating, and oviposition (Knisley 2011a, p. 32). Larvae also require these open patches to complete their development free from vegetation encroachment.

Without fire, successional change from tropical pineland to hardwood hammock is rapid, and displacement of native plants by invasive, nonnative plants often occurs, resulting in vegetation overgrowth and litter accumulation in the open, bare, sandy patches that are necessary for the Miami tiger beetle. In the absence of fire, pine rockland will succeed to tropical hardwood hammock in 20 to 30 years, as a thick duff layer accumulates and eventually results in the appearance of organic rich humic soils rather than organic poor mineral soils (Alexander 1967, p. 863; Wade *et al.* 1980, p. 92; Loope and Dunevitz 1981, p. 6; Snyder *et al.* 1990, p. 260). Fire is not only a necessity for maintaining pine rockland habitat, but also for preventing catastrophic loss to surrounding property and life in an urban landscape (URS 2007, p. 38). Studies and management plans have emphasized the necessity of prescribed fire in pine rockland habitat and highlighted it as preferential, compared to the alternatives to prescribed fire (*e.g.,* herbicide application and mechanical treatment) (Snyder *et al.* 2005, p. 1; URS 2007, p. 39).

Miami-Dade County has implemented various conservation measures, such as burning in a mosaic pattern and on a small scale, during prescribed burns, to help conserve the Miami tiger beetles and other imperiled species and their habitats (URS, 2007, p. J. Maguire, 2010, pers. comm.). Miami-Dade County Parks and Recreation staff has burned several of its conservation lands on fire return intervals of approximately 3 to 7 years. However, implementation of the county's prescribed fire program has been hampered by a shortage of resources, logistical difficulties, smoke management, and public concern related to burning next to residential areas (Snyder *et al.* 2005, p. 2; FNAI 2010, p. 5). Many homes and other developments have been built in a mosaic of pine rockland, so the use of prescribed fire in many places has become complicated because of potential danger to structures and smoke generated from the burns. The risk of liability and limited staff in Miami-Dade County has hindered prescribed fire efforts (URS 2007, p. 39). Nonprofit organizations, such as the Institute for Regional Conservation, have faced similar challenges in conducting prescribed burns, due to difficulties with permitting and obtaining the necessary permissions, as well as hazard insurance limitations (Bradley and Gann 2008, p. 17; G. Gann, 2013, pers. comm.). Few private landowners have the means or desire to implement prescribed fire on their property, and doing so in a fragmented urban environment is logistically difficult and costly (Bradley and Gann 2008, p. 3). Lack of management has resulted in rapid habitat decline on most of the small pine rockland fragments, with the disappearance of federally listed and candidate species where they once occurred (Bradley and Gann 2008, p. 3).

Despite efforts to use prescribed fire as a management tool in pine rockland habitat, sites with the Miami tiger beetle are not burned as frequently as needed to maintain suitable beetle habitat. Most of the occupied beetle habitat at Miami-Dade County's Zoo Miami parcel was last burned in January and October of 2007; by 2010, there was noticeable vegetation encroachment into suitable habitat patches (Knisley 2011a, p. 36). The northern portion (Zoo A) of the Zoo Miami site was burned in November 2014 (Knisley 2015c, p. 3). Several occupied locations at the CSTARS parcel were burned in 2010, but four other locations at CSTARS were last burned in 2004 and 2006 (Knisley 2011a, p. 36). No recent burns are believed to have occurred at the USCG parcel (Knisley 2011a, p. 36). The decline in adult numbers at the two primary Zoo Miami patches (A and B) in 2014 surveys, and the few larvae found there in recent years, may be a result of the observed loss of bare open patches (Knisley 2015a, p. 12; Knisley 2015c, pp. 1–3). Surveys of the CSTARS and USCG parcels in 2014 found similar loss of open patches from encroaching vegetation (Knisley 2015a, p. 13).

Alternatives to prescribed fire, such as mechanical removal of woody vegetation, are not as ecologically effective as fire. Mechanical treatments do not replicate fire's ability to recycle nutrients to the soil, a process that is critical to many pine rockland species (URS 2007, p. 39). To prevent organic soils from developing, uprooted woody debris requires removal, which adds to the required labor. The use of mechanical equipment can also damage soils and inadvertently include the removal or trampling of other nontarget species or critical habitat (URS 2007, p. 39).

Nonnative plants have significantly affected pine rocklands (Bradley and Gann 1999, pp. 15, 72; Bradley and Gann 2005, numbers not applicable; Bradley and van der Heiden 2013, pp. 12–16). As a result of human activities, at least 277 taxa of nonnative plants have invaded pine rocklands throughout south Florida (Service 1999, p. 3–175). *Neyraudia neyraudiana* (Burma reed) and *Schinus terebinthifolius* (Brazilian pepper), which have the ability to rapidly invade open areas, threaten the habitat needs of the Miami tiger beetle (Bradley and Gann 1999, pp. 13, 72). *S. terebinthifolius,* a nonnative tree, is the most widespread and one of the most invasive species. It forms dense thickets of tangled, woody stems that completely shade out and displace native vegetation (Loflin 1991, p. 19; Langeland and Craddock Burks 1998, p. 54). *Acacia auriculiformis* (earleaf acacia), *Melinis repens* (natal grass), *Lantana camara* (shrub verbena), and *Albizia lebbeck* (tongue tree) are some of the other nonnative species in pine rocklands. More species of nonnative plants could become problems in the future, such as *Lygodium microphyllum* (Old World climbing fern), which is a serious threat throughout south Florida.

Nonnative, invasive plants compete with native plants for space, light, water, and nutrients, and make habitat conditions unsuitable for the Miami tiger beetle, which responds positively to open conditions. Invasive nonnatives also affect the characteristics of a fire when it does occur. Historically, pine rocklands had an open, low understory where natural fires remained patchy with low temperature intensity. Dense infestations of *Neyraudia neyraudiana* and *Schinus terebinthifolius* cause higher fire temperatures and longer burning periods. With the presence of invasive, nonnative species, it is uncertain how fire, even under a managed situation, will affect habitat conditions or Miami tiger beetles.

Management of nonnative, invasive plants in pine rocklands in Miami-Dade County is further complicated because the vast majority of pine rocklands are

small, fragmented areas bordered by urban development. Fragmentation results in an increased proportion of ''edge'' habitat, which in turn has a variety of effects, including changes in microclimate and community structure at various distances from the edge (Margules and Pressey 2000, p. 248); altered spatial distribution of fire (greater fire frequency in areas nearer the edge) (Cochrane 2001, pp. 1518–1519); and increased pressure from nonnative, invasive plants and animals that may out-compete or disturb native plant populations. Additionally, areas near managed pine rockland that contain nonnative species can act as a seed source of nonnatives, allowing them to continue to invade the surrounding pine rockland (Bradley and Gann 1999, p. 13).

Conservation Efforts To Reduce the Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range

In 2005, the Service funded the Institute for Regional Conservation (IRC) to facilitate restoration and management of privately owned pine rockland habitats in Miami-Dade County. This initiative included prescribed burns, nonnative plant control, light debris removal, hardwood management, reintroduction of pines where needed, and development of management plans. The Pine Rockland Initiative includes 10-year cooperative agreements between participating landowners and the Service/IRC to ensure restored areas will be managed appropriately during that time. Although most of these objectives regarding nonnative plant control, creation of firebreaks, removal of excessive fuel loads, and management plans have been achieved, IRC has not been able to conduct the desired prescribed burns, due to logistical difficulties as discussed above (see ''Land Management''). IRC has recently resolved some of the challenges regarding contractor availability for prescribed burns and the Service has extended IRC's funding period through August 2016. Results from anticipated fire management restoration activities will be available in the fall of 2016.

Fairchild Tropical Botanic Garden, with the support of various Federal, State, local, and nonprofit organizations, has established the ''Connect to Protect Network.'' The objective of this program is to encourage widespread participation of citizens to create corridors of healthy pine rocklands by planting stepping stone gardens and rights-of-way with native pine rockland species, and restoring isolated pine rockland fragments. Although these projects may serve as valuable components toward the conservation of pine rockland species and habitat, they are dependent on continual funding, as well as participation from private landowners, both of which may vary through time.

Summary of Factor A

We have identified a number of threats to the habitat of the Miami tiger beetle that occurred in the past, continue currently, and are expected to impact the species in the future. Habitat loss, fragmentation, and degradation, and associated pressures from increased human population, are major threats; these threats are expected to continue, placing the species at greater risk. The species' occurrence on pine rocklands that are partially protected from development (see ''Local'' under Factor D, below) tempers some impacts, yet the threat of further loss and fragmentation of habitat remains. Various conservation programs are in place, and while these help to reduce some threats of habitat loss and modification, these programs are limited in nature. In general, available resources and land management activities (*e.g.,* prescribed fire and invasive plant control) on public and private lands are inadequate to prevent modification and degradation of the species' habitat. Therefore, based on our analysis of the best available information, the present and future loss and modification of the species' habitat are major threats to the Miami tiger beetle throughout its range.

Factor B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

Collection

Rare beetles, butterflies, and moths are highly prized by collectors. Tiger beetles are the subject of more intense collecting and study than any other single beetle group (Pearson 1988, pp. 123–124; Knisley and Hill 1992a, p. 9; Choate 1996, p. 1; Knisley *et al.* 2014, p. 94). Interest in the genus *Cicindela* (and *Cicindelidia*) is reflected in a journal entitled ''*Cicindela,''* which has been published quarterly since 1969 and is exclusively devoted to the genus. Tiger beetle collecting and the sale and trade of specimens have increased in popularity in recent years (Knisley *et al.* 2014, p. 138). Among the professional researchers and many amateurs that collect tiger beetles are individuals that take only small numbers; however, there are also avid collectors who take as many specimens as possible, often for sale or trade. At present, it is estimated that nationally 50 to 100 individuals collect tiger beetles, and approximately 50 individuals are avid collectors (Knisley 2015b, p. 14). Knowledge of and communication with many of these collectors suggest sale and trading of specimens has become much more common in recent years. The increased interest in collecting, along with photographing specimens, seems to have been stimulated in part due to the publication of the tiger beetle field guide (Pearson *et al.* 2006, entire). Collectors are especially interested in the less common forms, and may have little regard for their conservation (Knisley 2015b, p. 14). Recently, there was posting on social media from a tiger beetle collector with images of several rare species, including nine specimens of the Miami tiger beetle that are thought to have been collected at Zoo Miami (Wirth, 2016a, pers. comm.). There is ample evidence of collectors impacting imperiled and endangered butterflies (Gochfeld and Burger 1997, pp. 208–209) and even contributing to extirpations (Duffey 1968, p. 94). For example, the federally endangered Mitchell's satyr (*Neonympha mitchellii mitchellii*) is believed to have been extirpated from New Jersey due to overcollecting (57 FR 21567, May 20, 1992; Gochfeld and Burger 1997, p. 209).

Collection is a serious threat to the Miami tiger beetle due to the species' extreme rarity (a factor that increases demand by collectors) and vulnerability (*i.e.,* uncertain status and viability with just two known populations and few individuals). Collection is especially problematic if adults are taken prior to oviposition or from small, isolated, or poor-quality sites. Because no large, high-quality sites are currently known, any collection can have serious ramifications on the survival of the remaining population(s).

The recent description of the species did not disclose the exact locations of occurrence, due to concerns with collection (Brzoska *et al.* 2011, p. 5); however, it is now believed that occurrences at Zoo Miami, USCG, and CSTARS in the Richmond population are fairly well known, especially in the tiger beetle collecting community (B. Knisley, 2014b, pers. comm.). We have no specific information on the collection pressure for the Miami tiger beetle, but it is expected to be high based upon what has transpired in comparable situations with other federally listed and imperiled tiger beetles and butterflies both nationwide and in Florida. For example, the federally endangered Ohlone tiger beetle (*Cicindela ohlone*) was collected from its type locality in California after its

description in the scientific literature (66 FR 50340, October 3, 2001) (Knisley 2015a, p. 14). Similarly, overcollection of the Highlands tiger beetle may have contributed to the extirpation of that species from its type locality in Florida (Knisley and Hill 1992a, p. 9). An estimated 500 to 1,000 adult Highlands tiger beetles had been collected at this site during a several year period after its initial discovery (Knisley and Hill 1992a, p. 10).

Markets currently exist for tiger beetles. Specimens of two Florida tiger beetles, the Highlands tiger beetle, a Federal candidate species, and the scabrous tiger beetle are regularly offered for sale or trade through online insect dealers (The Bugmaniac 2015 and eBay 2015). Considering the recent rediscovery of the Miami tiger beetle and concerns regarding its continued existence, the desirability of this species to private collectors is expected to increase, which may lead to similar markets and increased demand.

Another reason it is not possible to assess actual impacts from collection is that known occurrences of the Miami tiger beetle are not regularly monitored. Two known occurrences on the USCG and CSTARS parcels are gated and accessible only by permit, so collection from these sites is unlikely unless authorized by the property owners. However, other occupied and potential habitats at neighboring and surrounding areas are much more accessible. Risk of collection is concerning at any location and is more likely at less secure sites. Collection potential at Zoo Miami and other accessible sites is high, in part because it is not entirely gated and only periodically patrolled (Knisley, 2014b, pers. comm.). Most of the remaining pine rockland habitat outside of ENP in Miami-Dade County is owned by the County or in private ownership and not regularly monitored or patrolled.

We consider collection to be a significant threat to the Miami tiger beetle in light of the few known remaining populations, low abundance, and highly restricted range. Even limited collection from the remaining populations could have deleterious effects on reproductive and genetic viability of the species and could contribute to its extinction. Removal of adults early in the flight season or prior to oviposition can be particularly damaging, as it further reduces potential for successful reproduction. A population may be reduced to below sustainable numbers (Allee effect) by removal of females, reducing the probability that new occurrences will be founded. Small and isolated occurrences in poor habitat may be at greatest risk (see Factor E discussion, below) as these might not be able to withstand additional losses. Collectors may be unable to recognize when they are depleting occurrences below the thresholds of survival or recovery (Collins and Morris 1985, pp. 162–165).

With regard to scientific research, we do not believe that general techniques used to date have had negative impacts on the species or its habitat. Visual index surveys and netting for identification purposes have been performed during scientific research and conservation efforts with the potential to disturb or injure individuals or damage habitat. Limited collection as part of laboratory rearing studies or taxonomic verification has occurred at some sites, with work authorized by permits. Based on the extreme rarity of the species, various collecting techniques (*e.g.,* pitfall traps, Malaise traps, light traps) for other more general insect research projects should be considered a potential threat.

Summary of Factor B

Collection interest in tiger beetles, especially rare species, is high, and markets currently exist. While it is not possible to quantify the impacts of collection on the Miami tiger beetle, collection of the Highlands tiger beetle has been documented in large numbers, and collection is currently occurring. The risk of collection of the Miami tiger beetle from both occupied and other potential habitat is high, as some sites are generally accessible and not monitored or patrolled. Due to the combination of few remaining populations, low abundance, and restricted range, we have determined that collection is a significant threat to the species and could potentially occur at any time. Even limited collection from the remaining populations could have negative effects on reproductive and genetic viability of the species and could contribute to its extinction.

Factor C. Disease or Predation

There is no evidence of disease or pathogens affecting the Miami tiger beetle, although this threat has not been investigated. Parasites and predators, however, have been found to have significant impacts on adult and larval tiger beetles. In general, parasites are considered to have greater effects on tiger beetles than predators (Nagano 1982, p. 34; Pearson 1988, pp. 136–138). While parasites and predators play important roles in the natural dynamics of tiger beetle populations, the current small size of the Miami tiger beetle populations may render the species more vulnerable to parasitism and predation than historically, when the species was more widely distributed and, therefore, more resilient.

Known predators of adult tiger beetles include birds, lizards, spiders, and especially robber flies (family Asilidae) (Pearson *et al.* 2006, p. 183). Researchers and collectors have often observed robber flies in the field capturing tiger beetles out of the air. Pearson (1985, pp. 68–69; 1988, p. 134) found tiger beetles with orange abdomens (warning coloration) were preyed upon less frequently than similar-sized tiger beetles without the orange abdomens. His field trials also determined that size alone provided some protection from robber flies, which are usually only successful in killing prey that is smaller than they are. This was the case with the hairy-necked tiger beetle (*Cicindela hirticollis*) being attacked at a significantly higher rate than the larger northeastern beach tiger beetle in Maryland (Knisley and Hill 2010, pp. 54–55).

On the basis of these field studies, it was estimated that robber flies may cause over 50 percent mortality to the hairy-necked tiger beetle and 6 percent to the northeastern beach tiger beetle population throughout the flight season (Knisley and Hill 2010, pp. 54–55). The small body size of the Miami tiger beetle, even with its orange abdomen, suggests it would be susceptible to robber fly attack. A few species of robber flies (*Polacantha gracilis, Triorla interrupta, Efferia* sp., and *Diogmites* sp.) have been observed in pine rocklands where the Miami tiger beetle is present (Mays and Cook 2015, p. 5; J. Kardys, 2016, pers. comm.); however, they are a common predator of the closely related Highlands tiger beetle (Knisley and Hill 2013, p. 40). In 24 hours of field study, Knisley and Hill (2013, p. 40) observed 22 attacks by robber flies on Highlands tiger beetles, 5 of which resulted in the robber fly killing and consuming the adult beetles.

Most predators of adult tiger beetles are opportunistic, feeding on a variety of available prey and, therefore, probably have only a limited impact on tiger beetle populations. However, predators, and especially parasites, of larvae are more common, and some attack only tiger beetles. Ants are regarded as important predators on tiger beetles, and although not well studied, they have been reported having significant impact on first instar larvae of some Arizona tiger beetles (*Cicindela* spp.) (Knisley and Juliano 1988, p. 1990). A study with the Highlands tiger beetle found ants accounted for 11 to 17 percent of larval mortality at several sites, primarily involving first instars (Knisley and Hill

2013, p. 37). During surveys for the Miami tiger beetle, various species of ants were commonly seen co-occurring in the sandy patches with adults and larvae, but their impact, if any, is unknown at this time.

Available literature indicates that the most important tiger beetle natural enemies are tiphiid wasps and bombyliid flies, which parasitize larvae (Knisley and Schultz 1997, pp. 53–57). The wasps enter the larvae burrows, and paralyze and lay an egg on the larvae. The resulting parasite larva consumes the host tiger beetle larva. Bombyliid flies (genus *Anthrax*) drop eggs into larval burrows with the resulting fly larvae consuming the tiger beetle larva. These parasitoids accounted for 20 to 80 percent mortality in larvae of several northeastern tiger beetles (Pearson and Vogler 2001, p. 172). Parasitism from bombyliid flies accounted for 13 to 25 percent mortality to larvae of the Highlands tiger beetle at several sites (Knisley and Hill 2013, p. 37). Generally, these rates of parasitism are similar to those reported for other species of tiger beetles (Bram and Knisley 1982, p. 99; Palmer 1982, p. 64; Knisley 1987, p. 1198). No tiphiid wasps or bombyliid flies were observed during field studies with the Miami tiger beetle (Knisley 2015a, p. 15); however, tiphiid wasps are small, secretive, and evidence of their attacks is difficult to find (Knisley 2015b, p. 16).

Summary of Factor C

Potential impacts from predators or parasites to the Miami tiger beetle are unknown. Given the small size of the Miami tiger beetle's two populations, the species is likely vulnerable to predation and parasitism.

Factor D. The Inadequacy of Existing Regulatory Mechanisms

Section 4(b)(1)(A) of the Act requires the Service to take into account ''those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species. . . .'' In relation to Factor D, we interpret this language to require the Service to consider relevant Federal, State, and Tribal laws, plans, regulations, and other such mechanisms that may minimize any of the threats we describe in threat analyses under the other four factors, or otherwise enhance conservation of the species. We give strongest weight to statutes and their implementing regulations and to management direction that stems from those laws and regulations. An example would be State governmental actions enforced under a State statute or constitution, or Federal action under statute.

Federal

The Miami tiger beetle currently has no Federal protective status and has limited regulatory protection in its known occupied and suitable habitat. The species is not known to occur on National Wildlife Refuge System or National Park Service land. The Miami tiger beetle is known to occur on USCG lands within the Richmond Pinelands Complex, and there are limited protections for the species on this property; any USCG actions or decisions that may have an effect on the environment would require consideration and review under the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*). No Federal permit or other authorization is currently needed for potential impacts to known occurrences on county-owned and private land. The Miami tiger beetle could be afforded limited protections from sections 7 and 10 of the Act based on its co-occurrence with listed species or their critical habitat, if applicable, within the Richmond Pine Rocklands, including species such as the Bartram's scrub-hairstreak butterfly (*Strymon acis bartrami*), Florida leafwing butterfly (*Anaea troglodyta floridalis*), Florida bonneted bat (*Eumops floridanus*), *Brickellia mosieri* (Florida brickell-bush), *Linum carteri* var. *carteri* (Carter's small-flowered flax), *Chamaesyce deltoidea* ssp. *deltoidea* (deltoid spurge), and *Polygala smallii* (tiny polygala). However, effect determinations and minimization and avoidance criteria for any of these listed species are unlikely to be fully protective to the Miami tiger beetle considering its extreme rarity. The listed species have broader distributions that allow for more flexibility with appropriate conservation measures. In contrast, with only two known populations and few remaining adults, the Miami tiger beetle has a much lower threat tolerance. Although the beetle is not currently federally protected, the Service has met with Miami-Dade County, the USCG, the University of Miami, and potential developers to express our concern regarding listed, proposed, candidate, and imperiled species in the Richmond Pine Rocklands, including the Miami tiger beetle. We have recommended that management and habitat conservation plans include and fully consider this species and its habitat.

State

The Miami tiger beetle is not currently listed as endangered or threatened by the State of Florida, so there are no existing regulations designated to protect it. The Miami tiger beetle is recognized as a species of greatest conservation need by the FWC (FWC 2012, p. 89). Species of greatest conservation need designation is part of the State's strategy to recognize and seek funding opportunities for research and conservation of these species, particularly through the State Wildlife Grants program. The list is extensive and, to date, we are unaware of any dedicated funding from this program for the beetle. The State was also petitioned and has started a biological status review of the species. The Miami tiger beetle is not known to occur on lands owned by the State of Florida; however, not all State-owned pine rockland parcels have been adequately surveyed. It is possible that some State-owned parcels do provide potentially suitable habitat for, and support occurrences of, the Miami tiger beetle.

Local

In 1984, section 24–49 of the Code of Miami-Dade County established regulation of County-designated Natural Forested Communities (NFCs), which include both pine rocklands and tropical hardwood hammocks. These regulations were placed on specific properties throughout the county by an act of the Board of County Commissioners in an effort to protect environmentally sensitive forest lands. The Miami-Dade County Department of Regulatory and Economic Resources (RER) has regulatory authority over NFCs, and is charged with enforcing regulations that provide partial protection on the Miami Rock Ridge. Miami-Dade Code typically allows up to 20 percent of a pine rockland designated as NFC to be developed, and requires that the remaining 80 percent be placed under a perpetual covenant. In certain circumstances, where the landowner can demonstrate that limiting development to 20 percent does not allow for ''reasonable use'' of the property, additional development may be approved. NFC landowners are also required to obtain an NFC permit for any work within the boundaries of the NFC on their property. The NFC program is responsible for ensuring that NFC permits are issued in accordance with the limitations and requirements of the code and that appropriate NFC preserves are established and maintained in conjunction with the issuance of an NFC permit. The NFC program currently regulates approximately 600 pine rockland or pine rockland/hammock properties, comprising approximately 1,200 ha

(3,000 ac) of habitat (J. Joyner, 2013, pers. comm.). When RER discovers unpermitted activities, it takes appropriate enforcement action, and seeks restoration when possible. Because these regulations allow for development of pine rockland habitat, and because unpermitted development and destruction of pine rockland continues to occur, the regulations are not fully effective at protecting against loss of Miami tiger beetles or their potential habitat.

Under Miami-Dade County ordinance (section 26–1), a permit is required to conduct scientific research (rule 9) on county environmental lands. In addition, rule 8 of this ordinance provides for the preservation of habitat within County parks or areas operated by the Parks and Recreation Department. The scientific research permitting effectively allows the County to monitor and manage the level of scientific research and collection of the Miami tiger beetle, and the preservation of pine rockland habitat benefits the beetle.

Fee Title Properties: In 1990, Miami-Dade County voters approved a 2-year property tax to fund the acquisition, protection, and maintenance of environmentally endangered lands (EEL). The EEL Program identifies and secures these lands for preservation. Under this program to date, Miami-Dade County has acquired a total of approximately 255 ha (630 ac) of pine rocklands. In addition, approximately 445 ha (1,550 ac) of pine rocklands are owned by the Miami-Dade County Parks and Recreation Department and managed by the EEL Program, including some of the largest remaining areas of pine rockland habitat on the Miami Rock Ridge outside of ENP (*e.g.,* Larry and Penny Thompson Park, Zoo Miami pinelands, and Navy Wells Pineland Preserve) (*http://www.miamidade.gov/environment/endangered-lands.asp#1* [Accessed May 11, 2016]). Unfortunately, many of these pine rocklands are not managed to maintain the open, sparsely vegetated areas that are needed by the beetle.

Summary of Factor D

There are some regulatory mechanisms currently in place to protect the Miami tiger beetle and its habitat on non-Federal lands. However, there are no Federal regulatory protections for the Miami tiger beetle, other than the limited protections afforded for listed species and critical habitat that co-occur with the Miami tiger beetle. While local regulations provide some protection, they are generally not fully effective (*e.g.,* NFC regulations allow development of 20 percent or more of pine rockland habitat) or implemented sufficiently (*e.g.,* unpermitted clearing of pine rockland habitat) to alleviate threats to the Miami tiger beetle and its habitat. The degradation of habitat for the Miami tiger beetle is ongoing despite existing regulatory mechanisms. Based on our analysis of the best available information, we find that existing regulatory measures, due to a variety of constraints, are inadequate to fully address threats to the species throughout its range.

Factor E. Other Natural or Manmade Factors Affecting Its Continued Existence

Few, Small, Isolated Populations

The Miami tiger beetle is vulnerable to extinction due to its severely reduced range, the fact that only two small populations remain, and the species' relative isolation.

Demographic stochasticity refers to random variability in survival or reproduction among individuals within a population (Shaffer 1981, p. 131). Demographic stochasticity can have a significant impact on population viability for populations that are small, have low fecundity, and are short-lived. In small populations, reduced reproduction or die-offs of a certain age-class will have a significant effect on the whole population. Although of only minor consequence to large populations, this randomly occurring variation in individuals becomes an important issue for small populations.

Environmental stochasticity is the variation in birth and death rates from one season to the next in response to weather, disease, competition, predation, or other factors external to the population (Shaffer 1981, p. 131). For example, drought or predation, in combination with a low population year, could result in extirpation. The origin of the environmental stochastic event can be natural or human-caused.

In general, tiger beetles that have been regularly monitored consistently exhibit extreme fluctuations in population size, often apparently due to climatic or other habitat factors that affect recruitment, population growth, and other population parameters. In 20 or more years of monitoring, most populations of the northeastern beach and puritan tiger beetles (*Cicindela puritan*) have exhibited 2 to 5 or more fold differences in abundance (Knisley 2012, entire). Annual population estimates of the Coral Pink Sand Dunes tiger beetle (*Cicindela albissima*) have ranged from fewer than 600 to nearly 3,000 adults over a 22-year period (Gowan and Knisley 2014, p. 124). The Miami tiger beetle has not been monitored as extensively as these species, but in areas where Miami tiger beetles were repeatedly surveyed, researchers found fluctuations that were several fold in numbers (Knisley 2015a, p. 24). While these fluctuations appear to be the norm for populations of tiger beetles (and most insects), the causes and effects are not well known. Among the suggested causes of these population trends are annual rainfall patterns for the Coral Pink Sand Dunes tiger beetle (Knisley and Hill 2001, p. 391; Gowan and Knisley 2014, p. 119), and shoreline erosion from storms for the northeastern beach and puritan tiger beetles (Knisley 2011b, p. 54). As a result of these fluctuations, many tiger beetle populations will experience episodic low numbers (bottlenecks) or even local extinction from genetic decline, the Allee effect, or other factors. Given that the Miami tiger beetle is known from only two remaining populations with few adult individuals, any significant decrease in the population size could easily result in extinction of the species.

Dispersal and movement of the Miami tiger beetle is unknown, but is considered to be very limited. A limited mark-recapture study with the closely related Highlands tiger beetle found that adult beetles moved no more than 150 m (490 ft), usually flying only 5–10 m (16–33 ft) at a time (Knisley and Hill 2013). Generally, tiger beetles are known to easily move around, so exchange of individuals among separated sites will commonly occur if there are habitat connections or if the sites are within dispersal range—which is not the case with the population structure of the Miami tiger beetle. Species in woodland, scrub, or dune habitats also seem to disperse less than water-edge species (Knisley and Hill 1996, p. 13). Among tiger beetles, there is a general trend of decreasing flight distance with decreasing body size (Knisley and Hill 1996, p. 13). The Miami tiger beetle has a small body size. Given these factors, dispersal may be limited for the Miami tiger beetle.

Small, isolated population size was listed as one of several of the threats in the petition received to list the Miami tiger beetle (CBD et al. 2014, pp. 17, 30). The effects of low population size on population viability are not known for tiger beetles, but population viability analyses for the northeastern beach, puritan, and Coral Pink Sand Dunes tiger beetles determined that stochasticity, specifically the fluctuations in population size, was the main factor accounting for the high risk

of extinction (Gowan and Knisley 2001, entire; 2005, p. 13; Knisley and Gowan 2009, pp. 13–23). The long-term monitoring of northeastern beach and puritan tiger beetles found that, despite the fluctuations, some small populations with fewer than 50 to 100 adults experienced several fold declines, but persisted (Knisley 2015b, p. 20). Several Highlands tiger beetle sites with fewer than 20 to 50 adults were lost over the past 15–20 years, while several others have persisted during that period (Knisley 2015b, p. 20). Losses may have been due to habitat disturbance or low population size effects. Knisley predicts that the Highlands tiger beetle populations (extinct and extant) are isolated from each other with little chance for dispersal between populations and immigration rescues (Knisley, 2015d, pers. comm.). With only two known populations of the Miami tiger beetle, separated by substantial urban development, the potential for immigration rescue is low.

Pesticides

Pesticides used in and around pine rockland habitat are a potential threat to the Miami tiger beetle through direct exposure to adults and larvae, secondary exposure from insect prey, overall reduction in availability of adult and larval prey, or any combination of these factors. The use of pesticides for agriculture and mosquito control presents potential risks to nontarget insects, especially imperiled insects (EPA 2002, p. 32; 2006a, p. 58; 2006b, p. 44). The negative effect of insecticides on several tiger beetle species was suggested by Nagano (1982, p. 34) and Stamatov (1972, p. 78), although impacts from pesticides do not appear to be well studied in tiger beetles.

Efforts to control mosquitoes and other insect pests in Florida have increased as human activity and population size have increased. To control mosquito populations, organophosphate (naled) and pyrethroid (permethrin) adulticides are applied by mosquito control districts throughout south Florida, including Miami-Dade County. These compounds have been characterized as being highly toxic to nontarget insects by the U.S. Environmental Protection Agency (2002, p. 32; 2006a, p. 58; 2006b, p. 44). The use of such pesticides (applied using both aerial and ground-based methods) for mosquito control presents a potential risk to the Miami tiger beetle, and this risk may increase with the spread of any mosquito-borne disease, such as the Zika virus, as current guidelines to incorporate no-spray buffers around butterfly critical habitat are not necessarily adhered to if there is a public health concern (Florida Administrative Code 5E–13.036; Service 2015, entire).

In order for mosquito control pesticides to be effective, they must make direct contact with mosquitoes. For this to happen, pesticides are applied using methods to promote drift through the air, so as to increase the potential for contact with their intended target organism. Truck-based permethrin application methods are expected to produce a swath of suspended pesticides approximately 91 m (300 ft) wide (Prentiss 2007, p. 4). The extent of pesticide drift from this swath is dependent on several factors, including wind speed, wind direction, and vegetation density. Hennessey and Habeck (1989, pp. 1–22; 1991, pp. 1–68) and Hennessey *et al.* (1992, pp. 715–721) illustrated the presence of mosquito spray residues long after application in habitat of the federally endangered Schaus swallowtail butterfly (*Heraclides aristodemus ponceanus*), as well as the Florida leafwing butterfly (*Anaea troglodyta floridalis*), Bartram's scrub-hairstreak butterfly, and other imperiled species. Residues of aerially applied naled were found 6 hours after application in a pineland area that was 750 m (2,460 ft) from the target area; residues of fenthion (an adulticide previously used in the Florida Keys) applied via truck were found up to 50 m (160 ft) downwind in a hammock area 15 minutes after application in adjacent target areas (Hennessey *et al.* 1992, pp. 715–721).

More recently, Pierce (2009, pp. 1–17) monitored naled and permethrin deposition following mosquito control application. Permethrin, applied by truck, was found to drift considerable distances from target areas, with residues that persisted for weeks. Permethrin was detected at concentrations lethal to three butterfly species at a distance of approximately 227 m (745 ft) away from targeted truck routes. Naled, applied by plane, was also found to drift into nontarget areas, but was much less persistent, exhibiting a half-life (time for half of the naled applied to chemically break down) of approximately 6 hours. To expand this work, Pierce (2011, pp. 6–11) conducted an additional deposition study in 2010, focusing on permethrin drift from truck spraying, and again documented low but measurable amounts of permethrin in nontarget areas. In 2009, Bargar (2012, p. 3) conducted two field trials that detected significant naled residues at locations within nontarget areas up to 366 m (1,200 ft) from the edge of zones targeted for aerial applications. After this discovery, the Florida Keys Mosquito Control District recalibrated the on-board model (Wingman, which provides flight guidance and flow rates). Naled deposition was reduced in some of the nontarget zones following recalibration (Bargar 2012, p. 3).

In addition to mosquito control chemicals entering nontarget areas, the toxic effects of such chemicals to nontarget organisms have also been documented. Lethal effects on nontarget moths and butterflies have been attributed to fenthion and naled in both south Florida and the Florida Keys (Emmel 1991, pp. 12–13; Eliazar and Emmel 1991, pp. 18–19; Eliazar 1992, pp. 29–30). Zhong *et al.* (2010, pp. 1961–1972) investigated the impact of single aerial applications of naled on the endangered Miami blue butterfly (*Cyclargus thomasi bethunebakeri*) larvae in the field. Survival of butterfly larvae in the target zone was 73.9 percent, which was significantly lower than in both the drift zone (90.6 percent) and the reference (control) zone (100 percent), indicating that direct exposure to naled poses significant risk to Miami blue butterfly larvae. Fifty percent of the samples in the drift zone also exhibited detectable concentrations, once again exhibiting the potential for mosquito control chemicals to drift into nontarget areas. Bargar (2012, p. 4) observed cholinesterase activity depression, to a level shown to cause mortality in the laboratory, in great southern white (*Ascia monuste*) and Gulf fritillary butterflies (*Agraulis vanillae*) exposed to naled in both target and nontarget zones.

Based on these studies, it can be concluded that mosquito control activities that involve the use of both aerial and ground-based spraying methods have the potential to deliver pesticides in quantities sufficient to cause adverse effects to nontarget species in both target and nontarget areas. Pesticide drift at a level of concern to nontarget invertebrates (butterflies) has been measured up to approximately 227 m (745 ft) from truck routes (Pierce 2011, pp. 3–5, 7; Rand and Hoang 2010, pp. 14, 23) and 400 m (1,312 ft) from aerial spray zones (Bargar 2012, p. 3). It should be noted that many of the studies referenced above dealt with single application scenarios and examined effects on only one or two butterfly life stages. Under a realistic scenario, the potential exists for exposure to all life stages to occur over multiple applications in a season. In the case of a persistent compound like permethrin, whose residues remain on

vegetation for weeks, the potential exists for nontarget species to be exposed to multiple pesticides within a season (*e.g.,* permethrin on vegetation coupled with aerial exposure to naled).

Prior to 2015, aerial applications of mosquito control pesticides occurred on a limited basis (approximately two to four aerial applications per year since 2010) within some of Miami-Dade County's pine rockland areas. The Miami tiger beetle is not known to occupy any of these aerial spray zone sites, but any unknown occupied sites could have been exposed, either directly or through drift. The Richmond Pine Rocklands region is not directly treated either aerially or by truck (C. Vasquez, 2013, pers. comm.), so any potential pesticide exposure in this area would be through drift from spray zones adjacent to the Richmond area. Pesticide drift from aerial spray zones to the two known populations of Miami tiger beetles is unlikely, based on the considerable distance from spray zone boundaries to known occurrences of the beetle (estimated minimum distances range from 2.0–3.0 km (1.2–1.9 mi) from the Richmond population and 434 m (0.3 mi) for the second population). In the past, truck-based applications occurred within 227 m (745 ft) of known occupied Miami tiger beetle habitat, a distance under which pesticide drift at a concentration of concern for nontarget invertebrates had been measured (Pierce 2011, pp. 3–5, 7; Rand and Hoang 2010, pp. 14, 23).

For the 2015 mosquito season (May through October), Miami-Dade Mosquito Control coordinated with the Service to institute 250-m truck-based and 400-m aerial spray buffers around critical habitat for the Bartram's scrub-hairstreak butterfly, with the exclusion of pine rocklands in the Navy Wells area, which is not known to be occupied by the Miami tiger beetle. These newly implemented buffers will also reduce exposure to any other imperiled species occurring on pine rockland habitat within Bartram's scrub-hairstreak butterfly critical habitat, such as the Miami tiger beetle. Assuming that the Miami tiger beetle is no more sensitive to pesticide exposure than the tested butterfly species, these spray buffers should avoid adverse impacts to the Miami tiger beetle population.

Based on Miami-Dade Mosquito Control's implementation of spray buffers, mosquito control pesticides are not considered a major threat for the Miami tiger beetle at this time. If these buffers were to change or Miami tiger beetles were found to occur on habitat that is not protected by Bartram's scrub-hairstreak butterfly critical habitat, then the threat of pesticide exposure would have to be reevaluated.

Human Disturbance

Human disturbance, depending upon type and frequency, may or may not be a threat to tiger beetles or their habitats. Knisley (2011b, entire) reviewed both the negative and positive effects of human disturbances on tiger beetles. Vehicles, bicycles, and human foot traffic have been implicated in the decline and extirpation of tiger beetle populations, especially for species in more open habitats like beaches and sand dunes. The northeastern beach tiger beetle was extirpated throughout the northeast coincidental with the development of recreational use from pedestrian foot traffic and vehicles (Knisley *et al.* 1987, p. 301). *Habroscelimorpha dorsalis media* (southeastern beach tiger beetle) was extirpated from a large section of Assateague Island National Seashore, Maryland, after the initiation of off-highway vehicle (OHV) use (Knisley and Hill, 1992b, p. 134). Direct mortality and indirect effects on habitat from OHVs have been found to threaten the survival of Coral Pink Sand Dunes tiger beetle (Gowan and Knisley 2014, pp. 127–128). The Ohlone tiger beetle has been eliminated from nearly all natural grassland areas in Santa Cruz, California, except where pedestrian foot traffic, mountain bike use, or cattle grazing has created or maintained trails and open patches of habitat (Knisley and Arnold 2013, p. 578). Similarly, over 20 species of tiger beetles, including *Cicindela decemnotata* (Badlands tiger beetle) at Dugway Proving Ground in Utah, are almost exclusively restricted to roads, trails, and similar areas kept open by vehicle use or similar human disturbances (Knisley 2011b, pp. 44–45).

Vehicle activity on seldom-used roads may have some negative effect on the Miami tiger beetle (*i.e.,* lethal impacts to adults or larvae or impacts to the habitat), but limited field observations to date indicate that effects are minimal (Knisley 2015a, p. 16). Observations in 2014 at Zoo Miami found a few adults along a little-used road and the main gravel road adjacent to interior patches where adults were more common (Knisley 2015a, p. 16). These adults may have dispersed from their primary interior habitat, possibly due to vegetation encroachment (Knisley 2015a, p. 16). Several of the adults at both CSTARS and the USCG parcels were also found along dirt roads that were not heavily used and apparently provided suitable habitat.

The parcels that comprise the two known populations of the Miami tiger beetle are not open to the public for recreational use, so human disturbance is unlikely. For any unknown occurrences of the species, human disturbance from recreational use is a possibility, as some of the remaining pine rockland sites in Miami-Dade County are open to the public for recreational use. Miami-Dade County leads the State in gross urban density at 8,343 people per square mile (*https://www.bebr.ufl.edu/population/publications/measuring-population-density-counties-florida* [accessed May 18, 2016]), and development and human population growth are expected to continue in the future. By 2025, Miami-Dade County is predicted to near or exceed a population size of 3 million people (Rayer and Wang 2016, p. 7). With the expected future increase in human population and development, there will likely be an increase in the use of recreational areas, including sites with potentially suitable habitat and unknown occurrences of Miami tiger beetles. Projected future increases in recreational use may increase the levels of human disturbance and negatively impact any unknown occurrences of the Miami tiger beetle and their habitat.

In summary, vehicular activity and recreational use within the known population of the Miami tiger beetle presents minimal impacts to the species. However, future negative impacts to unknown beetle occurrences on lands open to the public are possible and are expected to increase with the projected future population growth.

Climate Change and Sea Level Rise

Climatic changes, including sea level rise (SLR), are major threats to Florida, and could impact the Miami tiger beetle and the few remaining parcels of pine rockland habitat left in Miami-Dade County. Our analyses include consideration of ongoing and projected changes in climate. The terms ''climate'' and ''climate change'' are defined by the Intergovernmental Panel on Climate Change (IPCC). ''Climate'' refers to the mean and variability of different types of weather conditions over time, with 30 years being a typical period for such measurements, although shorter or longer periods also may be used (IPCC 2007a, p. 78). The term ''climate change'' thus refers to a change in the mean or variability of one or more measures of climate (*e.g.,* temperature or precipitation) that persists for an extended period, typically decades or longer, whether the change is due to natural variability, human activity, or both (IPCC 2007a, p. 78).

Scientific measurements spanning several decades demonstrate that changes in climate are occurring, and that the rate of change has been faster since the 1950s. Based on extensive analyses of global average surface air temperature, the most widely used measure of change, the IPCC concluded that warming of the global climate system over the past several decades is ''unequivocal'' (IPCC 2007a, p. 2). In other words, the IPCC concluded that there is no question that the world's climate system is warming. Examples of other changes include substantial increases in precipitation in some regions of the world and decreases in other regions (for these and additional examples, see IPCC 2007a, p. 30; Solomon *et al.* 2007, pp. 35–54, 82–85). Various environmental changes (*e.g.,* shifts in the ranges of plant and animal species, increasing ground instability in permafrost regions, conditions more favorable to the spread of invasive species and of some diseases, changes in amount and timing of water availability) are occurring in association with changes in climate (see IPCC 2007a, pp. 2–4, 30–33; Global Climate Change Impacts in the United States 2009, pp. 27, 79–88).

Results of scientific analyses presented by the IPCC show that most of the observed increase in global average temperature since the mid-20th century cannot be explained by natural variability in climate, and is ''very likely'' (defined by the IPCC as 90 percent or higher probability) due to the observed increase in greenhouse gas (GHG) concentrations in the atmosphere as a result of human activities, particularly carbon dioxide emissions from fossil fuel use (IPCC 2007a, pp. 5–6 and figures SPM.3 and SPM.4; Solomon *et al.* 2007, pp. 21–35). Further confirmation of the role of GHGs comes from analyses by Huber and Knutti (2011, p. 4), who concluded it is extremely likely that approximately 75 percent of global warming since 1950 has been caused by human activities.

Scientists use a variety of climate models, which include consideration of natural processes and variability, as well as various scenarios of potential levels and timing of GHG emissions, to evaluate the causes of changes already observed and to project future changes in temperature and other climate conditions (*e.g.,* Meehl *et al.* 2007, entire; Ganguly *et al.* 2009, pp. 11555, 15558; Prinn *et al.* 2011, pp. 527, 529). All combinations of models and emissions scenarios yield very similar projections of average global warming until about 2030. Although projections of the magnitude and rate of warming differ after about 2030, the overall trajectory of all the projections is one of increased global warming through the end of this century, even for projections based on scenarios that assume that GHG emissions will stabilize or decline. Thus, there is strong scientific support for projections that warming will continue through the 21st century, and that the magnitude and rate of change will be influenced substantially by the extent of GHG emissions (IPCC 2007a, pp. 44–45; Meehl *et al.* 2007, pp. 760–764; Ganguly *et al.* 2009, pp. 15555–15558; Prinn *et al.* 2011, pp. 527, 529).

In addition to basing their projections on scientific analyses, the IPCC reports projections using a framework for treatment of uncertainties (*e.g.,* they define ''very likely'' to mean greater than 90 percent probability, and ''likely'' to mean greater than 66 percent probability; see Solomon *et al.* 2007, pp. 22–23). Some of the IPCC's key projections of global climate and its related effects include: (1) It is virtually certain there will be warmer and more frequent hot days and nights over most of the earth's land areas; (2) it is very likely there will be increased frequency of warm spells and heat waves over most land areas; (3) it is very likely that the frequency of heavy precipitation events, or the proportion of total rainfall from heavy falls, will increase over most areas; and (4) it is likely the area affected by droughts will increase, that intense tropical cyclone activity will increase, and that there will be increased incidence of extreme high sea level (IPCC 2007b, p. 8, table SPM.2). More recently, the IPCC published additional information that provides further insight into observed changes since 1950, as well as projections of extreme climate events at global and broad regional scales for the middle and end of this century (IPCC 2011, entire).

Various changes in climate may have direct or indirect effects on species. These may be positive, neutral, or negative, and they may change over time, depending on the species and other relevant considerations, such as interactions of climate with other variables such as habitat fragmentation (for examples, see Franco *et al.* 2006; IPCC 2007a, pp. 8–14, 18–19; Forister *et al.* 2010; Galbraith *et al.* 2010; Chen *et al.* 2011). In addition to considering individual species, scientists are evaluating possible climate change-related impacts to, and responses of, ecological systems, habitat conditions, and groups of species; these studies include acknowledgement of uncertainty (*e.g.,* Deutsch *et al.* 2008; Euskirchen *et al.* 2009; McKechnie and Wolf 2009; Berg *et al.* 2010; Sinervo *et al.* 2010; Beaumont *et al.* 2011; McKelvey *et al.* 2011; Rogers and Schindler 2011).

Many analyses involve elements that are common to climate change vulnerability assessments. In relation to climate change, vulnerability refers to the degree to which a species (or system) is susceptible to, and unable to cope with, adverse effects of climate change, including climate variability and extremes. Vulnerability is a function of the type, magnitude, and rate of climate change and variation to which a species is exposed, its sensitivity, and its adaptive capacity (IPCC 2007a, p. 89; see also Glick *et al.* 2011, pp. 19–22). There is no single method for conducting such analyses that applies to all situations (Glick *et al.* 2011, p. 3). We use our expert judgment and appropriate analytical approaches to weigh relevant information, including uncertainty, in our consideration of various aspects of climate change.

Global climate projections are informative, and, in some cases, the only or the best scientific information available for us to use. However, projected changes in climate and related impacts can vary substantially across and within different regions of the world (*e.g.,* IPCC 2007a, pp. 8–12). Therefore, we use ''downscaled'' projections when they are available and have been developed through appropriate scientific procedures, because such projections provide higher resolution information that is more relevant to spatial scales used for analyses of a given species (see Glick *et al.* 2011, pp. 58–61, for a discussion of downscaling). For our analysis for the Miami tiger beetle, downscaled projections are available.

According to the Florida Climate Center, Florida is by far the most vulnerable State in the United States to hurricanes and tropical storms (*http://climatecenter.fsu.edu/topics/tropical-weather*). Based on data gathered from 1856 to 2008, Klotzbach and Gray (2009, p. 28) calculated the climatological probabilities for each State being impacted by a hurricane or major hurricane in all years over the 152-year timespan. Of the coastal States analyzed, Florida had the highest climatological probabilities, with a 51 percent probability of a hurricane (Category 1 or 2) and a 21 percent probability of a major hurricane (Category 3 or higher). From 1856 to 2008, Florida actually experienced more major hurricanes than predicted; out of the 109 hurricanes, 36 were major hurricanes. The most recent hurricane to have major impacts to Miami-Dade County was Hurricane Andrew in 1992.

While the species persisted after this hurricane, impacts to the population size and distribution from the storm are unknown, because no surveys were conducted until its rediscovery in 2007. Given the few, isolated populations of the Miami tiger beetle within a location prone to storm influences (located approximately 8 km (5 mi) from the coast), the species is at substantial risk from stochastic environmental events such as hurricanes, storm surges, and other extreme weather that can affect recruitment, population growth, and other population parameters.

Other processes to be affected by climate change, related to environmental stochasticity, include temperatures, rainfall (amount, seasonal timing, and distribution), and storms (frequency and intensity). Temperatures are projected to rise from 2–5 degrees Celsius (°C) (3.6–9 degrees Fahrenheit (°F)) for North America by the end of this century (IPCC 2007a, pp. 7–9, 13). Based upon predictive modeling, Atlantic hurricane and tropical storm frequencies are expected to decrease (Knutson *et al.* 2008, pp. 1–21). By 2100, there should be a 10–30 percent decrease in hurricane frequency. Hurricane frequency is expected to drop, due to more wind shear impeding initial hurricane development. However, hurricane winds are expected to increase by 5–10 percent. This is due to more hurricane energy available for intense hurricanes. These stronger winds will result in damage to the pine rockland vegetation and an increased storm surge (discussed below). In addition to climate change, weather variables are extremely influenced by other natural cycles, such as El Niño Southern Oscillation, with a frequency of every 4–7 years; solar cycle (every 11 years); and the Atlantic Multi-decadal Oscillation. All of these cycles influence changes in Floridian weather. The exact magnitude, direction, and distribution of all of these changes at the regional level are difficult to project.

The long-term record at Key West shows that sea level rose on average 0.229 cm (0.090 in) annually between 1913 and 2013 (National Oceanographic and Atmospheric Administration (NOAA) 2013, p. 1). This equates to approximately 22.9 cm (9.02 in) over the last 100 years. IPCC (2008, p. 28) emphasized it is very likely that the average rate of SLR during the 21st century will exceed the historical rate. The IPCC Special Report on Emission Scenarios (2000, entire) presented a range of scenarios based on the computed amount of change in the climate system due to various potential amounts of anthropogenic greenhouse gases and aerosols in 2100. Each scenario describes a future world with varying levels of atmospheric pollution, leading to corresponding levels of global warming and corresponding levels of SLR. The IPCC Synthesis Report (2007a, entire) provided an integrated view of climate change and presented updated projections of future climate change and related impacts under different scenarios.

Subsequent to the 2007 IPCC Report, the scientific community has continued to model SLR. Recent peer-reviewed publications indicate a movement toward increased acceleration of SLR. Observed SLR rates are already trending along the higher end of the 2007 IPCC estimates, and it is now widely held that SLR will exceed the levels projected by the IPCC (Rahmstorf *et al.* 2012, p. 1; Grinsted *et al.* 2010, p. 470). Taken together, these studies support the use of higher end estimates now prevalent in the scientific literature. Recent studies have estimated global mean SLR of 1.0–2.0 m (3.3–6.6 ft) by 2100 as follows: 0.75–1.90 m (2.5–6.2 ft; Vermeer and Rahmstorf 2009, p. 21530), 0.8–2.0 m (2.6–6.6 ft; Pfeffer *et al.* 2008, p. 1342), 0.9–1.3 m (3.0–4.3 ft; Grinsted *et al.* 2010, pp. 469–470), 0.6–1.6 m (2.0–5.2 ft; Jevrejeva *et al.* 2010, p. 4), and 0.5–1.40 m (1.6–4.6 ft; National Research Council 2012, p. 2).

All of the scenarios, from small climate change shifts to major changes, indicate negative effects on pine rockland habitat throughout Miami-Dade County. Prior to inundation, pine rocklands are likely to undergo habitat transitions related to climate change, including changes to hydrology and increasing vulnerability to storm surge. Hydrology has a strong influence on plant distribution in these and other coastal areas (IPCC 2008, p. 57). Such communities typically grade from salt to brackish to freshwater species. From the 1930s to 1950s, increased salinity of coastal waters contributed to the decline of cabbage palm forests in southwest Florida (Williams *et al.* 1999, pp. 2056–2059), expansion of mangroves into adjacent marshes in the Everglades (Ross *et al.* 2000, pp. 101, 111), and loss of pine rockland in the Keys (Ross *et al.* 1994, pp. 144, 151–155).

In one Florida Keys pine rockland with an average elevation of 0.89 m (2.9 ft), Ross *et al.* (1994, pp. 149–152) observed an approximately 65 percent reduction in an area occupied by South Florida slash pine over a 70-year period, with pine mortality and subsequent increased proportions of halophytic (salt-loving) plants occurring earlier at the lower elevations. During this same time span, local sea level had risen by 15.0 cm (6.0 in), and Ross *et al.* (1994, p. 152) found evidence of groundwater and soil water salinization. Extrapolating this situation to pine rocklands on the mainland is not straightforward, but suggests that similar changes to species composition could arise if current projections of SLR occur and freshwater inputs are not sufficient to prevent salinization.

Furthermore, Ross *et al.* (2009, pp. 471–478) suggested that interactions between SLR and pulse disturbances (*e.g.,* storm surges) can cause vegetation to change sooner than projected based on sea level alone. Effects from vegetation shifts in the pine rockland habitat on the Miami tiger beetle are unknown, but because the beetle occurs in a narrow range and microhabitat parameters are still being studied, vegetation shifts could cause habitat changes or disturbance that would have a negative impact on beetle recruitment and survival. Alexander (1953, pp. 133–138) attributed the demise of pinelands on northern Key Largo to salinization of the groundwater in response to SLR. Patterns of human development will also likely be significant factors influencing whether natural communities can move and persist (IPCC 2008, p. 57; USCCSP 2008, p. 76).

The Science and Technology Committee of the Miami-Dade County Climate Change Task Force (Wanless *et al.* 2008, p. 1) recognized that significant SLR is a very real threat to the near future for Miami-Dade County. In a January 2008 statement, the committee warned that sea level is expected to rise at least 0.9–1.5 m (3–5 ft) within this century (Wanless *et al.* 2008, p. 3). With a 0.9–1.2 m (3–4 ft) rise in sea level (above baseline) in Miami-Dade County: ''Spring high tides would be at about 6 to 7 ft; freshwater resources would be gone; the Everglades would be inundated on the west side of Miami-Dade County; the barrier islands would be largely inundated; storm surges would be devastating; landfill sites would be exposed to erosion contaminating marine and coastal environments. Freshwater and coastal mangrove wetlands will not keep up with or offset SLR of 0.6 m (2 ft) per century or greater. With a 1.5-m (5-ft) rise (spring tides at ~2.4 m (~8 ft)), Miami-Dade County will be extremely diminished'' (Wanless *et al.* 2008, pp. 3–4).

Drier conditions and increased variability in precipitation associated with climate change are expected to hamper successful regeneration of forests and cause shifts in vegetation types through time (Wear and Greis 2012, p. 39). Although it has not been

well studied, existing pine rocklands have probably been affected by reductions in the mean water table. Climate changes are also forecasted to extend fire seasons and the frequency of large fire events throughout the Coastal Plain (Wear and Greis 2012, p. 43). While restoring fire to pine rocklands is essential to the long-term viability of the Miami tiger beetle (see Factor A discussion, above), increases in the scale, frequency, or severity of wildfires could have negative effects on the species (*e.g.,* if wildfire occurs over the entire area occupied by the two known populations during the adult flight season when adults are present).

To accommodate the large uncertainty in SLR projections, researchers must estimate effects from a range of scenarios. Various model scenarios developed at Massachusetts Institute of Technology (MIT) and GeoAdaptive Inc. have projected possible trajectories of future transformation of the south Florida landscape by 2060, based upon four main drivers: Climate change, shifts in planning approaches and regulations, human population change, and variations in financial resources for conservation (Vargas-Moreno and Flaxman 2010, pp. 1–6). The scenarios do not account for temperature, precipitation, or species habitat shifts due to climate change, and no storm surge effects are considered. The current MIT scenarios range from an increase of 0.09–1.00 m (0.3–3.3 ft) by 2060.

Based on the most recent estimates of SLR and the data available to us at this time, we evaluated potential effects of SLR using the current ''high'' range MIT scenario, as well as comparing elevations of remaining pine rockland fragments and extant occurrences of the Miami tiger beetle. The ''high'' range (or ''worst case'') MIT scenario assumes high SLR (1.0 m (3.3 ft) by 2060), low financial resources, a 'business as usual' approach to planning, and a doubling of human population. Based on this scenario, pine rocklands along the coast in central Miami-Dade County would become inundated. The ''new'' sea level (1.0 m (3.3 ft) higher) would come up to the edge of pine rockland fragments at the southern end of Miami-Dade County, translating to partial inundation or, at a minimum, vegetation shifts for these pine rocklands. While sea level under this scenario would not overtake other pine rocklands in urban Miami-Dade County, including the known locations for the Miami tiger beetle, changes in the salinity of the water table and soils would surely cause vegetation shifts that may negatively impact the viability of the beetle. In addition, many existing pine rockland fragments are projected to be developed for housing as the human population grows and adjusts to changing sea levels under this ''high'' range (or ''worst case'') MIT scenario. Actual impacts may be greater or less than anticipated based upon high variability of factors involved (*e.g.,* SLR, human population growth) and assumptions made in the model.

When simply looking at current elevations of pine rockland fragments and occurrences of the Miami tiger beetle, it appears that an SLR of 1 m (3.3 ft) will inundate the coastal and southern pine rocklands and cause vegetation shifts largely as described above. SLR of 2 m (6.6 ft) appears to inundate much larger portions of urban Miami-Dade County. The western part of urban Miami-Dade County would also be inundated (barring creation of sea walls or other barriers), creating a virtual island of the Miami Rock Ridge. After a 2-m rise in sea level, approximately 75 percent of the remaining pine rockland would still be above sea level, but an unknown percentage of these fragments would be negatively impacted by salinization of the water table and soils, which would be exacerbated due to isolation from mainland fresh water flows. Above 2 m (6.6 ft) of SLR, very little pine rockland would remain, with the vast majority either being inundated or experiencing vegetation shifts.

The climate of southern Florida is driven by a combination of local, regional, and global events, regimes, and oscillations. There are three main ''seasons'': (1) The wet season, which is hot, rainy, and humid from June through October; (2) the official hurricane season that extends 1 month beyond the wet season (June 1 through November 30), with peak season being August and September; and (3) the dry season, which is drier and cooler, from November through May. In the dry season, periodic surges of cool and dry continental air masses influence the weather with short-duration rain events followed by long periods of dry weather.

Climate change may lead to increased frequency and duration of severe storms (Golladay *et al.* 2004, p. 504; McLaughlin *et al.* 2002, p. 6074; Cook *et al.* 2004, p. 1015). Hurricanes and tropical storms can modify habitat (*e.g.,* through storm surge) and have the potential to destroy the only known population of the Miami tiger beetle and its suitable habitat. With most of the historical habitat having been destroyed or modified, the two known remaining populations of the beetle are at high risk of extirpation due to stochastic events.

Alternative Future Landscape Models and Coastal Squeeze

The Miami tiger beetle is anticipated to face major risks from coastal squeeze, which occurs when habitat is pressed between rising sea levels and coastal development that prevents landward movement (Scavia *et al.* 2002, entire; FitzGerald *et al.* 2008, entire; Defeo *et al.* 2009, p. 8; LeDee *et al.* 2010, entire; Menon *et al.* 2010, entire; Noss 2011, entire). Habitats in coastal areas (*i.e.,* Charlotte, Lee, Collier, Monroe, Miami-Dade Counties) are likely the most vulnerable. Although it is difficult to quantify impacts due to the uncertainties involved, coastal squeeze will likely result in losses in habitat for the beetles as people and development are displaced further inland.

Summary of Factor E

Based on our analysis of the best available information, we have identified a wide array of natural and manmade factors affecting the continued existence of the Miami tiger beetle. The beetle is immediately vulnerable to extinction, due to the effects of few remaining small populations, restricted range, and isolation. Aspects of the Miami tiger beetle's natural history (*e.g.,* limited dispersal) and environmental stochasticity (including hurricanes and storm surge) may also contribute to imperilment. Other natural (*e.g.,* changes to habitat, invasive and exotic vegetation) and anthropogenic (*e.g.,* habitat alteration, impacts from humans) factors are also identifiable threats. Climate change, sea-level rise, and coastal squeeze are major concerns. Collectively, these threats have occurred in the past, are impacting the species now, and will continue to impact the species in the future.

Cumulative Effects From Factors A Through E

The limited distribution, small population size, few populations, and relative isolation of the Miami tiger beetle makes it extremely susceptible to further habitat loss, modification, degradation, and other anthropogenic threats. The Miami tiger beetle's viability at present is uncertain, and its continued persistence is in danger, unless protective actions are taken. Mechanisms causing the decline of this beetle, as discussed above, range from local (*e.g.,* lack of adequate fire management, vegetation encroachment), to regional (*e.g.,* development, fragmentation, nonnative species), to global influences (*e.g.,* climate change, SLR). The synergistic effects of threats

(such as hurricane effects on a species with a limited distribution consisting of just two known populations) make it difficult to predict population viability now and in the future. While these stressors may act in isolation, it is more probable that many stressors are acting simultaneously (or in combination) on the Miami tiger beetle.

Determination

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Miami tiger beetle. Habitat loss, degradation, and fragmentation have destroyed an estimated 98 percent of the historical pine rockland habitat in Miami-Dade County, with only two known populations remaining. The threat of habitat loss is continuing from development, inadequate habitat management resulting in vegetation encroachment, and environmental effects resulting from climatic change (see discussions under Factors A and E). Due to the restricted range, small population size, few populations, and relative isolation (see Factor E), collection is a significant threat to the species and could potentially occur at any time (see discussions under Factor B). Additionally, the species is currently threatened by a wide array of natural and manmade factors (see Factor E). Existing regulatory mechanisms do not provide adequate protection for the species (see Factor D). As a result, impacts from increasing threats, singly or in combination, are likely to result in the extinction of the species because the magnitude of threats is high.

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become endangered throughout all or a significant portion of its range within the foreseeable future.'' We find that the Miami tiger beetle is presently in danger of extinction throughout its entire range based on the severity and immediacy of threats currently affecting the species. The overall range has been significantly impacted because of significant habitat loss, degradation, and fragmentation of pine rockland habitat. Newly proposed development is currently threatening one of only two known populations of this species. The fragmented nature of Miami-Dade County's remaining pine rockland habitat and the influx of development around them may preclude the ability to conduct prescribed burns or other beneficial management actions that are needed to prevent vegetation encroachment. The two known, small populations of the Miami tiger beetle appear to occupy relatively small habitat patches, which make them vulnerable to local extinction from normal fluctuations in population size, genetic problems from small population size, or environmental catastrophes. Limited dispersal abilities in combination with limited habitat may result in local extirpations.

Therefore, on the basis of the best available scientific and commercial information, we are listing the Miami tiger beetle as endangered in accordance with sections 3(6) and 4(a)(1) of the Act. We find that a threatened species status is not appropriate for the Miami tiger beetle because of significant habitat loss (*i.e.,* 98 percent of pine rockland habitat in Miami-Dade County) and degradation; the fact that only two known small populations of the species remain; and the imminent threat of development projects in the Richmond pine rocklands.

Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. Because we have determined that the Miami tiger beetle is endangered throughout all of its range, no portion of its range can be ''significant'' for purposes of the definitions of ''endangered species'' and ''threatened species.'' See the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (79 FR 37577).

Available Conservation Measures

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and requires that recovery actions be carried out for all listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act requires the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning includes the development of a recovery outline shortly after a species is listed and preparation of a draft and final recovery plan. The recovery outline guides the immediate implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan identifies site-specific management actions that set a trigger for review of the five factors that control whether a species remains endangered or may be downlisted or delisted, and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our Web site (*http://www.fws.gov/endangered*) or from our South Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribal, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (*e.g.,* restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Following publication of this final listing rule, funding for recovery actions will be available from a variety of sources, including Federal budgets,

State programs, and cost-share grants for non-Federal landowners, the academic community, and nongovernmental organizations. In addition, pursuant to section 6 of the Act, the State of Florida will be eligible for Federal funds to implement management actions that promote the protection or recovery of the Miami tiger beetle. Information on our grant programs that are available to aid species recovery can be found at: *http://www.fws.gov/grants.*

Please let us know if you are interested in participating in recovery efforts for the Miami tiger beetle. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands administered by the U.S. Coast Guard; issuance of section 404 Clean Water Act permits by the Army Corps of Engineers; and construction and maintenance of roads or highways by the Federal Highway Administration.

The Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered wildlife. The prohibitions of section 9(a)(1) of the Act, codified at 50 CFR 17.21, make it illegal for any person subject to the jurisdiction of the United States to take (which includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these) endangered wildlife within the United States or on the high seas. In addition, it is unlawful to import; export; deliver, receive, carry, transport, or ship in interstate or foreign commerce in the course of commercial activity; or sell or offer for sale in interstate or foreign commerce any listed species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to employees of the Service, the National Marine Fisheries Service, other Federal land management agencies, and State conservation agencies.

We may issue permits to carry out otherwise prohibited activities involving endangered wildlife under certain circumstances. Regulations governing permits are codified at 50 CFR 17.22. With regard to endangered wildlife, a permit may be issued for the following purposes: For scientific purposes, to enhance the propagation or survival of the species, and for incidental take in connection with otherwise lawful activities. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

It is our policy, as published in the **Federal Register** on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a final listing on proposed and ongoing activities within the range of a listed species. Based on the best available information, the following actions may potentially result in a violation of section 9, of the Act; this list is not comprehensive:

(1) Unauthorized possession, collecting, trapping, capturing, killing, harassing, sale, delivery, or movement, including interstate and foreign commerce, or harming or attempting any of these actions, at any life stage without a permit (research activities where Miami tiger beetles are surveyed, captured (netted), or collected will require a permit under section 10(a)(1)(A) of the Act).

(2) Incidental take without a permit pursuant to section 10(a)(1)(B) of the Act.

(3) Sale or purchase of specimens, except for properly documented antique specimens of this taxon at least 100 years old, as defined by section 10(h)(1) of the Act.

(4) Unauthorized use of pesticides/herbicides that results in take.

(5) Release of biological control agents that attack any life stage.

(6) Discharge or dumping of toxic chemicals, silts, or other pollutants into, or other alteration of the quality of, habitat supporting the Miami tiger beetles that result in take.

(7) Unauthorized activities (*e.g.,* plowing; mowing; burning; herbicide or pesticide application; land leveling/clearing; grading; disking; soil compaction; soil removal; dredging; excavation; deposition of dredged or fill material; erosion and deposition of sediment/soil; grazing or trampling by livestock; minerals extraction or processing; residential, commercial, or industrial developments; utilities development; road construction; or water development and impoundment) that take eggs, larvae, or adult Miami tiger beetles or that modify Miami tiger beetle habitat in such a way that take Miami tiger beetles by adversely affecting their essential behavioral patterns, including breeding, foraging, sheltering, or other life functions. Otherwise lawful activities that incidentally take Miami tiger beetles, but have no Federal nexus, will require a permit under section 10(a)(1)(B) of the Act.

Questions regarding whether specific activities would constitute a violation of section 9 of the Act should be directed to the South Florida Ecological Services Office (see **FOR FURTHER INFORMATION CONTACT**).

Critical Habitat

Section 3(5)(A) of the Act defines critical habitat as ''(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.'' Section 3(3) of the Act (16 U.S.C. 1532(3)) also defines the terms ''conserve,'' ''conserving,'' and ''conservation'' to mean ''to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.''

In the proposed listing rule (80 FR 79533, December 22, 2015), we determined that designation of critical habitat for the Miami tiger beetle was prudent. See the *Prudency Determination* in the proposed rule for more information.

Once we determine that the designation is prudent, we must find whether critical habitat for *Cicindelidia floridana* is determinable. Our regulations (50 CFR 424.12(a)(2)) state

that critical habitat is not determinable when one or both of the following situations exists: (1) Information sufficient to perform required analysis of the impacts of the designation is lacking; or (2) the biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

In our proposed listing rule, we found that critical habitat was not determinable because the specific information sufficient to perform the required analysis of the impacts of the designation was lacking. We are still in the process of obtaining that information, but anticipate that a proposed rule designating critical habitat for the Miami tiger beetle will be published before the end of fiscal year 2017.

Required Determinations

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA), need not be prepared in connection with listing a species as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We are not aware of any *Cicindelida floridana* populations on tribal lands.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the South Florida Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are the staff members of the South Florida Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as follows:

PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245; unless otherwise noted.

■ 2. Amend § 17.11(h) by adding the following entry to the List of Endangered and Threatened Wildlife in alphabetical order under Insects:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
* * * * *				
INSECTS				
* * * * *				
Beetle, Miami tiger	*Cicindelidia floridana*	U.S.A. (FL)	E	81 FR [*Insert* ***Federal Register*** *page where the document begins*]; October 5, 2016.
* * * * *				

* * * * *

Dated: September 21, 2016.

Stephen Guertin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–23945 Filed 10–4–16; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 130312235–3658–02]

RIN 0648–XE910

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; 2016 Commercial Accountability Measure and Closure for South Atlantic Vermilion Snapper

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS implements accountability measures (AMs) for the commercial sector for vermilion snapper in the exclusive economic zone (EEZ) of the South Atlantic. NMFS projects that commercial landings of vermilion snapper will reach the commercial annual catch limit (ACL) for the July through December 2016 period on October 11, 2016. Therefore, NMFS closes the commercial sector for vermilion snapper in the South Atlantic EEZ on October 11, 2016, and it will remain closed until the start of the next fishing season on January 1, 2017. This closure is necessary to protect the South Atlantic vermilion snapper resource.

DATES: This rule is effective 12:01 a.m., local time, October 11, 2016, until 12:01 a.m., local time, January 1, 2017.

FOR FURTHER INFORMATION CONTACT: Mary Vara, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *mary.vara@noaa.gov.*

SUPPLEMENTARY INFORMATION: The snapper-grouper fishery of the South Atlantic includes vermilion snapper and is managed under the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (FMP). The FMP was prepared by the South Atlantic Fishery Management Council and is implemented by NMFS under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) by regulations at 50 CFR part 622.

The commercial quota for vermilion snapper in the South Atlantic is divided into separate quotas for two 6-month time periods each year, January through June and July through December. For the July through December 2016 period, the commercial quota is 388,703 lb (176,313 kg), gutted weight (431,460 lb (195,707 kg), round weight), as specified in 50 CFR 622.190(a)(4)(ii)(D).

On August 25, 2016 (81 FR 58411), NMFS published a temporary rule in the **Federal Register** to reduce the commercial trip limit for vermilion snapper in or from the EEZ of the South Atlantic to 500 lb (227 kg), gutted weight. The temporary rule was effective at 12:01 a.m., local time, August 28, 2016, until January 1, 2017, or until the commercial quota is reached and the commercial sector closes, whichever occurs first.

In accordance with regulations at 50 CFR 622.193(f)(1), NMFS is required to close the commercial sector for vermilion snapper when the commercial quota for that 6-month portion of the fishing year is reached, or is projected to be reached, by filing a notification to that effect with the Office of the Federal Register. NMFS has determined that the commercial quota for South Atlantic vermilion snapper for the July through December 2016 period will be reached by October 11, 2016. Accordingly, the commercial sector for South Atlantic vermilion snapper is closed effective 12:01 a.m., local time, October 11, 2016, until 12:01 a.m., local time, January 1, 2017. The commercial quota for vermilion snapper in the South Atlantic is 388,703 lb (176,313 kg), gutted weight (431,460 lb (195,707 kg), round weight), for the January 1 through June 30, 2017 period as specified in 50 CFR 622.190(a)(4)(i)(D).

The operator of a vessel with a valid commercial vessel permit for South Atlantic snapper-grouper having vermilion snapper onboard must have landed and bartered, traded, or sold such vermilion snapper prior to 12:01 a.m., local time, October 11, 2016. During the closure, the bag limit specified in 50 CFR 622.187(b)(5) and the possession limits specified in 50 CFR 622.187(c)(1), apply to all harvest or possession of vermilion snapper in or from the South Atlantic EEZ. During the closure, the sale or purchase of vermilion snapper taken from the EEZ is prohibited. As specified in 50 CFR 622.190(c)(1)(i), the prohibition on sale or purchase does not apply to the sale or purchase of vermilion snapper that were harvested, landed ashore, and sold prior to 12:01 a.m., local time, October 11, 2016, and were held in cold storage by a dealer or processor. For a person on board a vessel for which a Federal commercial or charter vessel/headboat permit for the South Atlantic snapper-grouper fishery has been issued, the bag and possession limits and the prohibition on sale and purchase apply regardless of whether the fish are harvested in state or Federal waters, as specified in 50 CFR 622.190(c)(1)(ii).

Classification

The Regional Administrator, Southeast Region, NMFS, has determined this temporary rule is necessary for the conservation and management of South Atlantic vermilion snapper and is consistent with the Magnuson-Stevens Act and other applicable laws.

This action is taken under 50 CFR 622.193(f)(1) and is exempt from review under Executive Order 12866.

These measures are exempt from the procedures of the Regulatory Flexibility Act because the temporary rule is issued without opportunity for prior notice and comment.

This action responds to the best scientific information available. The Assistant Administrator for NOAA Fisheries (AA) finds that the need to immediately implement this action to close the commercial sector for vermilion snapper constitutes good cause to waive the requirements to provide prior notice and opportunity for public comment pursuant to the authority set forth in 5 U.S.C. 553(b)(B), as such procedures are unnecessary and contrary to the public interest. Such procedures are unnecessary because the rule implementing the AMs has already been subject to notice and comment, and all that remains is to notify the public of the closure. Allowing prior notice and opportunity for public comment is contrary to the public interest because of the need to immediately implement this action to protect vermilion snapper since the capacity of the fishing fleet allows for rapid harvest of the commercial quota. Prior notice and opportunity for public comment could result in a harvest well in excess of the established commercial quota.

For the aforementioned reasons, the AA also finds good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

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

Dated: September 30, 2016.

Emily H. Menashes,

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

[FR Doc. 2016–24105 Filed 10–4–16; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 81, No. 193
Wednesday, October 5, 2016

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.

DEPARTMENT OF ENERGY

10 CFR Part 430

[Docket No. EERE–2013–BT–STD–0051]

RIN 1904–AD09

Energy Conservation Standards for General Service Lamps: Public Meeting

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

ACTION: Notice of public meeting and webinar.

SUMMARY: The U.S. Department of Energy (DOE) will hold a public meeting to discuss and receive comments on a proposed definition for general service lamps (GSLs) to be published in a forthcoming notice of proposed definition and data availability (NOPDDA). The meeting will cover the proposed scope of the GSL definition; DOE's approach to analyzing the 22 lamps exempted from the statutory definition of general service incandescent lamp, including available sales data; challenges manufacturers may have in meeting the statutory backstop requirement of 45 lumens per watt (lm/W) associated with the lamps meeting the GSL definition that will apply beginning in January, 2020; and options available to DOE and/or manufacturers to help manufacturers transition to the backstop requirement; and any other issues relevant to the scope of the GSL definition.

DATES: DOE will hold a public meeting on October 21, 2016, from 9:30 a.m. to 4:00 p.m., in Washington, DC.

ADDRESSES: The public meeting will be held at the U.S. Department of Energy, Forrestal Building, Room 1E–245, 1000 Independence Avenue SW., Washington, DC 20585–0121. In addition, you can attend the public meeting via webinar. Webinar registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's Web site at: *https://www1.eere.energy.gov/buildings/appliance_standards/standards.aspx?productid=4.* Participants are responsible for ensuring their systems are compatible with the webinar software. Please also note that any person wishing to bring a laptop into the Forrestal Building will be required to obtain a property pass. Visitors should avoid bringing laptops, or allow an extra 45 minutes.

FOR FURTHER INFORMATION CONTACT: Ms. Lucy deButts, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Office, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 287–1604. Email: *gsl@ee.doe.gov.*

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

SUPPLEMENTARY INFORMATION: Title III, Part B of the Energy Policy and Conservation Act of 1975 (EPCA or the Act), Public Law 94–163 (42 U.S.C. 6291–6309, as codified) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances (collectively referred to as ''covered products'').[1] Subsequent amendments expanded Title III of EPCA to include additional consumer products, including GSLs—the products that are the focus of this notice of public meeting (NOPM).

In particular, amendments to EPCA in the Energy Independence and Security Act of 2007 (EISA 2007) directed DOE to conduct two rulemaking cycles to evaluate energy conservation standards for GSLs. (42 U.S.C. 6295(i)(6)(A)–(B)) For the first rulemaking cycle, EPCA, as amended by EISA 2007, directs DOE to initiate a rulemaking no later than January 1, 2014, to evaluate standards for GSLs and determine whether exemptions for certain incandescent lamps should be maintained or discontinued. (42 U.S.C. 6295(i)(6)(A)(i)) The scope of the rulemaking is not limited to incandescent lamp technologies. (42 U.S.C. 6295(i)(6)(A)(ii)) Further, for this first cycle of rulemaking, the EISA 2007 amendments provide that DOE must consider a minimum standard of 45 lm/W. (42 U.S.C. 6295(i)(6)(A)(ii)) If DOE fails to meet the requirements of 42 U.S.C. 6295(i)(6)(A)(i)–(iv) or the final rule from the first rulemaking cycle does not produce savings greater than or equal to the savings from a minimum efficacy standard of 45 lm/W, sales of GSLs that do not meet the minimum 45 lm/W standard beginning on January 1, 2020, will be prohibited. (42 U.S.C. 6295(i)(6)(A)(v))

On March 17, 2016, DOE published a notice of proposed rulemaking (NOPR) for energy conservation standards for GSLs. 81 FR 14527. DOE held the related NOPR public meeting on April 20, 2016. During the public meeting and in written comments, interested parties provided additional data and raised concerns regarding the scope of the proposed GSL definition, DOE's approach to analyzing the 22 incandescent lamps exempted from EPCA's definition of general service incandescent lamps, and the 45 lm/W backstop requirement. In response to these comments, DOE conducted additional research and will publish a notice of proposed definition and data availability (NOPDDA) proposing a definition of GSL; presenting additional data collected by DOE; outlining options available to DOE and/or manufacturers to help manufacturers transition to the 2020 backstop requirement; and requesting public comment on the proposed definition of GSL and the compiled data.

After publication of the NOPDDA, DOE will hold a public meeting to discuss: (1) The proposed scope of the GSL definition; (2) DOE's approach to analyzing the 22 exemptions, including available sales data; (3) challenges manufacturers face with the 45 lm/W backstop requirement and options available to DOE and/or manufacturers to help manufacturers transition to the backstop requirement; and (4) any other issues relevant to the scope of the GSL definition.

Public Participation

Members of the public are welcome to observe the business of the meeting and, if time allows, may make oral statements during the specified period

[1] Part B was re-designated Part A on codification in the U.S. Code for editorial reasons.

for public comment. To attend the meeting and/or to make oral statements, please notify the Appliance and Equipment Standards Staff at (202) 586–6636 or *Appliance_Standards_Public_Meetings@ee.doe.gov.* In the email, please indicate your name, organization (if appropriate), citizenship, and contact information. Please note that foreign nationals visiting DOE Headquarters are subject to advance security screening procedures which require advance notice prior to attendance at the public meeting. If a foreign national wishes to participate in the public meeting, please inform DOE of this fact as soon as possible by contacting Ms. Regina Washington at (202) 586–1214 or by email (*Regina.Washington@ee.doe.gov)* so that the necessary procedures can be completed.

Anyone attending the meeting will be required to present a government photo identification, such as a passport, driver's license, or government identification. Due to the required security screening upon entry, individuals attending should arrive early to allow for the extra time needed.

Due to the REAL ID Act implemented by the Department of Homeland Security (DHS), there have been recent changes regarding identification (ID) requirements for individuals wishing to enter federal buildings from specific states and U.S. territories. As a result, driver's licenses from several states or territory will not be accepted for building entry, and instead, one of the alternate forms of ID listed below will be required. DHS has determined that regular driver's licenses (and ID cards) from the following jurisdictions are not acceptable for entry into DOE facilities: Alaska, American Samoa, Arizona, Louisiana, Maine, Massachusetts, Minnesota, New York, Oklahoma, and Washington. Acceptable alternate forms of Photo-ID include: U.S. Passport or Passport Card; an Enhanced Driver's License or Enhanced ID-Card issued by the States of Minnesota, New York, or Washington (Enhanced licenses issued by these states are clearly marked Enhanced or Enhanced Driver's License); a military ID or other federal-government-issued photo ID-card.

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

Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this NOPM.

Issued in Washington, DC, on September 27, 2016.

Kathleen B. Hogan,

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

[FR Doc. 2016–24063 Filed 10–4–16; 8:45 am]

BILLING CODE 6450–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Chapter I

[NRC–2016–0185]

Processing Fitness-for-Duty Drug and Alcohol Cases

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy revision; request for comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is requesting public comments on proposed revisions to its Enforcement Policy (the Policy). The NRC is proposing to revise Section 4.1, ''Considerations in Determining Enforcement Actions Involving Individuals,'' of the Policy to indicate that the NRC typically will not consider Fitness-for-Duty (FFD) Drug and Alcohol (D&A) related violations for enforcement unless the licensee's FFD program has apparent deficiencies.

DATES: Submit comments by November 4, 2016. Comments received after this date will be considered if it is practical to do so, but the NRC is able to assure consideration only for comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2016–0185. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Email comments to: Rulemaking.Comments@nrc.gov.* If you do not receive an automatic email reply confirming receipt, then contact us at 301–415–1677.
- *Fax comments to:* Secretary, U.S. Nuclear Regulatory Commission at 301–415–1101.
- *Mail comments to:* Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.
- *Hand deliver comments to:* 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern Time) Federal workdays; telephone: 301–415–1677.

For additional direction on obtaining information and submitting comments, see ''Obtaining Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: David Furst, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–7634, email: *David.Furst@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2016–0185 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–2016–0185.
- *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 ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* You may examine and purchase copies of public documents at the NRC's PDR, Room O1–F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC–2016–0185 in your comment submission.

The NRC cautions you not to include identifying or contact information that you do not want to be publicly

disclosed in your comment submission. The NRC will post all comment submissions at *http://www.regulations.gov* as well as enter the comment submissions into ADAMS. The NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Discussion

On January 31, 2016, the NRC staff submitted to the Commission SECY–16–0009, ''Recommendations Resulting from the Integrated Prioritization and Re-Baselining of Agency Activities,'' dated January 31, 2016 (ADAMS Package Accession No. ML16028A189). Item 101 in Enclosure 1 of SECY–16–0009 included the NRC staff's recommendations for creating efficiencies in the Enforcement Process, in part by reducing FFD case processing.

In developing potential efficiencies in the enforcement program, the NRC staff concluded that not processing routine cases involving D&A issues would reduce NRC staff resources without impacting safety, as discussed more fully below.

The Commission approved the NRC staff's recommendation to reduce FFD case processing in the Staff Requirements Memorandum for SECY–16–0009, dated April 13, 2016 (ADAMS Accession No. ML16104A158).

Part 26 of title 10 of the *Code of Federal Regulations* (10 CFR) requires licensees to establish D&A testing programs and report test results to the NRC. The NRC's Office of Investigations (OI) investigates FFD D&A cases, many of which involve an individual who violates FFD D&A procedures at a site. Typically, the licensee has identified the issue and conducted an internal investigation yielding evidence of an FFD D&A violation by the time they notify the NRC. In most cases, pursuant to 10 CFR part 26, the site FFD D&A policy provides penalties for specific violations. The NRC believes that individual FFD D&A issues generally are dispositioned by the licensee according to the programs in place. Therefore, NRC staff review of individual FFD D&A cases appears to be an area where the NRC can make efficiency gains. The NRC is proposing changes to the enforcement process with respect to FFD D&A cases where an individual violates the site FFD D&A procedure, but where there is no breakdown in the performance of the FFD process itself.

On March 31, 2008 (73 FR 16965), the NRC amended 10 CFR part 26, in part, to strengthen the D&A testing requirements and broaden the scope of D&A testing to other NRC licensees (*e.g.,* owner operators of uranium fuel fabrication facilities) and to persons who perform safety or security-significant activities within the protected areas (PA) of these sites. The NRC implemented an electronic reporting (e-reporting) system to simplify and improve FFD data reporting and to enable the reporting of additional voluntary information to the NRC.

Based on the FFD performance information reported electronically to the NRC since 2009 and a comparison of this information to previous years and other indicators, the commercial nuclear industry continues to effectively implement the 10 CFR part 26 D&A provisions and FFD program results have directly contributed to public health and safety and the common defense and security. Licensees identify persons under the influence of illicit drugs and/or alcohol and remove them from the PA of NRC-licensed facilities, and licensees identify persons of questionable trustworthiness and reliability, in part, through rigorous testing methods (*e.g.,* limit-of-detection testing, cutoffs, and effective monitoring during specimen collections). These outcomes provide reasonable assurance that persons who perform safety or security-significant activities, or who have unescorted access to certain NRC-licensed facilities, information, or material, are fit-for-duty, and that the public and the NRC are timely informed of FFD performance. The data indicates no adverse trends.

Since March 31, 2008, when the NRC amended 10 CFR part 26, the NRC has processed approximately 40 FFD D&A related cases in which OI investigated instances of individuals violating FFD D&A procedures at licensee sites. These types of cases result from a range of issues including failed drug tests, alleged attempts to subvert FFD testing, alleged possession or use of illegal drugs or alcohol, or alleged misuse or failure to report the use of prescription drugs. Typically the issues are discovered, investigated by, and reported to the NRC by licensees using the e-reporting system. By the time the NRC implements the process to investigate, the licensees have imposed the appropriate 10 CFR part 26 sanctions.

In many regards, 10 CFR part 26 is unique in comparison to other 10 CFR regulations; for example, explicit sanctions are specified for individuals who violate FFD policy. Section 26.75, ''Sanctions,'' specifies, in part, the minimum sanctions that licensees and other entities shall impose when an individual has violated the D&A provisions of their FFD policy (*e.g.,* immediate unfavorable termination of the individual's authorization for at least 14 days for the first violation and 5 years for the second violation, and permanent denial of access for any act or attempted act to subvert the testing process). The requirement also states that the licensee or other entity may impose more stringent sanctions.

A limited exception to the proposal to not process FFD cases is when NRC staff identifies an apparent breakdown of the licensee's FFD program itself. Any case involving an alleged breakdown of the FFD program itself would be reviewed and considered for an NRC enforcement sanction.

III. Proposed Revisions

The NRC can gain efficiency in its enforcement program if it elects to no longer pursue D&A cases; this process change is possible because 10 CFR 26.75 already requires licensees to disposition individual violations of their FFD D&A procedures. This process change could be implemented by adding the following paragraph at the end of Section 4.1, ''Considerations in Determining Enforcement Actions Involving Individuals:''

The NRC typically will not consider FFD drug and alcohol related violations for enforcement action unless there is an apparent deficiency of the licensee's FFD program.

The proposed revision to the Policy is available in ADAMS under Accession No. ML16197A561.

Dated at Rockville, Maryland, this 29th day of September, 2016.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission.

[FR Doc. 2016–24073 Filed 10–4–16; 8:45 am]

BILLING CODE 7590–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 107

Small Business Investment Companies—Early Stage SBICs; Public Webinar

AGENCY: U.S. Small Business Administration.

ACTION: Proposed rule; notice of public webinar.

SUMMARY: The U.S. Small Business Administration (SBA) announces that it is holding a public webinar regarding its Early Stage Small Business Investment Companies proposed rule, which was published on September 19, 2016. The webinar will describe the changes proposed in the rulemaking and answer questions regarding the proposed rule.

DATES: The webinar will be held on October 12, 2016, at 1 p.m. EST. Attendees must pre-register by October 10, 2016, at 11:59 p.m. EST.

ADDRESSES: Parties interested in attending the webinar must pre-register by sending an email request to SBA's Office of Investment and Innovation at *applySBIC@sba.gov,* as further described in section III of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Scott Schaefer, SBA Office of Investment and Innovation at (202) 205–6514 or *applySBIC@sba.gov.*

SUPPLEMENTARY INFORMATION:

I. Background Information

The Early Stage SBIC program was launched in 2012 as a 5-year effort as part of President Obama's Startup America Initiative. The intent of the Early Stage SBIC program was to license and provide SBA-guaranteed leverage to Early Stage SBICs that would focus on making investments in early stage small businesses. Although 62 investment funds applied to the program, few satisfied SBA's licensing criteria. To date, SBA has only licensed five Early Stage SBICs.

On September 19, 2016, SBA published a proposed rule regarding the Early Stage Small Business Investment Company (SBIC) program (81 FR 64075), which proposes to make the Early Stage SBIC program a permanent part of the SBIC program. In addition, the rule proposes changes to the Early Stage SBIC Program with respect to licensing, non-SBA borrowing, and leverage eligibility.

The proposed Early Stage SBIC rule may be viewed at *https://www.regulations.gov/document?D=SBA-2015-0002-0009.* The comment period for the proposed rule closes on October 19, 2016. In order to familiarize the public with the content of the Early Stage SBIC proposed rule, SBA will host a webinar on the proposed rule before the closing date. The webinar will be transcribed and become part of the administrative record for SBA's consideration when the Agency deliberates on the final Early Stage SBIC regulations.

II. Webinar Schedule

Webinar date and time	Registration closing date
October 12, 2016, 1 p.m. EST.	October 10, 2016, 11:59 p.m. EST.

The session is expected to last no more than 1 hour.

III. Registration

If you are interested in attending the webinar, you must pre-register by the registration closing date. To pre-register, send an email to *applySBIC@sba.gov.* In the body of the email, please provide the following: Participant's Name, Title, Organization Affiliation, Address, Telephone Number, and Email Address. You must submit your email by the applicable registration closing date listed in this notice.

Due to technological limitations, attendance is limited to 120 participants per session. If demand exceeds capacity for the webinar, SBA will hold another one. SBA will announce any additional sessions through a **Federal Register** document and on its Web site, *www.sba.gov/inv/earlystage.*

SBA will confirm the registration via email along with instructions for participating. SBA will post any presentation materials associated with the webinar on the day of the webinar by 10 a.m. EST at *www.sba.gov/inv/earlystage.*

If there are specific questions you would like SBA to address in the webinar, SBA must receive them no later than October 9, 2016. Since the Early Stage SBIC regulations are in the proposed rulemaking stage, SBA will not be able to answer questions that are outside of clarification of the proposed rule.

Mark L. Walsh,

Associate Administrator for Investment and Innovation.

[FR Doc. 2016–24031 Filed 10–4–16; 8:45 am]

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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 100

[Docket No. FR–5508–N–03]

Application of the Fair Housing Act's Discriminatory Effects Standard to Insurance

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Reconsideration of public comments; implementation of the Fair Housing Act's Discriminatory Effects Standard.

SUMMARY: HUD is issuing this document to supplement its responses to certain insurance industry comments to HUD's proposed rule implementing the Fair Housing Act's (''Act'') discriminatory effects standard. These commenters requested, *inter alia,* total or partial exemptions or safe harbors from liability under the Act's discriminatory effects standard. After careful reconsideration of the insurance industry comments in accordance with the court's decision in *Property Casualty Insurers Association of America* (*PCIAA*) v. *Donovan,* HUD has determined that categorical exemptions or safe harbors for insurance practices are unworkable and inconsistent with the broad fair housing objectives and obligations embodied in the Act. HUD continues to believe that the commenters' concerns regarding application of the discriminatory effects standard to insurance practices can and should be addressed on a case-by-case basis.

DATES: Supplemental Responses issued on October 5, 2016.

FOR FURTHER INFORMATION CONTACT: Jeanine Worden, Associate General Counsel for Fair Housing, Office of General Counsel, U.S. Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410–0500; (202) 402–5188 (this is not a toll-free number). Persons with hearing or speech impairments may contact this number via TTY by calling the toll-free Federal Relay Service at 800–877–8399.

SUPPLEMENTARY INFORMATION:

Background

Title VIII of the Civil Rights Act of 1968, as amended (''Fair Housing Act'' or ''Act''), prohibits discrimination in the sale, rental, or financing of dwellings and in other housing-related activities on the basis of race, color, religion, sex, disability, familial status, or national origin.[1] On November 16,

[1] 42 U.S.C. 3601–3619.

2011, HUD issued a proposed rule seeking to formalize, through notice-and-comment rulemaking, HUD's longstanding interpretation of the Act as prohibiting practices with an unjustified discriminatory effect and to standardize the analytical framework for evaluating such cases.[2] In response to the proposed rule, HUD received nearly one hundred comments from a range of interested parties, including from three insurance trade associations requesting exemptions or safe harbors. The National Association of Mutual Insurance Companies (''NAMIC'') and the American Insurance Association (''AIA'') requested an exemption from discriminatory effects liability for all insurance practices. NAMIC also requested, in the alternative, exemptions for insurance pricing, for Fair Access to Insurance Requirements (''FAIR'') plans, and/or safe harbors for recognized risk factors. The Property Casualty Insurers Association of America (''PCIAA'') requested an exemption for all insurance underwriting practices.

On February 15, 2013, HUD published its final rule, entitled ''Implementation of the Fair Housing Act's Discriminatory Effects Standard'' (''Rule'').[3] In the Rule, HUD declined to grant the requested exemptions or safe harbors for any insurance practices, explaining that the commenters' concerns could be addressed on a case-by-case basis. On November 27, 2013, PCIAA filed an action in the U.S. District Court for the Northern District of Illinois (''the court'') alleging that HUD's Rule violated the McCarran-Ferguson Act[4] (''McCarran-Ferguson'') and the Administrative Procedure Act.[5]

On September 3, 2014, the court issued a decision in *PCIAA* v. *Donovan*.[6] The court upheld the Rule's burden-shifting framework for analyzing discriminatory effects claims as a reasonable interpretation of the Fair Housing Act.[7] The court also held that a violation of McCarran-Ferguson can be adjudicated by a court only in the context of a concrete dispute challenging the application of the Rule to a particular insurance practice, and not in the abstract.[8] Distinguishing between adjudication and agency rulemaking, the court concluded that HUD had not adequately explained why case-by-case adjudication was preferable to using its rulemaking authority to provide exemptions or safe harbors related to homeowners insurance.[9] The court remanded the matter to HUD for further proceedings consistent with its ruling.[10]

After careful reconsideration of the comments from insurance industry representatives and the court's opinion, HUD continues to believe that case-by-case adjudication is preferable to creating the requested exemptions or safe harbors for insurance practices. The Fair Housing Act's broad prohibitions on discrimination in housing are intended to eliminate segregated living patterns while moving the nation toward a more integrated society. When Congress enacted the Fair Housing Act in 1968 and amended it in 1988, it established exemptions for certain practices[11] but not for insurance. Rather, Congress stated that the Act is intended to provide for fair housing throughout the United States.[12] The Supreme Court has recognized the Act's broad remedial purpose.[13] Among other things, the Act requires HUD to affirmatively further fair housing in all of its housing-related programs and activities,[14] one of which is the administration and enforcement of the Act.[15] McCarran-Ferguson, enacted in 1945, restricts only those applications of federal law that directly conflict with state insurance laws, frustrate a declared state policy, or interfere with a State's administrative regime.[16] For HUD to create the requested exemptions or safe harbors would allow to go uncorrected at least some discriminatory insurance practices that can be subject to disparate impact challenges consistent with McCarran-Ferguson and the filed rate doctrine. Thus, to create such exemptions or safe harbors would undermine the efficacy of the Act and run counter to the Act's purpose and HUD's statutory responsibilities. The concerns raised by the insurance industry commenters do not outweigh this loss of efficacy in the administration and enforcement of the Act. Rather, the case-by-case approach appropriately balances these concerns against HUD's obligation to give maximum force to the Act by taking into account the diversity of potential discriminatory effects claims, as well as the variety of insurer business practices and differing insurance laws of the states, as they currently exist or may exist in the future. Moreover, in light of the variety of practices and relevant state laws, as well as the substantial range of possible discriminatory effects claims, it is practically impossible for HUD to define the scope of insurance practices covered by an exemption or safe harbor with enough precision to avoid case-by-case disputes over its application.

Accordingly, HUD has determined that categorical exemptions or safe harbors for insurance practices are unworkable and inconsistent with HUD's statutory mandate. The discriminatory effects standard imposes liability only for those insurance practices that actually or predictably result in a discriminatory effect and that lack a legally sufficient justification.[17] It takes into account an insurer's interest in the challenged practice and, for the reasons explained below, any conflict with a specific state insurance law can and should be addressed on a case-by-case basis in the context of that state law. HUD provides the following supplemental responses to the public comments submitted by the three insurance trade associations that sought exemptions or safe harbors.

Revised Responses to Insurance Industry Comments

Issue: Two commenters requested exemptions from the Rule for all

[2] 76 FR 70921 (Nov. 16, 2011).

[3] 78 FR 11460 (Feb. 15, 2013).

[4] 15 U.S.C. 1011–1015.

[5] 5 U.S.C. 551–559.

[6] *Prop. Cas. Insurers Ass'n of Am.* v. *Donovan* (*PCIAA*), 66 F. Supp. 3d 1018 (N.D. Ill. 2014).

[7] *Id.* at 1051–53.

[8] *Id.* at 1037–42.

[9] *Id.* at 1049.

[10] *Id.* at 1054.

[11] *See, e.g.,* 42 U.S.C. 3605(c) (exempting appraisal practices from disparate impact liability), 3607(b)(1) (exempting reasonable governmental occupancy limits from disparate impact liability), 3607(b)(4) (exempting practices related to certain controlled substance convictions from disparate impact liability); *see also Tex. Dep't of Hous. & Cmty. Affairs* v. *Inclusive Cmtys. Project, Inc.,* 135 S. Ct. 2507, 2520–21 (2015) (discussing these ''exemptions from liability'').

[12] *See* 42 U.S.C. 3601.

[13] *See Havens Realty Corp.* v. *Coleman,* 455 U.S. 363, 380 (1982) (recognizing Congress's ''broad remedial intent'' in passing the Act); *Trafficante* v. *Metro. Life Ins. Co.,* 409 U.S. 205, 209 (1972) (recognizing the ''broad and inclusive'' language of the Act); *see also Inclusive Cmtys.,* 135 S. Ct. at 2521 (describing the ''central purpose'' of the Act as ''to eradicate discriminatory practices within a sector of our Nation's economy'').

[14] *See* 42 U.S.C. 3608(e)(5).

[15] *See, e.g.,* 42 U.S.C. 3608 (the Secretary's administrative responsibilities under the Act), 3609 (education, conciliation, conferences, and reporting obligations to further the purposes of the Act), 3610 (investigative authority), 3611 (subpoena power), 3612 (administrative enforcement authority), 3614a (rulemaking authority), 3616 (authority to cooperate with state and local agencies in carrying out the Secretary's responsibilities under the Act), 3616a (authority to fund of state and local agencies and private fair housing groups to eliminate discriminatory housing practices prohibited by the Act).

[16] *Humana Inc.* v. *Forsyth,* 525 U.S. 299, 310 (1999) (''When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.'').

[17] *See* 24 CFR 100.500(b).

insurance practices, and a third commenter requested an exemption for insurance underwriting practices. All three of these insurance industry commenters raised McCarran-Ferguson in support of their requests for an exemption. One of these three commenters urged HUD to delete the insurance example from the Rule, stating that McCarran-Ferguson dictates that ''state insurance law trumps the application of any federal law to state regulated insurance, except under very narrow circumstances, which are not met here.'' [18] Another questioned ''whether non-racially motivated and sound actuarial underwriting principles recognized by state insurance regulators that permit accurate risk-based pricing for consumers can be prohibited by federal regulators who find them to have a 'disparate impact.' '' [19]

The third commenter was concerned that ''the disparate impact standards would impair state unfair discrimination standards,'' which have ''historically been a cost based concept'' prohibiting ''underwriting and rating distinctions 'between individuals or risks of the same class and essentially the same hazard.' '' [20] The commenter expressed concern that if the Rule is applied to homeowners insurance, ''accurate risk assessment will be threatened, adverse selection will increase, and coverage availability will suffer.'' [21] This commenter also sought, in the alternative, ''safe harbors for long-recognized risk-related factors,'' stating that ''[f]ailure to provide safe harbor protection for the use of factors historically allowed by state insurance regulators would subject insurers to baseless litigation and threaten the sound actuarial standards underpinning the insurance market.'' [22]

HUD Response: HUD does not agree that it is necessary or appropriate to create an exemption from discriminatory effects liability for all insurance practices or for all underwriting practices in order to accommodate the insurance industry's concerns. McCarran-Ferguson does not require HUD to do so, and categorical exemptions would undermine the Act's broad remedial purpose and contravene HUD's own statutory obligation to affirmatively further fair housing. HUD also declines to create safe harbors from discriminatory effects liability for the use of particular risk factors. HUD disagrees with the commenter's assertions about the consequences that would befall the insurance industry if HUD does not grant the requested safe harbors for ''long-recognized risk-related factors'' or ''historically allowed'' factors. Establishing safe harbors for specific risk-related criteria would be overbroad, arbitrary, and quickly outdated.

The Act's broad remedial purpose is ''to provide . . . for fair housing throughout the United States.'' [23] Thus, the Act plays a ''continuing role in moving the Nation toward a more integrated society.'' [24] Ensuring that members of all protected classes can access insurance free from discrimination is necessary to achieve the Act's objective because obtaining a mortgage for housing typically requires obtaining insurance, too.[25] Likewise, obtaining insurance may be a precondition to securing a home in the rental market.[26] Insurance is also critical to maintaining housing because fire, storms, theft, and other perils frequently result in property damage or loss that would be too costly to repair or replace without insurance coverage.

Yet the history of discrimination in the homeowners insurance industry is long and well documented,[27] beginning with insurers overtly relying on race to deny insurance to minorities and evolving into more covert forms of discrimination.[28] At times, agents were given plainly discriminatory instructions, such as '''get away from blacks' and sell to 'good, solid premium-paying white people,''' or they simply were told, ''We don't write Blacks or Hispanics.'' [29] Underwriting guidelines contained discriminatory statements, such as listing ''population and racial changes'' among ''red flags for agents.'' [30] Minorities were offered inferior products, such as coverage for repairs rather than replacement, or were subject to additional hurdles during the quote and underwriting process.[31] Additionally, discrimination took the form of insurers redlining predominantly minority neighborhoods and disproportionately placing agents and offices in predominately white neighborhoods.[32] Minorities also were denied access to insurance through property-location and property-age restrictions, even when data had demonstrated that such restrictions are not justified by risk of loss.[33] This history of discrimination led to

[18] American Insurance Association, Comment Letter on Proposed Rule on Implementation of the Fair Housing Act's Discriminatory Effects Standard (Jan. 17, 2012).

[19] Property Casualty Insurers Association of America, Comment Letter on Proposed Rule on Implementation of the Fair Housing Act's Discriminatory Effects Standard (Jan. 17, 2012).

[20] National Association of Mutual Insurance Companies, Comment Letter on Proposed Rule on Implementation of the Fair Housing Act's Discriminatory Effects Standard (Jan. 17, 2012).

[21] *Id.*

[22] *Id.*

[23] 42 U.S.C. 3601; *see also* cases cited *supra* note 13.

[24] *Inclusive Cmtys.,* 135 S. Ct. at 2526.

[25] *NAACP* v. *Am. Family Mut. Ins. Co.,* 978 F.2d 287, 297 (7th Cir. 1992) (''No insurance, no loan; no loan, no house; lack of insurance thus makes housing unavailable.'').

[26] *See, e.g.,* Or. Rev. Stat. 90.222(1) (''A landlord may require a tenant to obtain and maintain renter's liability insurance in a written rental agreement.''); Va. Code Ann. 55–248.7:2(B) (''A landlord may require as a condition of tenancy that a tenant have renter's insurance. . . .'').

[27] Although the discussion that follows focuses on race and national origin discrimination because of their historic prevalence, examples of discrimination in insurance against other protected classes exist as well. *See e.g., Nevels* v. *W. World Ins. Co.,* 359 F. Supp. 2d 1110, 1120–21 (W.D. Wash. 2004) (disability).

[28] *See generally, Homeowners' Insurance Discrimination: Hearings Before the S. Comm. on Banking, Housing and Urban Affairs,* 103d Cong. (1994) [hereinafter *1994 Hearings*]; *Insurance Redlining Practices: Hearings before the Subcom. on Commerce, Consumer Protection & Competitiveness of the H. Comm. on Energy and Commerce,* 103d Cong. (1993) [hereinafter *Mar. 1993 Hearings*]; *Insurance Redlining: Fact or Fiction: Hearing before the Subcom. On Consumer Credit and Insurance of the H. Comm. on Banking, Finance & Urban Affairs,* 103d Cong. (1993) [hereinafter *Feb. 1993 Hearing*]; Insurance Redlining: Fact Not Fiction (Feb. 1979) [hereinafter Comm'n on Civil Rights] (report of the Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin Advisory Committees to the U.S. Commission on Civil Rights); President's National Advisory Panel on Insurance in Riot-Affected Areas, Meeting the Insurance Crisis of Our Cities (1968) [hereinafter Nat'l Advisory Panel].

[29] *See* 139 Cong. Rec. 22,459 (1993) (statement of Rep. Joseph P. Kennedy, II); *see also, e.g.,* Nat'l Advisory Panel, *supra* note 28, at 116 (quoting an insurance broker as explaining, ''No matter how good [a customer] is, they [the insurers] take that into consideration, the fact he is a Negro.'').

[30] *Feb. 1993 Hearing, supra* note 28 at 19, 27 (statement of Gregory Squires, Prof. U. Wis. Milwaukee).

[31] *1994 Hearings, supra* note 28, at 15, 47–48 (statements of Deval Patrick, DOJ Ass't Attorney Gen. for Civil Rights); *id.* at 18–19, 51 (statements of Roberta Achtenberg, HUD Ass't Sec'y of Fair Hous. & Equal Opportunity).

[32] *Feb. 1993 Hearing, supra* note 28, at 7 (statement of John Garamendi, Cal. Ins. Comm'r) (''There may be some people that deny that redlining exists. They are not telling you the truth, or they just don't know what they are talking about. It is real, it does exist, and it is a very serious socioeconomic problem.''); Comm'n on Civil Rights, *supra* note 28, at 5 (listing ''[p]lacing agents selectively in order to reduce the opportunity to secure business in certain areas'' among the types of documented redlining practices).

[33] *See, e.g.,* Comm'n on Civil Rights, *supra* note 28, at 34–39 (''The greater the minority concentration of an area and the older the housing, independent of fire and theft, the less voluntary insurance is currently being written.''); *1994 Hearings, supra* note 28, at 18 (statement of Roberta Achtenberg, HUD Ass't Sec'y of Fair Hous. & Equal Opportunity) (noting the ''disparate impact on minority communities'' of property age and value requirements, and explaining that ''47 percent of black households, but just 23 percent of white households, live in homes valued at less than $50,000'' and that ''40 percent of black households compared to 29 percent of white households live in homes build before 1950.'').

minorities being unjustifiably denied insurance policies or paying higher premiums.[34]

HUD's long experience in administering the Act counsels that discriminatory effects liability does not threaten the fundamental nature of the insurance industry. HUD's position that discriminatory effects liability applies to insurance dates back more than three decades,[35] as does the industry's concern that such liability makes it ''near impossible for an insurer to successfully defend himself.'' [36] HUD has maintained for decades that remedying discrimination in insurance, including discriminatory effects claims, requires examination of each allegedly discriminatory insurance practice on a case-by-case basis,[37] and HUD sees no reason to deviate now from this longstanding approach.

HUD recognizes that risk-based decision making is an important aspect of sound insurance practice, and nothing in the Rule prohibits insurers from making decisions that are in fact risk-based. Under the standard established by the Rule, practices that an insurer can prove are risk-based, and for which no less discriminatory alternative exists, will not give rise to discriminatory effects liability.[38] All the Rule requires is that if an insurer's practices are having a discriminatory effect on its insureds and ''an adjustment . . . can still be made that will allow both [parties'] interests to be satisfied,'' the insurer must make that change.[39] Risk-based decision making is not unique to insurance, and discriminatory effects liability has proven workable in other contexts involving risk-based decisions, such as mortgage lending, without the need for exemptions or safe harbors.[40] Moreover, some states provide for discriminatory effects liability against insurers under state laws, further undermining the industry's claim that providing for such liability as a matter of federal law threatens the fundamental nature of the industry.[41]

Consistent with the Act's broad scope and purpose, as well as HUD's own obligation to affirmatively further fair housing, HUD declines to foreclose viable discrimination claims by creating an overbroad exemption. For the reasons detailed below, wholesale exemptions for all insurance practices or all insurance underwriting practices would necessarily be overbroad, allowing some practices with unjustified discriminatory effects to go uncorrected. Wholesale exemptions also would invariably sweep within their scope potential intentional discrimination in the insurance market as well because ''disparate-impact liability under the [Fair Housing Act] also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment.'' [42]

Some discriminatory effects claims against insurers will survive a McCarran-Ferguson defense depending on a host of case-specific variables, and therefore wholesale exemptions would be overbroad. McCarran-Ferguson specifically provides that ''[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.'' [43] As interpreted by the Supreme Court in *Humana* v. *Forsyth*, McCarran-Ferguson applies only when a particular application of a federal law directly conflicts with a specific state insurance regulation, frustrates a declared state policy, or interferes with a State's administrative regime.[44] Accordingly, the mere fact that a state has the authority to regulate insurance or has adopted ratemaking regulations does not suffice on its own to create the kind of conflict, frustration of purpose, or interference that triggers McCarran-Ferguson.[45] Rather, the inquiry required by *Humana* depends on the relevant state law and other case-specific variables.[46]

For example, in *Dehoyos* v. *Allstate*,[47] the Fifth Circuit rejected a McCarran-Ferguson defense to a disparate impact claim where the insurer did not identify a specific state law that was impaired. In so ruling, the Fifth Circuit reasoned that the Seventh Circuit's holding in *Doe* v. *Mutual of Omaha* [48] does not foreclose all discriminatory effects claims against insurers as barred by McCarran-Ferguson. Instead, the Fifth Circuit distinguished *Doe*, where McCarran-Ferguson was held to bar a claim of discrimination under the Americans with Disabilities Act [49] (''ADA''), by explaining that ''[i]n *Doe*, there was an actual *state insurance law* which purportedly conflicted with the application of the [ADA] to the particular question at issue.'' [50] Thus,

[34] *See, e.g.* 139 Cong. Rec. 22,459 (1993) (statement of Rep. Joseph P. Kennedy, II) (''[S]hocking anecdotal evidence was supported by 12 years of data submitted by Missouri State Insurance Commissioner Jay Angoff. . . . It shows that, in the cities of St. Louis and Kansas City, low-income minorities had to pay more money for less coverage than their white counterparts, despite the fact that losses in minority areas were actually less than those in white areas. This evidence directly challenges industry assertions that minorities are too risky to insure.'').

[35] *Fair Housing Amendments Act of 1979: Hearings before the Subcom. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 96th Cong. 79 (1979) (statement of Patricia Roberts Harris, Sec'y of HUD).

[36] *Fair Housing Act: Hearings before the Subcom. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 20, 616 (1978) (statement of the Am. Ins. Ass'n.).

[37] *1994 Hearings, supra* note 28, at 19 (statement of Roberta Achtenberg, HUD Ass't Sec'y of Fair Hous. & Equal Opportunity) (discussing insurers' property age and value requirements and stating that ''when practices with such racial impacts are not legally or otherwise justified, a case-by-case, Fair Housing Act analysis is warranted''); *id* at 50 (stating that ''it is important to stress that the finding of a [Fair Housing Act] violation occurs on a case by case basis'' for insurance practices that are ''neutral on their face [but] have a disproportionate racial impact'' and ''cannot meet the established test of business necessity and . . . less discriminatory alternative'').

[38] 24 CFR 100.500(b)*; see also Toledo Fair Hous. Ctr.* v. *Nationwide Mut. Ins. Co.*, 94 Ohio Misc. 2d 151, 157 (Ohio Ct. Com. Pl. 1997) (''[T]he disparate-impact approach does not unduly undermine the business of selling insurance. Assuming . . . that the insurance industry is based on 'fair' risk discrimination, the disparate-impact approach will not impede such fair discrimination if the insurer can show a business necessity.'').

[39] *Ave. 6E Invs., LLC* v. *City of Yuma*, 818 F.3d 493, 513 (9th Cir. 2016).

[40] *See, e.g.,* Policy Statement on Discrimination in Lending, 59 FR 18266 (Apr. 15, 1994); *Interagency Fair Lending Examination Procedures* (Aug. 2009); *see also 1994 Hearings, supra* note 28, at 20 (statement of Roberta Achtenberg, HUD Ass't Sec'y of Fair Hous. & Equal Opportunity) (''As in other areas of fair housing law enforcement, standards to determine [insurance] discrimination will . . . [include] disparate impact. . . . The investigative techniques we will utilize will include those that have grown from our fair housing investigative experience across the board . . . the kinds of tactics that we currently utilize . . . in lending discrimination investigations.'').

[41] *See infra* notes 61 thru 64 and accompanying text.

[42] *Inclusive Cmtys.*, 135 S. Ct. at 2522.

[43] 15 U.S.C. 1012(b).

[44] *Humana*, 525 U.S. at 310 (''When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.'').

[45] *Dehoyos* v. *Allstate Corp.*, 345 F.3d 290, 295 (5th Cir. 2003) (disparate impact under the Act); *Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995) (disparate treatment under the Act); *Moore* v. *Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1221 (11th Cir. 2001) (disparate treatment in life insurance).

[46] *See PCIAA*, 66 F. Supp. 3d at 1038 (''McCarran-Ferguson challenges to housing discrimination claims [depend on] the particular, allegedly discriminatory practices at issue and the particular insurance regulations and administrative regime of the state in which those practices occurred.'').

[47] *Dehoyos*, 345 F.3d 290.

[48] 179 F.3d 557 (7th Cir. 1999).

[49] 42 U.S.C. 12101–12213.

[50] *Dehoyos*, 345 F.3d at 298 n.6. Although in HUD's view the Fifth Circuit persuasively distinguished the Seventh Circuit's holding in *Doe*,

Continued

where no state law is impaired, McCarran-Ferguson will not bar a discriminatory effects claim against an insurer.

Past cases demonstrate also that discriminatory effects claims brought under the Fair Housing Act against insurers survive McCarran-Ferguson defenses even when an insurer points to a specific state law and alleges that it is impaired. Although the commenters provided examples of cases in which state laws were found to be impaired by a particular discriminatory effects challenge, other cases provide examples of state laws that were not. For instance, in *Lumpkin* v. *Farmers Group*, the court rejected a McCarran-Ferguson defense to a disparate impact challenge to credit scoring in insurance pricing, holding that disparate impact liability in that context did not impair the state's law mandating that ''insurance rates cannot be 'unfairly discriminatory.' '' [51] In so ruling, the court held it erroneous to read a state law prohibiting ''unfairly discriminatory'' rates ''too broadly'' and rejected the insurer's argument that such state laws require that practices with an unjustified discriminatory effect must be permitted ''as long as the rates are actuarially sound.''[52] The court then cited other provision of the state's insurance code specifically dealing with credit scoring, concluding that they too were not impaired.[53]

McCarran-Ferguson requires a fact-intensive inquiry that will vary state by state and claim by claim. Thus, even those cases in which impairment was found support the case-by-case approach herein adopted by HUD because, in such cases, the finding of impairment was made only after considering the particularities of the challenged practices and the state law at hand. In *Saunders* v. *Farmers Insurance Exchange*, for example, prior to ruling that McCarran-Ferguson barred a discriminatory effects claim under the Act,[54] the Eighth Circuit first remanded the case for further inquiry into several unknowns about the facts and Missouri law.[55]

The many ways in which one state's insurance laws can differ from another's, as well as the ways in which a single state's insurance laws can change over time, mean that even an exemption for specific insurance practices would be overbroad and quickly outdated. For example, variations in state insurance laws have resulted in discriminatory effects challenges to similar insurance practices surviving a McCarran-Ferguson defense in regard to some state laws but not others.[56] Past cases also demonstrate that the insurance laws of each state can change over time in significant ways,[57] and state insurance regulators respond to new practices as they become common and their effects become clear.[58] Given the variation in state insurance laws across more than fifty jurisdictions and over time, HUD declines to fashion a one-size-fits-all exemption that would inevitably insulate insurers engaged in otherwise unlawful discriminatory practices from Fair Housing Act liability.

A one-size-fits-all exemption is also inappropriate in light of the fact that insurance practices are not governed solely by ''hermetically sealed'' state insurance codes,[59] but are also governed by a range of other state laws, including state fair housing laws. Many state fair housing laws track the Act's applicability to insurance and provision of effects liability, indicating that those states do not consider disparate impact liability to conflict with the nature of insurance. Categorical exemptions or safe harbors of the types requested by the commenters would deprive all states of federal support in addressing discriminatory insurance practices—even those states that welcome or depend on such support. This outcome would be at odds with the purpose of McCarran-Ferguson to support the autonomy and sovereignty of each individual state in the field of insurance.[60] Connecticut's Discriminatory Housing Practices Act, for example, ''provides similar (albeit broader) protection against housing discrimination as the [Fair Housing Act], which is strong indication that application of the federal antidiscrimination law will not impair Connecticut's regulation of the insurance industry, but rather is complementary with Connecticut's overall regulatory scheme.'' [61] Similarly, a state court found that ''the disparate-impact approach does not conflict with Ohio Insurance law'' and thus allowed a disparate impact claim against an insurer to proceed under the state's fair housing law.[62] In another case where the court rejected a McCarran-Ferguson defense to a discriminatory effects claim against an insurer, the court explained that it was ''not persuaded that California law would allow [the challenged] practice'' and therefore ''the Fair Housing Act complements California law in this regard.'' [63] Furthermore, the allocation of authority to enforce a state's protections against discrimination in insurance can impact whether McCarran-Ferguson is a viable defense to a discriminatory effects claim in a given state.[64] The case-by-case approach thus affirms state autonomy

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the case-by-case approach appropriately accommodates any variations among the circuits that may exist, now or in the future, as to how McCarran-Ferguson should be applied. This includes the Second Circuit's skepticism over whether McCarran-Ferguson applies at all to ''subsequently enacted civil rights legislation.'' *Viens* v. *Am. Empire Surplus Lines Ins. Co.*, 113 F. Supp. 3d 555, 572 (D. Conn. 2015) (quoting *Spirt* v. *Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1065 (2d Cir. 1982)).

[51] *Lumpkin* v. *Farmers Grp.* (*Lumpkin II*), No. 05–2868 Ma/V, 2007 U.S. Dist. LEXIS 98949, at *19 (W.D. Tenn. July 6, 2007).

[52] *Id.*

[53] *Id.* at *19–20.

[54] *Saunders* v. *Farmers Ins. Exch.* (*Saunders II*), 537 F.3d 961 (8th Cir. 2008).

[55] *Saunders* v. *Farmers Ins. Exch.* (*Saunders I*), 440 F.3d 940 (8th Cir. 2006). These variables included whether Missouri insurance law provided a private right of action to challenge the conduct at issue, and whether determinations by the state insurance agency were subject to judicial review. The court explained that ''the mere fact of overlapping complementary remedies under federal and state law does not constitute impairment for McCarran-Ferguson purposes.'' *Id.* at 945.

[56] For example, in cases challenging the discriminatory effect of insurers' reliance on credit scores, the McCarran-Ferguson defense has failed in some states but succeeded in others. *Compare Dehoyos*, 345 F.3d 290 (McCarran-Ferguson defense fails) *and Lumpkin II*, 2007 U.S. Dist. LEXIS 98949 (same) *with Saunders II*, 537 F.3d 961 (McCarran-Ferguson defense succeeds) *and McKenzie* v. *S. Farm Bureau Cas. Ins. Co.*, No. 3:06CV013–B–A, 2007 U.S. Dist. LEXIS 49133 (N.D. Miss. July 5, 2007) (same). *See also PCIAA*, 66 F. Supp. 3d at 1039 (''Variations among state regulatory regimes . . . provide an additional variable that may complicate any hypothetical McCarran-Ferguson analysis.'').

[57] *Compare Ojo* v. *Farmers Grp., Inc.*, 356 SW.3d 421 (Tex. 2011) (recognizing a McCarran-Ferguson defense to a credit scoring disparate impact claim based on the state legislature ''expressly authoriz[ing] the use of credit scoring in setting insurance rates in 2003'') *with Dehoyos*, 345 F.3d 290 (rejecting a McCarran-Ferguson defense to the same type of claim based on Texas law in effect before 2003).

[58] *See, e.g.*, Nat'l Ass'n of Ins. Comm'rs, *Price Optimization White Paper* (Nov. 19, 2015) *http://www.naic.org/documents/committees_c_catf_related_price_optimization_white_paper.pdf* [hereinafter *NAIC White Paper*] (discussing the responses of state regulators to the rising increase in use of price optimization practices by insurance providers).

[59] *Humana*, 525 U.S. at 312.

[60] *See* 15 U.S.C. 1011 (explaining the purpose of McCarran-Ferguson as ''the continued regulation . . . by the several States of the business of insurance is in the public interest'').

[61] *Viens*, 113 F. Supp. 3d at 573 n.20 (finding that McCarran-Ferguson does not bar an FHA disparate impact claim against an insurer related to a property located in Connecticut).

[62] *Toledo*, 94 Ohio Misc. 2d at 157.

[63] *Jones* v. *Travelers Cas. Ins. Co. of Am.*, Tr. of Proceedings Before the Honorable Lucy H. Koh U.S. District Judge, No. C–13–02390 LHK (N.D. Cal. May 7, 2015), ECF No. 269–1.

[64] *Toledo*, 94 Ohio Misc. 2d at 157 (recognizing discriminatory effects liability in homeowners insurance under state law in part because the Superintendent of Insurance lacks ''primary jurisdiction'' over such claims).

and furthers the Act's broad remedial goals by ensuring that HUD is not hindered in fulfilling its statutory charge to support and encourage state efforts to protect fair housing rights.[65]

The commenters' concerns about the incompatibility between HUD's Rule and the fundamental nature of insurance do not warrant the requested exemptions. Although the commenters assert that a broad exemption for *all* insurance practices or *all* underwriting decisions is necessary to preserve ''sound actuarial underwriting'' and the ''risk-based insurance 'unfair discrimination' standard,'' HUD declines to create a broad exemption of that sort because doing so would immunize a host of potentially discriminatory insurance practices that do not involve actuarial or risk-based calculations. Insurers regularly engage in practices, such as marketing and claims processing and payment, that do not involve risk-based decision making and to which the Act applies in equal force.[66] In addition, a discriminatory effects claim also can challenge an insurer's underwriting policies as ''*not* purely risk-based'' without infringing on the insurer's ''right to evaluate homeowners insurance risks fairly and objectively.'' [67] Even practices such as ratemaking that are largely actuarially-based can incorporate an element of non-actuarially-based subjective judgment or discretion under state law. Indeed, many of the state statutes referenced by commenters mandating that rates be reasonable, not excessive, inadequate, or unfairly discriminatory permit insurers, via the very same section of the insurance code, to rely on ''judgment factors'' in ratemaking.[68] The example of price optimization practices,[69] which a minority of states have started regulating, illustrates how non-actuarial factors, such as price elasticity of market demand,[70] can impact insurance pricing in a manner similar to how such considerations affect pricing of products in non-actuarial industries.[71]

HUD likewise declines to craft a safe harbor for any risk-based factor or for the specific ''long-recognized'' factors suggested by one commenter because it would be arbitrary and overbroad. Creating a safe harbor for the use of any factor that an insurer could prove is in fact risk-based would be overbroad because it would foreclose claims where the plaintiff could prove the existence of a less discriminatory alternative, such as an alternative risk-based practice. Moreover, if HUD were to provide a safe harbor for the use of any factor that an insurer could prove is purely risk-based, entitlement to the safe harbor would inevitably necessitate a determination of whether the use of the factor is, in fact, risk-based. As stated above, if an insurance practice is provably risk-based, and no less discriminatory alternative exists, the insurer will have a legally sufficient justification under the Rule as is. The arguments and evidence that would be necessary to establish whether a practice qualifies for the requested exemption would effectively be the same as the arguments and evidence necessary for establishing a legally sufficient justification. Thus, an exemption for all provably risk-based factors would offer little added value for insurers not already provided by the Rule itself while foreclosing potentially meritorious claims in contravention of the Act's broad remedial goals and HUD's obligation to affirmatively further fair housing.

Selecting a few factors for exemption, such as those suggested by the commenter, based on bare assertions about their actuarial relevance, without data and without a full survey of all factors utilized by the homeowners insurance industry, would also be arbitrary. Even if such data were available and a full survey performed, safe harbors for specific factors would still be overbroad because the actuarial relevance of a given factor can vary by context.[72] Also, while use of a particular risk factor may be generally correlated with probability of loss, the ways in which an insurer uses that factor may not be. Furthermore, the actuarial relevance of any given factor may change over time as societal behaviors evolve, new technologies develop, and analytical capabilities improve.

In light of the long, documented history of discrimination in the homeowners' insurance industry, including the use of ''risk factors'' by insurers and regulators that were subsequently banned as discriminatory, as well as the fact-specific nature of McCarran-Ferguson analysis and the non-actuarial or hybrid nature of many insurance practices, HUD considers it inappropriate to craft any exemptions or safe harbors for insurance practices. HUD's longstanding case-by-case approach can adequately address any McCarran-Ferguson concerns and better serves the Act's broad remedial purpose and HUD's statutory obligation to affirmatively further fair housing, including by supporting fair housing efforts undertaken by states.[73]

Issue: One commenter requested that HUD ''exempt insurance pricing from the discriminatory effects standards.'' The commenter argued that pricing is not covered by the Act because the Act only covers insurance practices that ''make[ ] homeowners insurance unavailable'' and pricing does not do so. The commenter also asserted that pricing is ''subject to the filed rate doctrine'' and should therefore be exempted because the filed rate doctrine precludes ''private claims for damages based on challenges to filed rates.''

HUD Response: HUD disagrees with the commenter's characterization of the Act as only covering insurance practices that make insurance unavailable, as well as with the commenter's premise that pricing does not do so. HUD also declines to craft an exemption for insurance pricing based on the filed rate doctrine because HUD does not anticipate that the filed rate doctrine will bar discriminatory effects claims involving insurance pricing. In light of the broad remedial goals of the Act and HUD's obligation to affirmatively further fair housing, HUD continues to prefer

[65] *See, e.g.*, 42 U.S.C. 3610(f); 24 CFR pt. 115 (HUD's Fair Housing Assistance Program); 42 U.S.C. 3608(d); 80 FR 42272 (July 16, 2015) (HUD's rule on Affirmatively Furthering Fair Housing).

[66] *See, e.g., Franklin* v. *Allstate Corp.*, No. C–06–1909 MMC, 2007 U.S. Dist. LEXIS 51333 (N.D. Cal. July 3, 2007) (applying the Act to claims processing); *Burrell* v. *State Farm & Cas. Co.*, 226 F. Supp. 2d 427 (S.D.N.Y. 2002) (same).

[67] *Nat'l Fair Hous. Alliance* v. *Prudential Ins. Co. of Am.*, 208 F. Supp. 2d 46, 60 (D.D.C. 2002).

[68] *See e.g.*, Ga. Code Ann. 33–9–4; Mont. Code Ann. 33–16–201; *see also NAIC White Paper, supra* note 58, at 1 ¶ 5 (''Making adjustments to actuarially indicated rates is not a new concept; it has often been described as 'judgment.' '').

[69] The term ''price optimization'' can refer to ''the process of maximizing or minimizing a business metric using sophisticated tools and models to quantify business considerations,'' such as ''marketing goals, profitability and policyholder retention.'' *NAIC White Paper, supra* note 58, at 4 ¶ 14(a).

[70] The term ''price elasticity of demand'' refers to ''the rate of response of quantity demanded due to a price change. Price elasticity is used to see how sensitive the demand for a good is to a price change.'' *Id.* at 4 ¶ 14(f) (internal quotations omitted).

[71] *Id.* at 9 ¶ 30 (''Price optimization has been used for years in other industries, including retail and travel. However, the use of model-driven price optimization in the U.S. insurance industry is relatively new.'').

[72] For example, in some high-crime neighborhoods the higher-than-average risk of loss from theft could be offset by a lower-than-average risk of other losses, such as those caused by weather. Therefore, the legitimacy of declining to issue insurance policies in all locations with high crime rates would depend on other features of those locations.

[73] *Cf. CROSSRDS* v. *MSP Crossroads Apts., LLC*, No. 16–233 ADM/KMM, 2016 U.S. Dist. LEXIS 86965 at *32 n.6 (D. Minn. July 5, 2016) (declining to adopt a per se rule that a certain category of disparate impact claims could not be brought in part because ''HUD has indicated a preference for case-by-case review of practices alleged to cause a disparate impact'').

case-by-case adjudication over the requested exemption.

In addition to Section 804(a),[74] which prohibits discrimination that ''make[s] unavailable'' a dwelling, there are several other provisions of the Act that can prohibit discriminatory insurance practices, including pricing.[75] One of those is Section 805(a),[76] which prohibits discrimination in the ''terms or conditions'' of ''residential real estate-related transactions.'' Another is Section 804(b),[77] which prohibits discrimination in the ''provision of services . . . in connection'' with a dwelling. Indeed, HUD's fair housing regulations since 1989 have specifically stated that the Act prohibits ''[r]efusing to provide . . . property or hazard insurance for dwellings *or providing such . . . insurance differently''* because of a protected characteristic.[78] Courts have applied the Act to insurance pricing,[79] as well as to other practices such as marketing and claims processing,[80] irrespective of whether the discriminatory conduct occurred in conjunction with or subsequent to the acquisition of a dwelling.

HUD is not aware of any case, and no commenter cited one, in which a court has applied the filed rate doctrine to defeat any sort of claim under the Act, although several courts have rejected such attempts.[81] ''The filed rate doctrine bars suits against regulated utilities grounded on the allegation that the rates charged by the utility are unreasonable.''[82] The doctrine primarily serves two purposes: First, preventing litigants from securing more favorable rates than their non-litigant competitors, and second, preserving for agencies rather than courts the role of ratemaking.[83]

The fit between the filed rate doctrine and discriminatory effects claims is attenuated, at best, because discriminatory effects claims ''do not challenge the reasonableness of the insurance rates'' but rather their discriminatory effects.[84] To the extent there is any conflict between the directives of the federal Fair Housing Act and those of state ratemaking regulations, ''the Supremacy Clause tips any legislative competition in favor of the federal antidiscrimination statutes.''[85] Unlike filed rate doctrine cases involving a conflict between *federal* ratemaking and a federal statute, applying the filed rate doctrine to prioritize *state* ratemaking over a federal statute ''would seem to stand the Supremacy Clause on its head.''[86] Moreover, the filed rate doctrine ''does not preclude injunctive relief or prohibit the Government from seeking civil or criminal redress,''[87] which are types of relief often obtained for violations of the Act.[88]

Because ''the law on the filed rate doctrine is extremely creaky,''[89] abundant variations exist among the courts as to how the doctrine applies. Even where it does apply, a filed rate doctrine defense ''must be examined specifically in the context of the laws and regulatory structures at issue.''[90] This would be a ''fact-intensive issue''[91] that would include consideration of the particular state's ratemaking structures.[92] The case-by-case approach best accommodates these variations.

For all the foregoing reasons, HUD does not agree that the filed rate doctrine, nor the commenter's assertions about the Act's scope, warrant an exemption for insurance pricing.

Issue: One commenter sought an exemption from discriminatory effects liability for FAIR plans because ''the operation of FAIR plans facilitates private conduct that otherwise would not have occurred.''

HUD Response: FAIR plans were first enacted by many states in response to the federal Urban Property Protection and Reinsurance Act of 1968,[93] which was passed by Congress to address the problem of inadequate property insurance availability in the nation's urban areas due to insurance redlining. FAIR plans operate as insurance pools that sell property insurance to

[74] 42 U.S.C. 3604(a).

[75] Depending on the circumstances, discriminatory insurance practices can violate 42 U.S.C. 3604(a), (b), (c), (f)(1), (f)(2), 3605, and 3617. *See, e.g., Nationwide Mut. Ins. Co.* v. *Cisneros*, 52 F.3d at 1360 (holding that section 3604 of the Act prohibits discriminatory insurance underwriting); *Nevels,* 359 F. Supp. 2d at 1120–21 (recognizing that sections 3604(f)(1), 3604(f)(2), 3605 and 3617 of the Act cover insurance practices); *Nat'l Fair Hous. Alliance*, 208 F. Supp. 2d at 55–58 (holding that sections 3604(a), 3604(b), and 3605 of the Act prohibit discriminatory insurance underwriting practices); *Owens* v. *Nationwide Mut. Ins. Co.*, No. 3:03–CV–1184–H, 2005 U.S. Dist. LEXIS 15701, at *16–17 (N.D. Tex. Aug. 2, 2005) (holding that section 3604(b) of the Act prohibits discriminatory insurance practices); *Francia* v. *Mount Vernon Fire Ins. Co.*, No. CV084032039S, 2012 Conn. Super. LEXIS 665 (Conn. Super. Ct. Mar. 6, 2012) (relying on section 3604(c) to interpret an analogous state law as prohibiting a discriminatory statement in an insurance quote).

[76] 42 U.S.C. 3605(a).

[77] 42 U.S.C. 3604(b).

[78] 24 CFR 100.70(d)(4) (emphasis added). As used in this regulation, the phrase ''property or hazard insurance for dwellings'' includes insurance purchased by an owner, renter, or anyone else seeking to insure a dwelling. *See* 42 U.S.C. 3602(b) (defining ''dwelling'' without reference to whether the residence is owner- or renter-occupied).

[79] *See, e.g., NAACP*, 978 F.2d at 301 (''Section 3604 of the Fair Housing Act applies to discriminatory denials of insurance, and *discriminatory pricing*, that effectively preclude ownership of housing because of the race of the applicant.'') (emphasis added); *Dehoyos*, 345 F.3d at 293 (holding that a claim alleging discriminatory insurance pricing was not barred by McCarran-Ferguson).

[80] *See* sources cited *supra* note 66; *see also Owens*, 2005 U.S. Dist. LEXIS 15701, at *17 (Insurance practices are covered by the Act ''whether the insurance is sought in connection with the maintenance of a previously purchased home or with an application to purchase a home.''); *Lindsey* v. *Allstate Ins. Co.*, 34 F. Supp. 2d 636, 643 (W.D. Tenn. 1999) (''It would seem odd to construe a statute purporting to promote fair housing as prohibiting discrimination in providing property insurance to those seeking a home, but allowing that same discrimination so long as it takes place in the context of renewing those very same insurance policies.'').

[81] *See Saunders I,* 440 F.3d at 944–46 (''The district court erred in invoking the judicially created filed rate doctrine to restrict Congress's broad grant of standing to seek judicial redress for race discrimination.''); *Dehoyos,* 345 F.3d at 297 n.5 (finding ''unpersuasive'' the argument that the filed rate doctrine barred a Fair Housing Act disparate impact claim); *Lumpkin* v. *Farmers Grp., Inc.* (*Lumpkin I*), No. 05–2868 Ma/V, 2007 U.S. Dist. LEXIS 98994, at *20–22 (W.D. Tenn. Apr. 26, 2007) (ruling that ''the filed rate doctrine does not apply'' to a Fair Housing Act disparate impact claim).

[82] *Wegoland Ltd.* v. *NYNEX Corp.,* 27 F.3d 17, 18 (2d Cir. 1994).

[83] *Id.*

[84] *Lumpkin I,* 2007 U.S. Dist. LEXIS 98994, at *21; *see also Dehoyos,* 345 F.3d at 297 n.5 (''[T]he application of anti-discrimination laws cannot be reasonably construed to supplant the specific insurance rate controls of [states].'').

[85] *Saunders I,* 440 F.3d at 944.

[86] *Perryman* v. *Litton Loan Servicing, LP,* No. 14–cv–02261–JST, 2014 U.S. Dist. LEXIS 140479, at *20–22 (N.D. Cal. Oct. 1, 2014).

[87] *In re Title Ins. Antitrust Cases,* 702 F. Supp. 2d 840, 849 (N.D. Ohio 2010); *see also Marcus* v. *AT&T Corp.,* 138 F.3d 46, 62 (2d Cir. 1998).

[88] *See* 42 U.S.C. 3612(g)(3), 3613(c), 3614(d).

[89] *Town of Norwood* v. *New England Power Co.,* 202 F.3d 408, 420 (1st Cir. 2000). The filed rate doctrine has also been described as a ''weak and forcefully criticized doctrine.'' *Cost Mgmt. Servs.* v. *Wash. Natural Gas Co.,* 99 F.3d 937, 946 (9th Cir. 1996).

[90] *Munoz* v. *PHH Corp.,* 659 F. Supp. 2d 1094, 1099 (E.D. Cal. 2009).

[91] *Saunders I,* 440 F.3d at 945.

[92] For example, the Seventh Circuit has questioned the applicability of the filed rate doctrine to any claims involving property insurance in Illinois because ''[a]lthough [a property insurance provider] is required to file its insurance rates with the Illinois Department of Insurance, it is not at all clear that the Department has the authority to approve or disapprove property-insurance rates.'' *Cohen* v. *Am. Sec. Ins. Co.,* 735 F.3d 601, 607 (7th Cir. 2013). States vary considerably in the degree to which they regulate rate-setting, with six different types of rate regulatory systems in use across the country: Prior approval; file and use; use and file; flex rating; modified prior approval; and no file. *See* NAIC, 2 Compendium of State Laws on Insurance Topics, Health/Life/Property/Casualty II–PA–10–21 (2011). As the classifications indicate, these rate regulatory systems vary with respect to whether or when an insurance company is required to file its rates with a state insurance agency before those rates can be used.

[93] Public Law 90–448, 82 Stat. 555 (1968).

individuals who are unable to purchase insurance in the voluntary market.

HUD declines to categorically exempt FAIR plans from discriminatory effects liability under the Act. To do so, without any consideration of the particular insurance practice or state requirements at issue, would be inconsistent with the broad remedial purpose of the Act and HUD's obligation to affirmatively further fair housing. Like state regulation of voluntary market insurance practices, state laws governing the provision and pricing of FAIR plans vary across jurisdictions. Variations in state regulation of FAIR plans include the types of coverage provided by such plans,[94] the amount of coverage allowed under such plans,[95] and the conditions under which an individual or property will qualify for such plans.[96] Additionally, even within a given state, FAIR plan regulations are subject to revision over time.

Given such variation and changeability, exempting all FAIR plans from application of the discriminatory effects standard would be overbroad and would deprive individuals of the protections afforded by the Fair Housing Act. Indeed, one state court has held ''the disparate impact approach does not interfere with the Ohio FAIR Plan.'' [97] In light of this demonstrated compatibility, and because insurers retain some discretion in the operation of FAIR plans,[98] HUD determines that case-by-case adjudication is preferable to the requested exemption of FAIR plans.

[94] *Compare, e.g.,* Conn. Agencies Regs. 38a–328–3(c) (defining ''basic insurance'' for purposes of the Connecticut FAIR plan to include liability coverage for any dwelling of up to three families) *with* Mass. Gen. Laws ch. 175c, § 1 (defining ''basic property insurance'' for purposes of the Massachusetts FAIR plan to include liability coverage for only non-owner occupied dwellings of up to four families) *and* 98–08 Wash. Reg. 4 (April 15, 1998) (excluding liability coverage from the definition of ''essential property insurance'' for purposes of the Washington FAIR plan).

[95] *Compare, e.g.,* Mo. Rev. Stat. 379.825 (limiting maximum insurance coverage for a dwelling under the Missouri FAIR plan to $200,000) *with* 98–08 Wash. Reg. 5 (April 15, 1998) (limiting maximum insurance coverage for a dwelling under the Washington FAIR plan to $1.5 million).

[96] *Compare, e.g.,* Ohio Rev. Cod. Ann. 3929.44(D) (requiring applicant to certify that two insurance companies declined to provide coverage for purposes of FAIR plan eligibility) *with* 215 Ill. Comp. Stat. 5/524(1) (restricting FAIR plan eligibility to applicants who have been declined insurance coverage by three companies).

[97] *Toledo,* 94 Ohio Misc. 2d at 157.

[98] *See, e.g.*, Cal. Ins. Code 10094 (leaving discretion to governing committee of participating insurers to establish ''reasonable underwriting standards'' for determining whether a property for which FAIR plan coverage is sought is insurable); 215 Ill. Comp. Stat. 5/524(1) (same); Ohio Rev. Code. Ann. 3929.43(C) (same).

Dated: September 23, 2016.

Gustavo Velasquez,

Assistant Secretary for Fair Housing and Equal Opportunity.

[FR Doc. 2016–23858 Filed 10–4–16; 8:45 am]

BILLING CODE 4210–67–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2016–0489; FRL–9953–63–Region 4]

Air Plan Approval; Georgia: Volatile Organic Compounds

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve portions of two revisions to the Georgia State Implementation Plan submitted by the Georgia Department of Environmental Protection on July 25, 2014, and November 1, 2015. These revisions modify the definition of ''volatile organic compounds'' (VOC). Specifically, these revisions add two compounds to the list of those excluded from the VOC definition on the basis that these compounds make a negligible contribution to tropospheric ozone formation. This action is being taken pursuant to the Clean Air Act.

DATES: Written comments must be received on or before November 4, 2016.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2016–0489 at *http://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov.* EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW., Atlanta, Georgia 30303–8960. Mr. Lakeman can be reached by phone at (404) 562–9043 or via electronic mail at *lakeman.sean@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules Section of this **Federal Register**, EPA is approving the State's implementation plan revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period on this document. Any parties interested in commenting on this document should do so at this time.

Dated: September 23, 2016.

V. Anne Heard,

Acting Regional Administrator, Region 4.

[FR Doc. 2016–23971 Filed 10–4–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 8360

[LLCO913000.L16300000.NU0000.16X]

Notice of Proposed Supplementary Rules for Public Lands in Colorado

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed supplementary rules.

SUMMARY: The Bureau of Land Management (BLM) is proposing supplementary rules to protect natural resources and provide for public health and safety. The proposed supplementary rules would apply to all public lands and BLM facilities in Colorado.

DATES: You should submit your comments by December 5, 2016.

ADDRESSES: You may submit comments by the following methods: Mail or hand

deliver to John Bierk, State Chief Ranger, BLM Colorado State Office, 2850 Youngfield Street, Lakewood, CO 80215. You may also submit comments via email to *jbierk@blm.gov* (include ''Proposed Supplementary Rules'' in the subject line).

FOR FURTHER INFORMATION CONTACT: John Bierk, State Chief Ranger (see **ADDRESSES** listed above), or by phone at (303) 239–3893. Persons who use a telecommunications device for the deaf may call the Federal Information Relay Service (FIRS) at (800) 877–8339 to contact the above individual during normal business hours. The FIRS is available 24 hours a day, seven days a week, to leave a message or question with the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

Written comments on the proposed supplementary rules should be specific, confined to issues pertinent to the proposed supplementary rules, and explain the reason for any recommended change. Where possible, comments should reference the specific section or paragraph of the proposed supplementary rules that the comments are addressing. The BLM is not obligated to consider or include in the Administrative Record for the final supplementary rules comments delivered to an address other than the one listed above (see **ADDRESSES**) or that the BLM receives after the close of the comment period (see **DATES**), unless they are postmarked or electronically dated before the deadline. Comments, including names, street addresses, and other contact information of respondents, will be available for public review at the address listed above during regular business hours (7:30 a.m. to 4:30 p.m. Monday through Friday, except on Federal holidays). 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.

II. Background

The BLM Colorado State Office has issued various statewide supplementary rules to protect natural resources and provide for public health and safety since 1990. Individual BLM field offices have also issued various supplementary rules for travel management, protection of natural resources, and public health and safety since 1995. Although these supplementary rules have addressed a wide variety of natural resource and public health and safety concerns, evolving social trends and recreational uses of public land have necessitated additional statewide supplementary rules.

III. Discussion of the Proposed Supplementary Rules

These proposed supplementary rules would apply to all public lands and BLM facilities in Colorado. Proposed supplementary rule numbers 1–11 would address general public conduct on public lands and at BLM facilities. Many of these proposed supplementary rules were intentionally written using language found in Title 18 of the Colorado Revised Statutes.

Proposed supplementary rule numbers 12–16 would address resource damage and public safety concerns involving the use of exploding targets, flammable devices, and target shooting. The BLM consulted with the Shooting Sports Roundtable during the drafting of the proposed supplementary rules. The Shooting Sports Roundtable requested that the proposed rules be clear, specific, and enforceable, and asked the BLM to provide a comprehensive outreach effort prior to enforcement.

The BLM incorporated most of the recommendations from the Shooting Sports Roundtable into the proposed supplementary rules and is planning to issue press releases, post the new supplementary rules on the BLM State and Field Office Web sites, and will have BLM Law Enforcement Rangers conduct public education activities.

The BLM must consider risks to public safety and natural resources in light of increasing fire danger and development in the wildland urban interface. The USFS reported at least 16 wildfires were associated with exploding targets in 2013, causing millions of dollars in fire suppression costs and threatening the safety and well-being of surrounding communities. The USFS subsequently issued an order banning exploding targets in forests and grasslands in Colorado, Wyoming, Kansas, Nebraska, and South Dakota in August 2013. Accordingly, the BLM believes that the proposed supplementary rules regarding exploding targets are warranted.

Proposed supplementary rule numbers 17–19 clarify existing Federal regulations found in 43 CFR 9264.1(h) relating to vehicles, game animals, boating, and outfitters. Proposed supplementary rule number 20 would address mechanized vehicle use within Wilderness Study Areas (WSA) off of a designated route. Until Congress makes a final determination on a WSA, the BLM manages these areas to preserve their suitability for designation as wilderness. Existing regulations in 43 CFR 8341.1 limit off-road vehicles to designated routes of travel, but this part does not apply to non-motorized vehicles. Existing regulations in 43 CFR 6302.20(d) restrict the use of mechanical transport in a congressionally designated Wilderness Area, but do not apply to WSAs. Proposed supplementary rule number 20 affirms that the use of mechanical transport is generally prohibited in WSAs, consistent with Resource Management Plan decisions.

Proposed supplementary rule number 21 would address the burning of wood or wood pallets containing nails or staples on public land. Campsites in popular areas on public land are used repeatedly throughout the spring, summer, and fall. As use increases, the availability of firewood decreases, leading more campers to bring construction debris or wood pallets containing nails or staples to use as firewood. The nails and staples inadvertently end up in campfire ash left at the campsite. In an effort to return campsites to a more primitive condition, many campers scatter ashes and rock rings before leaving their campsite. The nails or staples end up on the ground surface, causing flat tires. Proposed supplementary rule number 21 would reduce the risk of tire damage and personal injury from discarded nails and/or staples in popular camping areas.

The proposed supplementary rules are in conformance with the following Resource Management Plans (RMPs):

- Uncompahgre Basin RMP (1989);
- San Luis Resource Area RMP (1991);
- Gunnison RMP (1993);
- Royal Gorge RMP (1996);
- Colorado Canyons National Conservation Area and Black Ridge Canyons Wilderness RMP (2004);
- Little Snake RMP (2010);
- Canyons of the Ancients National Monument RMP (2010);
- Tres Rios RMP (2015);
- Colorado River Valley RMP (2015);
- Kremmling RMP (2015);
- White River RMP (2015); and
- Grand Junction RMP (2015).

IV. Procedural Matters

Executive Order 12866, Regulatory Planning and Review

These proposed supplementary rules are not a significant regulatory action and are not subject to review by the Office of Management and Budget under Executive Order 12866. They would not have an annual effect of $100 million or more on the economy. They would not adversely affect, in a material way, the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities. They would not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. They would not materially alter the budgetary effects of entitlements, grants, user fees, loan programs, or the rights or obligations of their recipients, nor would they raise novel legal or policy issues. The proposed supplementary rules would merely establish rules of conduct for public use of a limited area of public lands.

National Environmental Policy Act (NEPA)

The BLM has found that the proposed supplementary rules comprise a category or kind of action that has no significant individual or cumulative effect on the quality of the human environment. See 40 CFR 1508.4; 43 CFR 46.210. Specifically, the promulgation of the proposed supplementary rules is an action that is of an administrative, financial, legal, technical, or procedural nature within the meaning of 43 CFR 46.210(i). Therefore, the proposed action is categorically excluded from further documentation under NEPA in accordance with 43 CFR 46.205(b) and 46.210(i). BLM has reviewed the proposed action and none of the extraordinary circumstances listed at 43 CFR 46.215 are applicable. The NEPA Categorical Exclusion (CX) documentation is on file at the Colorado State Office under NEPA No. DOI–BLM–CO–0000–2015–0002–CX.

Regulatory Flexibility Act

Congress enacted the Regulatory Flexibility Act of 1980 (RFA), as amended, 5 U.S.C. 601–612, to ensure that government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. These proposed supplementary rules would have no effect on business entities of any size. They would merely impose reasonable restrictions on certain recreational activities on certain public lands to protect natural resources and the environment and human health and safety. Therefore, the BLM has determined under the RFA that these supplementary rules would not have a significant economic impact on a substantial number of small entities.

Small Business Regulatory Enforcement Fairness Act

These proposed supplementary rules are not a ''major rule'' as defined under 5 U.S.C. 804(2). Proposed supplemental rule number 12 would restrict the possession, discharge, or use of exploding targets on public land in Colorado. Limiting the use of exploding targets on public land in Colorado would not have a significant effect on commercial sale of these targets.

Unfunded Mandates Reform Act

These proposed supplementary rules would not impose an unfunded mandate on State, local, or tribal governments of more than $100 million per year; nor would they have a significant or unique effect on small governments or the private sector. The proposed supplementary rules would merely impose reasonable rules of conduct on public lands in Colorado to protect natural resources and public safety. Therefore, the BLM is not required to prepare a statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*).

Executive Order 12630, Governmental Actions and Interference With Constitutionally Protected Property Rights (Takings)

The proposed supplementary rules are not a government action capable of interfering with constitutionally protected property rights. The proposed supplementary rules would not address property rights in any form and would not cause the impairment of constitutionally protected property rights. Therefore, the BLM has determined that these proposed supplementary rules would not cause a ''taking'' of private property or require further discussion of takings implications under this Executive Order.

Executive Order 13132, Federalism

The proposed supplementary rules would not have a substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, the BLM has determined that these proposed supplementary rules would not have sufficient Federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 12988, Civil Justice Reform

Under Executive Order 12988, the BLM has determined that these proposed supplementary rules would not unduly burden the judicial system and that they meet the requirements of sections 3(a) and 3(b)(2) of Executive Order 12988.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

In accordance with Executive Order 13175, the BLM has found that these proposed supplementary rules do not include policies that have tribal implications, and would have no bearing on trust lands or on lands for which title is held in fee status by Indian tribes or U.S. Government-owned lands managed by the Bureau of Indian Affairs.

Information Quality Act

In developing these proposed supplementary rules, the BLM did not conduct or use a study, experiment or survey requiring peer review under the Information Quality Act (Section 515 of Pub. L. 106–554).

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

These proposed supplementary rules do not comprise a significant energy action. These proposed supplementary rules would not have an adverse effect on energy supply, production, or consumption, and have no connection with energy policy.

Executive Order 13352, Facilitation of Cooperative Conservation

In accordance with Executive Order 13352, the BLM has determined that the proposed supplementary rules would not impede facilitating cooperative conservation; would take appropriate account of and consider the interests of persons with ownership or other legally recognized interests in land or other natural resources; would properly accommodate local participation in the Federal decision-making process; and would provide that the programs, projects, and activities are consistent with protecting public health and safety.

Paperwork Reduction Act

These proposed supplementary rules do not contain information collection requirements that the Office of Management and Budget must approve under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521.

Author

The principal author of these proposed supplementary rules is John Bierk, State Chief Ranger, BLM Colorado State Office.

V. Proposed Rules

For the reasons stated in the preamble, and under the authority of 43 U.S.C. 315a, 1733(a), and 1740, and 43 CFR 8365.1–6, the State Director proposes supplementary rules for public lands and BLM facilities in Colorado, to read as follows:

Supplementary Rules for Public Lands in Colorado

Definitions

Alcoholic beverage means a beverage as defined in 23 CFR 1270.3 (a).

BLM facility means any BLM office, storage yard, warehouse, or building owned or leased by the BLM directly or through the General Services Administration.

Camp means erecting a tent or shelter of natural or synthetic material; preparing a sleeping bag or other bedding material; parking a motor vehicle, motor home, or trailer; or mooring a vessel for the apparent purpose of overnight occupancy.

Demonstrations means public protests, assemblies, picketing, speechmaking, parades, marching, placement of signs or banners, holding vigils or religious services, and all other like forms of conduct that involve the communication or expression of views or grievances, engaged in by one or more persons, the conduct of which is reasonably likely to attract a crowd or onlookers. The term does not include casual use of public lands or BLM facilities in Colorado that is not reasonably likely to attract a crowd or onlookers.

Designated travel routes means roads and trails open to specified modes of travel and identified on a map of designated roads and trails that is maintained and available for public inspection at the BLM. Designated roads and trails are open to public use in accordance with such limits and restrictions as are, or may be, specified in the Resource Management Plan (RMP) or travel management plan governing applicable public lands and BLM facilities in Colorado, or in future decisions implementing the RMP. This definition excludes any road or trail with BLM-authorized restrictions that prevent use of the road or trail. Restrictions may include signs or physical barriers such as gates, fences, posts, branches, or rocks.

Disorderly conduct means to intentionally, knowingly, or recklessly:

(a) Make a coarse and obviously offensive utterance, gesture, or display in a public place when the utterance, gesture, or display tends to incite an immediate breach of the peace;

(b) Make unreasonable noise in a public place or near a private residence that he or she has no right to occupy;

(c) Fight with another in a public place except in an amateur or professional contest of athletic skill;

(c) Discharge a firearm or other projectile shooting device in a public place except when engaged in lawful target practice or hunting; or (d) Display a deadly weapon, display any article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon, or represent verbally or otherwise that he or she is armed with a deadly weapon in a public place in a manner calculated to alarm.

Existing travel routes means immediately recognizable motor vehicle travel routes or two-track trails that are not identified as closed to motorized vehicle use by a BLM sign or map.

Federal Officer means any delegated Federal law enforcement officer.

Firearm or Other Projectile Shooting Device means all firearms, air rifles, pellet and BB guns, spring guns, bows and arrows, slings, paint ball markers, other instruments that can propel a projectile (such as a bullet, dart, or pellet by combustion, air pressure, gas pressure, or other means), or any instrument that can be loaded with and fire blank cartridges.

Indecent exposure means to knowingly:

(a) expose a person's genitals to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person with the intent to arouse or to satisfy the sexual desire of any person; or

(b) perform an act of masturbation in a manner which exposes the act to the view of any person under circumstances in which such conduct is likely to cause affront or alarm to the other person.

Intimate parts mean the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person.

Mechanized vehicle means a human-powered mechanical device or contrivance for moving people or material in or over land, water, snow, or air that has moving parts, including, but not limited to, bicycles, game carriers, carts, and wagons, not powered by a motor. The term does not include wheelchairs, skis, or snowshoes.

Motorized vehicle means a vehicle that is propelled by a motor or engine, such as a car, truck, off-highway vehicle, motorcycle, or snowmobile.

Open alcoholic beverage container means a bottle, can, or other receptacle that contains any amount of alcoholic beverage and:

(a) That is open or has a broken seal; or

(b) The contents of which are partially removed.

Passenger area means the area designed to seat the driver and passengers while a motor vehicle is in operation and any area that is readily accessible to the driver or a passenger while in his or her seating position, including, but not limited to, the glove compartment.

Public indecency means to perform any of the following acts in a public place or where the conduct may reasonably be expected to be viewed by members of the public:

(a) An act of sexual intercourse;

(b) A lewd exposure of an intimate part of the body, not including the genitals, done with intent to arouse or to satisfy the sexual desire of any person;

(c) A lewd fondling or caress of the body of another person; or

(d) A knowing exposure of the person's genitals to the view of a person under circumstances in which such conduct is likely to cause affront or alarm to the other person.

Public land means any land or interest in land owned by the United States and administered by the Secretary of the Interior through the BLM without regard to how the United States acquired ownership.

Public place means a place to which the public has access.

Riot means a public disturbance involving an assemblage of three or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs the performance of any governmental function.

Wheelchair means a device designed solely for use by a mobility-impaired person for locomotion that is suitable for use in an indoor pedestrian area.

Prohibited Acts on Public Lands and BLM Facilities in Colorado

1. You must not engage in disorderly conduct.

2. You must not engage in actions or behaviors that are intended to prevent

or disrupt any lawful BLM meeting, procession, or gathering; or significantly obstruct or interfere with said meeting, procession, or gathering by physical action, verbal utterance, or any other means.

3. You must not willfully deny any member of the public, public official, BLM employee, volunteer, invitee, or agent thereof, their lawful rights to gain access to, enter, use, or leave a BLM facility.

4. You must not willfully impede any public official, BLM employee, or volunteer in the lawful performance of duties or activities through the use of restraint, abduction, coercion, or intimidation, or by force and violence or threat thereof.

5. You must not willfully refuse or fail to leave a BLM facility upon being requested to do so by a Federal Officer, Field Office Manager, Acting Manager, or privately contracted security officer assigned to the facility if you have willfully committed, are committing, threaten to commit, or are inciting others to commit any act which did, or would, if completed, disrupt, impair, interfere with, or obstruct the lawful missions, processes, procedures, or functions being carried on in the BLM facility.

6. You must not willfully impede, disrupt, or hinder the normal proceedings of any BLM meeting or session conducted by any public official, BLM employee, volunteer, invitee, or agent thereof by any act of intrusion into the chamber or other areas designated for use of the body or official conducting the meeting or session or by any act designed to intimidate, coerce, or hinder any public official, BLM employee, volunteer, invitee, or agent thereof.

7. You must not conduct, participate in, or engage in demonstrations outside of designated demonstration areas when BLM has established such areas. BLM will establish designated demonstration areas only where it finds, in writing, that demonstrations would: (i) Cause injury or damage to public lands or BLM facilities in Colorado; (ii) unreasonably impair the atmosphere of peace and tranquility maintained in wilderness, natural, or historic areas; (iii) unreasonably interfere with interpretive, visitor service, or other program activities, or with the administrative activities of BLM; (iv) substantially impair the operation of public use facilities or services; (v) present a clear and present danger to the public health and safety; or (vi) be incompatible with the nature and traditional use of the particular area of public land or BLM facility involved.

8. You must not remain or camp at any BLM facility past the normal business hours posted on the facility, unless otherwise authorized.

9. You must not incite or urge a group of five or more persons to engage in a current or impending riot or give commands, instructions, or signals to a group of five or more persons in furtherance of a riot.

10. You must not engage in a riot.

11. You must not engage in public indecency or indecent exposure.

12. You must not possess, discharge, or use explosives, incendiary or chemical devices, or exploding targets without prior authorization.

13. You must not engage in rifle or pistol target shooting activities unless they are conducted towards and into a backstop of material that prevents further travel beyond the intended target and/or ricochet of the bullet or projectile.

14. You must not rifle or pistol target shoot at materials other than paper, plastic, or steel targets manufactured for shooting sports or biodegradable clay pigeons.

15. You must not leave targets, target debris (except pieces of biodegradable clay pigeons), cartridge ''brass,'' or shell casings at any shooting area.

16. You must not possess, discharge, or use flammable devices including, but not limited to, gasoline bombs commonly referred to as ''Sobe Bombs'' or flammable projectiles discharged from a launching tube or other device.

17. You must not drink an alcoholic beverage or possess an open alcoholic beverage container while in the passenger area of a motorized vehicle.

18. You must not tow or be in possession of a trailer requiring registration under Colorado Revised Statutes that is either unregistered or has expired registration.

19. You must not violate any Colorado Revised Statute regarding hunting, fishing, boating, or outfitters.

20. You must not operate a mechanized vehicle within a designated Wilderness Study Area except on travel routes identified for such use by a BLM sign or map.

21. You must not burn wood or wood pallets containing nails or staples.

Exemptions

The following persons are exempt from these supplementary rules: Any Federal, State, local, and/or military employees acting within the scope of their official duties; members of any organized rescue or fire fighting force performing an official duty; and persons who are expressly authorized or approved by the BLM.

Enforcement

Any person who violates any of these supplementary rules may be tried before a United States Magistrate and fined in accordance with 18 U.S.C. 3571, imprisoned for no more than 12 months under 43 U.S.C. 1733(a) and 43 CFR 8360.0–7, or both. In accordance with 43 CFR 8365.1–7, State or local officials may also impose penalties for violations of Colorado law.

Ruth Welch,

BLM Colorado State Director.

[FR Doc. 2016–21934 Filed 10–4–16; 8:45 am]

BILLING CODE 4310–JB–P

SURFACE TRANSPORTATION BOARD

49 CFR Part 1152

[Docket No. EP 729]

Offers of Financial Assistance

AGENCY: Surface Transportation Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Surface Transportation Board (Board) is proposing changes to its rules pertaining to Offers of Financial Assistance to improve the process and protect it against abuse.

DATES: Comments are due by December 5, 2016. Reply comments are due by January 3, 2017.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the ''E–FILING'' link on the Board's Web site, at ''*http://www.stb.gov.*'' Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 729, 395 E Street SW., Washington, DC 20423–0001. Copies of written comments and replies will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's Web site.

FOR FURTHER INFORMATION CONTACT: Jonathon Binet, (202) 245–0368. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: In the ICC Termination Act of 1995, Public Law 104–88, 109 Stat. 803 (1995) (ICCTA), Congress revised the process for filing Offers of Financial Assistance (OFAs) for continued rail service, codified at 49 U.S.C. 10904. Under the OFA process, as implemented in the Board's

regulations at 49 CFR 1152.27, financially responsible parties may offer to temporarily subsidize continued rail service over a line on which a carrier seeks to abandon or discontinue service, or offer to purchase a line and provide continued rail service on a line that a carrier seeks to abandon.

Upon request, the abandoning or discontinuing carrier must provide certain information required under 49 U.S.C. 10904(b) and 49 CFR 1152.27(a) to a party that is considering making an OFA. A party that decides to make an OFA (the offeror) must submit the OFA to the Board, including the information specified in 49 CFR 1152.27(c)(1)(ii). If the Board determines that the OFA is made by a ''financially responsible'' offeror, the abandonment or discontinuance authority is postponed to allow the parties to negotiate a sale or subsidy arrangement. 49 U.S.C. 10904(d)(2); 49 CFR 1152.27(e). If the parties cannot agree to the terms of a sale or subsidy, they may request that the Board set binding terms under 49 U.S.C. 10904(f)(1). After the Board has set the terms, the offeror can accept the terms or withdraw the OFA. When the operation of a line is subsidized to prevent abandonment or discontinuance of service, it may only be subsidized for up to one year, unless the parties mutually agree otherwise. 49 U.S.C. 10904(f)(4)(b). When a line is purchased pursuant to an OFA, the buyer must provide common carrier service over the line for a minimum of two years and may not resell the line (except to the carrier from which the line was purchased) for five years after the purchase. 49 U.S.C. 10904(f)(4)(A); 49 CFR 1152.27(i)(2).

On May 26, 2015, Norfolk Southern Railway Company (NSR) filed a petition to institute a rulemaking proceeding to address abuses of Board processes. In particular, NSR sought to have the Board establish new rules regarding the OFA process. NSR proposed that the Board establish new rules creating a pre-approval process for filings submitted by parties deemed abusive filers, financial responsibility presumptions, and additional financial responsibility certifications. In a decision served on September 23, 2015, the Board denied NSR's petition, stating that the Board would instead seek to address the concerns raised in the petition through increased enforcement of existing rules and by instituting an Advanced Notice of Proposed Rulemaking (ANPRM) to consider possible changes to the OFA process. *Pet. of Norfolk S. Ry. to Institute a Rulemaking Proceeding to Address Abuses of Board Processes* (*NSR Petition*), EP 727, slip op. at 4 (STB served Sept. 23, 2015).

The Board issued the ANPRM on December 14, 2015. In that ANPRM, the Board explained that its experiences have shown that there are areas where clarifications and revisions could enhance the OFA process and protect it against abuse. Accordingly, the Board requested public comments on whether and how to improve any aspect of the OFA process, including enhancing its transparency and ensuring that it is invoked only to further its statutory purpose of preserving lines for continued rail service. The Board also specifically requested comments on methods for ensuring offerors are financially responsible, addressing issues related to the continuation of rail service, and clarifying the identities of potential offerors.

The Board received comments on the ANPRM from 10 commenters: The Department of the Army Military Surface Deployment and Distribution Command (Army); NSR; CSX Transportation, Inc. (CSXT); the Association of American Railroads (AAR); the Rails-to-Trails Conservancy (Rails-to-Trails); Union Pacific Railroad Corporation (UP); Consolidated Rail Corporation (Conrail); the City of Jersey City (Jersey City); the American Short Line and Regional Railroad Association (ASLRRA); and Mr. James Riffin (Riffin). Based on the comments, the Board has a sufficient record on which to develop specific changes that could improve the OFA process. In Section I, the Board addresses the comments and how they have formed the basis of the rule proposed here. Even if not specifically discussed, the Board has carefully reviewed all comments on the ANPRM and taken each comment into account in developing the proposed rule. In Section II, the Board explains the newly proposed rule.

I. Comments in Response to the ANPRM

Financial Responsibility. The Board's regulations require that a potential offeror demonstrate that it is ''financially responsible,'' but those regulations do not fully define this concept or what facts or evidence a party must provide to demonstrate financial responsibility. Accordingly, in the ANPRM, the Board sought comments regarding how to modify its regulations so that the definition of financial responsibility is more transparent and understandable. In particular, the Board asked parties to comment on a number of methods of ensuring that an offeror is in fact financially responsible, which are discussed below.

a. Documentation

The Board sought comment on what documentation a potential offeror should be required to submit to show financial responsibility. AAR suggested generally that the Board clarify the documentation needed to show financial responsibility (AAR Comments 7–8), while the individual railroads and ASLRRA proposed specific evidence that should be required from offerors, including income statements, balance sheets, letters of credit, statements of financial resources, and evidence of adequate insurance or the ability to obtain such insurance. (*See* Conrail Comments 6–7, ASLRRA Comments 5, UP Comments 4, CSXT Comments 9.) Riffin commented that the Board's current financial responsibility requirements are too strict and should be broadened to allow offerors to provide evidence of non-liquid assets, ability to borrow money, including on credit cards, and demonstrations of cash. (Riffin Comments 17.)

The Board disagrees with Riffin that the financial responsibility requirements are currently too strict, and the Board does not believe that the types of evidence he suggests would show an offeror's financial ability to actually purchase and operate, or subsidize the operation of, a railroad, as is the purpose of an OFA. The Board agrees with the railroad commenters that clarification of the financial responsibility requirements is necessary, but finds that requiring specific documentation would likely place too heavy a burden on legitimate offerors. Instead, as discussed below, the Board proposes to provide clarifying examples of documentation the Board would accept as evidence of financial responsibility, including those documents suggested by the railroad and association commenters, and documentation the Board will not accept, including some of the types of evidence proposed by Riffin.

b. Notice of Intent To File an OFA

Another question posed by the Board in the ANPRM was whether it should require that potential offerors file notices of intent to file an OFA in abandonment and discontinuance proceedings by a date certain. Under the Board's current regulations, a notice of intent to file an OFA is required only when the carrier seeks abandonment or discontinuance authority through the Board's class exemption process, but not through a petition for exemption or application. 49 CFR 1152.27(c)(2)(i).

The railroad and association commenters expressed support for the idea that the Board require offerors to file notices of intent (NOIs) to file an OFA by a date certain in all cases. (*See* Conrail Comments 4, AAR Comments 5–6, NSR Comments 3, 5–6, CSXT Comments 5–6, ASLRRA Comments 5.) AAR and NSR specifically suggested that the Board require NOIs to be filed within 10 days of the publication of a notice of exemption or a petition, and within 45 days after the publication of notice of an application. (AAR Comments 5–6, NSR Comments 5–6.) Several commenters also proposed that the Board require these NOIs to contain specific financial and other certifications about the offeror. (*See* Conrail Comments 5, AAR Comments 6, CSXT Comments 5–6.) Jersey City and Riffin commented that NOIs should not be required. (Jersey City Comments 33–35, Riffin Comments 18.) Riffin argued that the purpose of NOIs in class exemption proceedings is to stay the proceeding to allow an offeror to obtain data from the carrier. Riffin also argued that potential offerors often do not know a line is going to be discontinued or abandoned until a Board decision is served or that potential offerors may decide after a petition, exemption, or application is filed that they want to file an OFA, making it difficult to file a NOI so early in the process. (Riffin Comments 19.)

As discussed further below, the Board proposes to require OFA NOIs in all abandonment or discontinuance proceedings, with the deadlines proposed by AAR and NSR. Congress expedited the abandonment process so that carriers could promptly relieve themselves of unprofitable assets, and the OFA process should move quickly so that carriers can know where things stand. The Board believes that the benefit of providing notice to the abandoning or discontinuing carrier that a party is considering an OFA will help expedite the process. Although Riffin argues that a party may not know so early in the process that it wants to file an OFA, the proposed filing deadlines for an NOI should still allow potential offerors sufficient time to consider their options. However, the Board believes the detailed certification and information requirements proposed by many of the commenters place too heavy a burden on legitimate potential OFA offerors at the NOI stage, and thus we propose to require only the information that is currently required as part of the class exemption process, as well as a minimal preliminary financial responsibility showing described further below.

c. Preliminary Financial Responsibility

In the ANPRM, the Board also sought comment on whether it should require potential offerors to make a financial responsibility showing before carriers are required to provide financial information to the offerors. ASLRRA, NSR, and AAR supported the idea, Jersey City and Riffin opposed it, and the Army commented that this should not be required for governmental entities. (ASLRRA Comments 5–6, NSR Comments 6–8, AAR Comments 6, Jersey City Comments 38–40, Riffin Comments 15–17, Army Comments 2.) ASLRRA proposed requiring prima facie evidence of the ability to purchase, operate, and maintain the line, along with a preliminary determination of financial responsibility from the Board. (ASLRRA Comments 5–6.) NSR proposed requiring financial information at the NOI stage, including statements on the potential offeror's financing abilities. (NSR Comments 7–8.) Jersey City commented that the statute requires carriers to provide valuation information before a showing of financial responsibility. (Jersey City Comments 38.) Riffin commented that no financial responsibility showing should be required at the NOI stage because a potential offeror at this stage will not have the information required to determine the net liquidation value (NLV) of the line, and he suggested as an alternative that a potential offeror should have 30 days after NLV is disclosed by a carrier to demonstrate financial responsibility. (Riffin Comments 15–17.)

The Board is convinced that it makes sense to require offerors to demonstrate some degree of financial responsibility before requiring the railroads to turn over their financial information to offerors. However, the Board also recognizes that a potential offeror cannot be expected to make a full financial responsibility showing based on the value of a rail line without financial information from the carrier. Accordingly, as discussed in more detail in Section II, the Board proposes requiring potential offerors to make a minimal, preliminary financial responsibility showing, but one that does not require any information from the carrier beyond that provided in the notice, petition, or application for abandonment or discontinuance.

With regard to Jersey City's comment that the current requirements for exchanging information is mandated by statute, the regulations proposed here would still require carriers to provide valuation information before a full financial responsibility showing is required. The Board simply proposes this preliminary minimal showing to ensure that potential offerors are legitimate and are not seeking to abuse the OFA process to cause delay in the abandonment or discontinuance process.

With regard to the Army's comment that no financial responsibility showing be required by governmental entities prior to obtaining financial information from the carrier, under 49 CFR 1152.27(c)(1)(ii)(B), governmental entities are presumed financially responsible and the Board does not propose to change that presumption in this rulemaking. Governmental entities, therefore, would not to be subject to this preliminary financial responsibility requirement, although this presumption of financial responsibility would still be rebuttable. *See Ind. Sw. Ry.—Aban. Exemption—in Posey & Vanderburgh Ctys., Ind.,* AB 1065X, slip op. at 5 (STB served Apr. 8, 2011) (finding government entity was not financially responsible, dismissing its OFA, and stating that the presumption that government entities are financially responsible, ''although entitled to significant weight, is not conclusive'').

d. Definition of Financial Responsibility

The Board also sought comment on the definition of financial responsibility. Conrail, ASLRRA, and AAR supported the idea of amending the definition of financial responsibility to include the ability to purchase and operate for at least two years, or subsidize for one year, a line being abandoned or to subsidize for one year service being discontinued. (*See* Conrail Comments 4, ASLRRA Comments 6, AAR Comments 8.) Jersey City supported such a requirement for private offerors, but not for governmental entities, though the City states that it believes it may be difficult to administer a requirement for financial responsibility for two years of operation. (Jersey City Comments 43–46.) AAR commented that the Board should establish a rebuttable presumption that an offeror that has been previously found not to be financially responsible remains not financially responsible. (AAR Comments 8.) CSXT proposed a detailed definition of financial responsibility that would include an offeror having to show immediately available funds for a number of payments and purchases, including locomotives and cars, insurance, and 15 days of working capital. (CSXT Comments 9.) Riffin opposed including the ability to purchase and operate or to subsidize in

the definition of financial responsibility, arguing that it would be contrary to Congressional intent. Riffin also opposes AAR's proposal and CSXT's proposal. (Riffin Comments 11, 15, Riffin Reply Comments 5.)

The Board declines to create a rebuttable presumption of the sort proposed by AAR: That an offeror that has been previously found not to be financially responsible remains not financially responsible. Under the current rules, all offerors (except government entities) bear the burden of showing that they are financially responsible, regardless of whether they have or have not been found financially responsible in the past. As such, there would be little benefit, if any, from AAR's proposed presumption.

The Board, however, does propose to make clear in its rules that, consistent with current Board precedent, an offeror attempting to make the proposed preliminary financial responsibility showing must, at a minimum, demonstrate some ability to purchase and operate the line, or, if there is no active service, at least maintain the line. *See, e.g., Consol. Rail Corp.—Aban. Exemption—in Phila. Pa.,* AB 167 (Sub-No. 1191X) et al., slip op. at 2 (STB served Mar. 14, 2012) (rejecting OFA because offerors ''failed to include any evidence to demonstrate that they are financially responsible to acquire and operate the OFA Segment''); *Greenville Cty. Econ. Dev. Corp.—Aban. & Discontinuance Exemption—in Greenville Cty, S.C.,* AB 490 (Sub-No. 1X), slip op. at 1 (STB served Oct. 27, 2005) (finding offeror financially responsible where it had ''sufficient financial resources to acquire and operate'' the line); *CSX Transp. Inc.—Aban.—in Atkinson & Ware Ctys, Ga.,* AB 55 (Sub-No. 640), slip op. at 1 (STB served Jan. 7, 2004) (finding offeror financially responsible because it had ''the financial resources to acquire and operate the line''). Accordingly, the Board proposes requiring as part of a NOI a minimal showing that this basic requirement can be met. The specifics of the proposed preliminary financial responsibility showing are discussed in Section II below.

e. Railroads' Duty To Provide Information

In the ANPRM, the Board also questioned whether it should alter the process for carriers to provide required financial information to potential offerors. CSXT commented that carriers should only be required to provide the information they are required to disclose by statute and should not be required to provide publicly available information. (CSXT Comments 6–8.) Jersey City argued that most of the delay in the OFA process arises because carriers do not timely provide valuation information, and that to avoid this delay, the Board should require that valuation information be provided with a carrier's initial filing, or create a rule that failure to provide such information promptly waives the carrier's ability to object to an offeror's valuation of a line. (Jersey City 21, 25.) Riffin also suggested that carriers could be required to provide valuation information with the carrier's initial abandonment or discontinuance filing, or within 30 days thereafter. (Riffin Comments 23.) AAR opposed this idea as unnecessary. (AAR Reply Comments 4.)

The Board agrees with AAR that requiring valuation information to be submitted with a carrier's initial filing would place an unnecessarily high burden on carriers at the abandonment or discontinuance filing stage because an OFA may never be filed. Indeed, in most abandonment and discontinuance proceedings, OFAs are not filed. We also reject CSXT's suggestion that the Board limit the carriers' disclosure to evidence required by statute and that is not publicly available. Under 49 U.S.C. 10904(b)(4), the Board has the authority to require carriers to provide potential OFA offerors with ''any other information that the Board considers necessary to allow a potential offeror to calculate an adequate subsidy or purchase offer,'' and the Board does not wish to foreclose this ability in the regulations.

f. Earnest Money/Escrow

The Board also requested comment on whether or not offerors should be required to make an earnest money payment or escrow payment, or to obtain a bond for some portion of their offer. ASLRRA supported an escrow or bond requirement, also suggesting that if the Board determines an OFA to be a sham or abuse of the OFA process, the escrow amount should be paid to the carrier to compensate it for delays and costs. (ASLRRA Comments 6.) UP also supported an earnest money payment, suggesting the payment should be in the amount of the OFA filing fee [1] and made to the carrier before the carrier is required to produce the financial information required under 49 CFR 1152.27(a). (UP Comments 5.) UP argued that the railroad should be allowed to keep the payment, either as part of the final purchase price of the rail line if a sale occurs or to compensate it for the time and expense involved in providing financial information to the offeror if a sale does not occur. (UP Comments 5–6.) Jersey City opposed the idea, arguing that initial payments or bonds should not be required for governmental entities and that the Board has not shown such a requirement is necessary. (Jersey City Comments 48–49.) Riffin also opposed the Board's proposal, arguing that bonds are not feasible within the OFA timeline, that earnest money would not be useful because settlement in an OFA proceeding usually happens quickly after abandonment or discontinuance authority is granted, and that escrow would take too much time and cost the offeror too much money. (Riffin Comments 18.)

As detailed in the proposed rule, the Board proposes to require an offeror to include with its OFA evidence proof that the offeror has placed in escrow with a reputable financial institution 10% of the preliminary financial responsibility amount that would be calculated at the NOI stage under the proposed rule. The Board believes that the proposed escrow requirement would reduce illegitimate offers from parties that may later be found not to be financially responsible. Many significant financial transactions, like real estate transactions, involve escrow, and the Board sees no reason why the purchase or subsidization of a rail line is any different. If an offeror is legitimately interested in an OFA and legitimately capable of acquiring or subsidizing the subject line, this amount is unlikely to be burdensome, especially at the actual offer stage when an offeror should have financing in place. While the Board believes a payment of some kind by an offeror would be a useful tool for the offeror to show the legitimacy of its participation in the OFA process, we do not believe this payment should be made to either the Board or the carrier, nor should this payment go to the carrier other than as part of the purchase or subsidy price in the event of a successful OFA. For that reason, the Board believes escrow would be the best choice for the format of this payment.

Lastly, we note that although governmental entities are presumed to be financially responsible, as discussed below, the Board proposes that these entities also be subject to this escrow requirement.

[1] The filing fee for ''an offer of financial assistance under 49 U.S.C. 10904 relating to the purchase of or subsidy for a rail line proposed for abandonment'' is currently set at $1,700. *See Regulations Governing Fees for Servs. Performed in Connection with Licensing & Related Servs.—2016 Updated,* EP 542 (Sub-No. 24) (STB served Aug. 2, 2016).

g. Abusive Filers

In the ANPRM, the Board also requested comment as to whether to prohibit filings by individuals or entities that have abused the Board's processes in the past, and if so, what standards the Board should apply to such a determination. ASLRRA, NSR, and Conrail supported such a prohibition, with ASLRRA and NSR offering potential standards for such a finding. (ASLRRA Comments 7, NSR Comments 8–9, Conrail Comments 8.) ASLRRA proposed prohibiting parties from filing an OFA when they have repeatedly submitted filings without following through on those filings or have submitted false or misleading information. (ASLRRA Comments 7.) NSR proposed that the Board create a ''demonstrated unqualified offeror'' status for parties who have been found not financially responsible in their most recent prior OFA, have failed to consummate their most recent OFA, or are currently subject to an active bankruptcy proceeding. (NSR Comments 8–9.) NSR proposed that such parties be subject to pre-approval requirements before being allowed to participate in the OFA process. (*Id.*) Jersey City commented that the Board should not make any changes to its regulations, but instead enforce its existing rules to prevent abusive filings. (Jersey City Comments 52–56.) Riffin commented against a prohibition, arguing that a frequent litigant is not the same as an abusive filer. (Riffin 20–22.)

The Board continues to be concerned with inappropriate and vexatious filings and the burden they place on the Board's resources and the resources of the parties that come before the Board. But given that many parties file for bankruptcy and later reestablish themselves financially, prior bankruptcy should not be an absolute bar to using the Board's processes. Nor does the failure to follow through on one OFA necessarily indicate that a party would not follow through on the next one. Finally, even if a party files a vexatious pleading, as the Board has witnessed, we are not persuaded on this record that a special rule is warranted to protect the agency and the public in OFA and other cases.[2] Rather, at this time, we believe that the best way to handle inappropriate filings is to increase enforcement of the existing rules, including 49 CFR 1104.8.[3]

h. Other Issues

Parties also commented on other aspects of financial responsibility. Conrail commented that the Board should eliminate the presumption of financial responsibility for governmental entities, should require governmental entities to show they have taken the necessary steps to authorize the acquisition of the property subject to an OFA and the common carrier obligation, and should require governmental entities to show community support for continued rail operations. (Conrail Comments 7.) The Army and Riffin commented that the Board should keep the presumption of financial responsibility for governmental entities. (Army Comments 2, Riffin Comments 17.) The Board agrees. Conrail has not shown that any changes to the presumption of financial responsibility for governmental entities are necessary to prevent an abuse of the Board's processes, and the Board therefore does not propose to adopt these proposals.[4]

Riffin also suggested that, if a party acquiring a line via OFA fails to make a good faith effort to provide rail service, the line should be subject to reversion to the carrier or made available to other entities that may be able to provide service. (Riffin Reply Comments 8–9.) The Board rejects this proposal, as there are existing remedies before the Board if a carrier fails to meet its common carrier obligation, such as Feeder Line applications, unreasonable practice complaints, emergency service orders, or assistance through the Board's Rail Customer & Public Assistance program.

Continuation of Rail Service. Another area where the Board sought comment concerns whether a party seeking to subsidize or acquire a line through the OFA process is doing so based on a genuine interest in and ability to preserve the line for rail service. Specifically, the Board inquired whether offerors should be required to address whether there is a commercial need for rail service as demonstrated by support from shippers or receivers on the line or through other evidence of immediate and significant commercial need; whether there is community support for rail service; and whether rail service is operationally feasible.

The railroad commenters supported a requirement that offerors address whether there is a commercial need for rail service using the criteria laid out by the Board in *Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—in Los Angeles County, California* (*LACMTA*), AB 409 (Sub-No. 5X), slip op. at 3 (STB served June 16, 2008). (*See* Conrail Comments 9–10, UP Comments 6–8, ASLRRA Comments 7, AAR Comments 8–10, NSR Comments 9–10, CSXT Comments 5.) Some commenters further suggested that the Board require an offeror to present specific evidence that the OFA would enable continued rail service and that the offeror would be able to provide that service, as demonstrated by a business plan, traffic projections, service plans and contracts with shippers on the line. (AAR Comments 9, NSR Comments 9–10 (agreeing with AAR's proposal).) Several commenters also suggested that the burden on an offeror should be higher when a carrier has filed a notice of exemption to abandon or discontinue, given that in such cases, there has been no traffic on the line for at least two years, making the need for continued rail service more doubtful. Some commenters provide specific suggestions for what that burden should be. (Conrail Comments 10, CSXT Comments 11, AAR Comments 9, NSR Comments 10.) NSR argues that a higher burden should also apply when abandonment or discontinuance is sought through a petition for exemption. (NSR Comments 10.)

Jersey City argued against a detailed requirement for offerors to address commercial need, suggesting instead that offerors only be required to show support from one shipper, potential shipper, or interested governmental entity. (Jersey City Reply Comments 10–11.) Jersey City contended that requiring a more substantial showing that the line is needed for continued rail service conflicts with the agency's prior interpretations of ICCTA. (Jersey City Comments 59–61.) Finally, the Army argued there should be no requirement for governmental entities and shippers to address commercial need (Army Comments 2), but as Conrail points out in response, the Army's comments seem to contemplate a subsidy (not purchase) scenario, in which case ''neither the need for rail service nor its operational feasibility will likely be a serious issue.'' (Conrail Reply Comments 1.)

The Board agrees with the railroad commenters on the benefit of imposing a requirement that offerors demonstrate

[2] We are aware that one option could be to require a pro se party found to have abused the Board's processes in one proceeding to be represented by counsel in any future matters. The idea would be that a licensed attorney would exercise some control over the filings made by the pro se party. Although we will not propose that approach in this NPRM, if parties believe that it could improve our processes, they may wish to address the matter in their comments.

[3] In a recent case the Board rejected a vexatious filing. *See Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of Del. & Hudson Ry.,* FD 35873 (STB served Mar. 24, 2016).

[4] Community support for continued rail operations—with respect to all offerors, not only governmental entities—is discussed further below.

a need for continuation of rail service, as it would ensure that the OFA is being sought for the reason Congress intended. Accordingly, as discussed below, the Board proposes to require offerors to address the continued need for rail service when submitting an OFA. However, instead of requiring an offeror to satisfy the specific *LACMTA* criteria or additional criteria, the Board proposes to list those criteria as examples of what the Board will accept as evidence of continued need. The Board also will not adopt a requirement that offerors must submit specific information to show continued need for rail service.

The Board disagrees with Jersey City's argument that requiring such a showing is contrary to the Board's prior ICCTA interpretation. Although the Board, when it adopted regulations implementing ICCTA, concluded that 10904 as revised did not require such a showing, the Board later concluded that an OFA nevertheless must be for continued rail service. *Roaring Fork R.R. Holding Auth.—Aban.—in Garfield, Engle, & Pitkin Ctys., Colo.,* AB 547X (STB served May 21, 1997). That determination has been judicially affirmed. *E.g., Kulmer* v. *STB,* 236 F.3d 1255, 1256–57 (10th Cir. 2001); *Redmond-Issaquah R.R. Preservation Ass'n* v. *STB,* 223 F.3d 1057, 1061–63 (9th Cir. 2000).

OFA Exemptions. The Board also sought comment on whether it should establish criteria and deadlines for carriers that seek exemptions from the OFA process. Some commenters generally supported the idea of establishing criteria and deadlines for carriers seeking exemptions from the OFA process, but they did not agree how stringent the criteria should be. (*See* ASLRRA Comments 8–9, Riffin Comments 28–29.) Other commenters suggested the Board should even establish a class exemption from the OFA process in certain scenarios, including: where the abandoning carrier has entered into an agreement to sell or donate the line for a public purpose (AAR Comments 10, UP Comments 9 (agreeing with AAR's proposal)), where there has been no local traffic for five years (UP Comments 10), or for all notice of exemption and petition for exemption proceedings (NSR Comments 4–5). In addition, Jersey City and Rails-to-Trails also commented that, when determining whether to grant an exemption from the OFA process, greenway or trail projects should be treated with equal importance to other public projects when balanced against the commercial need for continued rail service. (Jersey City 64–65, Rails-to-Trails Comments 3.) In other words, they argue an OFA exemption should be granted if the public importance of the greenway or trail project outweighs the commercial need for continued rail service.

Based on the comments, the Board is not convinced that establishing criteria or deadlines for exemptions from the OFA process is needed. The Board finds that reviewing requests for exemptions from the OFA process on a case-by-case basis allows it to consider the individual circumstances of each case, which the Board would not be able to do if it established specific criteria or created a class exemption. Accordingly, the Board will continue its existing practice of considering such exemptions on a case-by-case basis. We note that the proposal to require offerors to address the continued need for commercial service would ease the burden on carriers without the need for a class exemption. With regard to the comments from Jersey City and Rails-to-Trails, given the Board's conclusion that requests for exemptions from the OFA process should continue to be decided on a case-by-case basis, the Board will not generalize about how it would apply the OFA exemption test in the context of a public greenway or trail project. In addition, there are existing processes under the National Trails System Act, 16 U.S.C. 1247(d) (2014), and the public use provisions of 49 U.S.C. 10905, for seeking the use of rail corridors that would otherwise be abandoned for purposes such as trail and greenway projects.

Other Continuation of Rail Service Comments. UP suggested the Board should allow an abandoning carrier to withdraw its request for abandonment authorization if a need for continued rail service becomes apparent during an OFA proceeding. (UP Comments 11–12.) This is an action carriers may already take in such situations. *See, e.g., Reading Blue Mountain & N. R.R.—Aban. Exemption—in Schuylkill Cty, Pa.,* AB 996X (STB served Feb. 5, 2008); *Almono LP—Aban. Exemption—in Allegheny Cty., Pa.,* AB 842X (Served Jan. 28, 2004); *CSX Transp.—Aban. in Vermillion Cty., Ill.,* AB 55 (Sub-No. 193) (STB served Aug. 28, 1989). Therefore, we are not proposing to change the Board's rules.

Conrail suggested that the Board specify that an offeror successfully acquiring a line via OFA must actually provide service for a minimum of two years before the Board will allow abandonment or discontinuance. (Conrail Reply Comments 3.) In contrast, Riffin commented that operation in the first two years after acquisition should be of little concern to the Board because the purpose of the OFA process is to preserve rail corridors for future use. (Riffin Comments 15.) While the offeror must intend to operate the line for two years, Conrail's comment does not take into account the fact that the offeror may not receive requests allowing it to provide service throughout its first two years. However, Riffin's comment is also incorrect, as the purpose of the OFA statute is not to preserve an unused rail corridor for future rail service, but to fulfill the common carrier obligation under 49 U.S.C. 11101 by providing continued rail service *upon reasonable request* for at least two years.

Identity of the Offeror. In the ANPRM, the Board noted that there has been confusion in some OFA proceedings over the identity of the potential offeror and therefore sought comments regarding ideas on how to address this issue. With regard to the idea that the Board should require multiple parties submitting a joint OFA to form a single legal entity, commenters were split. As an alternative, AAR proposed the Board require joint OFA filers to clearly disclose which entity will be assuming the common carrier obligation, along with how the parties would allocate responsibility for financing the purchase or subsidy and operation of the line, if purchased. (AAR Comments 4.) As discussed below, the Board proposes to adopt AAR's alternative suggestion, as it would allow the Board to identify responsible parties without requiring parties to form a separate entity.

The Board also inquired whether an individual filing an OFA should be required to provide his or her personal address. Commenters generally found such a requirement would be reasonable (Jersey City Comments 77–78, Conrail Comments 11, ASLRRA Comments 8, AAR Comments 4), although Riffin commented that individuals might want to keep their personal addresses out of the public record. (Riffin Comments 9.) Based on the comments, the Board believes that requiring an individual offeror to provide contact information would assist carriers and the Board in identifying the parties involved in an OFA. This is true for all offerors, not only individuals. Any legitimate party that intends to undertake the responsibility for purchasing an operating a rail line, making it subject to various federal, state, and local laws, should be willing to disclose its address. Without an address, it could be difficult for parties to engage the offeror or pursue legal recourse. As discussed below, for this reason, the Board proposes to require an address, either

business or personal, and other contact information for an offeror or a representative of an offeror. This proposed requirement would apply to all offerors, including legal entities.

With regard to the identity of private legal entities filing an OFA, commenters generally agreed that the Board should require such an entity to provide its complete legal name and state of incorporation. (Conrail Comments 11, ASLRRA Comments 8–9, AAR Comments 3–4.) AAR also suggested requiring further details regarding the ownership of an entity, while Conrail also suggested requiring entities to document that they are in good standing in their state of organization. (AAR Comments 3–4, Conrail Comments 11–12.) Riffin pointed out that the location of an entity's principal place of business is not necessary in the OFA process (Riffin Comments 9–10.), and that ownership information is not relevant to whether or not the entity is interested in providing rail service. (Riffin Reply Comments 4.)

The Board proposes to require some information as to the ownership of a legal entity. This information, along with the other identifying information we propose to require, would assist the Board and carriers in identifying the parties involved in an OFA. Although Riffin argues that this information is currently not necessary under the OFA process, the Board is permitted to adopt regulations that will improve the process, so long as it is not contrary to statute, which this proposal is not. Contrary to Riffin's claim, we also believe that ownership information could shed light on whether the entity has a legitimate interest in providing rail service, or instead, is seeking to acquire the corridor for some other, non-rail related purpose. Moreover, ownership information could be helpful in assessing whether the entity has the means to finance the purchase or subsidization of the line.

CSXT commented that the Board should reduce the time for consummation of an OFA once terms and conditions have been set from 90 days to 30 days. (CSXT Comments 6.) CSXT argues that carriers are now familiar with the documentation required for OFAs and can have documents ready for finalization quickly. (*Id.*) However, CSXT does not provide any evidence that the 90-day time period has been problematic. The Board also notes that parties are free to consummate an OFA sooner than 90 days.

Jersey City proposed that governmental entities should be allowed to use OFAs to acquire rail lines for passenger rail service, as long as they also assume the freight common carrier obligation. (Jersey City Comments 28–29.) Jersey City argues OFAs may already be used for passenger rail service, citing *Chicago & North Western Transportation Company* v. *United States,* 678 F.2d 665 (7th Cir. 1982). As the Board has stated, ''nothing in section 10904 precludes a line from being acquired under the OFA procedures to provide combined passenger/freight service and indeed there are situations where . . . it is the inclusion of passenger operations that would seem to make it financially viable for an operator to offer continued (or restored) freight service.'' *Trinidad Ry.—Acquis. & Operation Exemption—in Las Animas Cty., Colo.,* AB 573X et al., slip op. at 8 (STB served Aug. 13, 2001). *See also Union Pac. R.R.—Aban. Exemption—in Rio Grande & Mineral Ctys., Colo.,* AB 33 (Sub-No. 132X), slip op. at 3 (STB served Apr. 22, 1999). Therefore, the Board does not believe the OFA regulations require further clarification on this point.

Jersey City also expressed its concern that ''illegal de facto abandonments'' are the biggest issue surrounding the OFA process. (*See, e.g.,* Jersey City Comments 2, 10–21, 31, 53–54.) This issue is outside the scope of this proceeding, which is focused on changes to the OFA process, not whether more abandonment filings ought to be made.

The Army described situations in which it would make an OFA, and argued that there should be a presumption that existing carriers will retain the common carrier obligation if an OFA is successful. (Army Comments 2.) The situation described by the Army is one of an OFA subsidy, rather than a purchase, in which an existing carrier would continue operation of a line subsidized by an OFA, and would retain the common carrier obligation. Thus, in the scenario that the Army raises, existing law already provides the outcome the Army seeks. If a special situation arose for the Army involving the OFA process, the Board would work with the Army to identify a workable solution.

II. The Proposed Rule

The proposed rule contains eight proposed changes to the Board's regulations at 49 CFR part 1152, which are set out below: Four changes relating to financial responsibility, one relating to the continuation of rail service, and three relating to the identity of offerors.[5] In proposing these changes, the Board has considered the suggestions from commenters on the ANPRM, incorporating them where appropriate and modifying them where necessary in order to propose changes to the regulations that the Board believes would best improve the OFA process and protect it from abuse.

Financial Responsibility. The proposed rule includes four changes intended to clarify the requirement that OFA offerors be financially responsible and to require offerors to provide additional evidence of financial responsibility to the Board.

1. *Examples of evidence of financial responsibility.* First, the Board proposes to further define financial responsibility in its regulations at 49 CFR 1152.27(c)(1)(ii)(B) by including examples of the kinds of evidence the Board would accept to demonstrate that offerors are financially responsible, as well as examples of the kinds of documentation the Board would not accept as evidence of financial responsibility. Examples of documentation the Board would accept include income statements, balance sheets, letters of credit, profit and loss statements, account statements, financing commitments, and evidence of adequate insurance or ability to obtain adequate insurance. Examples of evidence the Board would not accept include the ability to borrow money on credit cards and evidence of non-liquid assets an offeror intends to use as collateral.

Including these examples in the regulations is intended to provide guidance to offerors as to what evidence demonstrates financial responsibility in the OFA process. This change to the regulations would not create new requirements, but would simply provide guidance as to what the regulations already require. The Board proposes to provide these as examples instead of strict requirements because we recognize that each OFA offeror's financial situation may be different, and thus offerors are likely to have access to different types of evidence. The Board believes that requiring the same evidence from all offerors could place an unnecessarily heavy burden on some offerors.

2. *Notice of Intent filing.* Second, the Board proposes to amend its regulations at 49 CFR 1152.27(c)(1) to require potential offerors to submit notices of intent (NOIs) to file an OFA in all

[5] The Surface Transportation Board Reauthorization Act of 2015, Public Law 114–110, 129 Stat. 2228 (2015) revised parts of the United States Code, including re-designating chapter 7 of title 49 of the Code as chapter 13. As a result, in this rulemaking the Board is also revising the authority citation for 49 CFR part 1152 as set out below.

abandonment and discontinuance proceedings. The Board proposes to require NOIs to be filed no later than 10 days after the **Federal Register** publication of notice that a petition for exemption has been filed, and no later than 45 days after the **Federal Register** publication of notice that an application to abandon or discontinue has been filed.

Under 49 CFR 1152.27(c)(2)(i), potential offerors are already required to file NOIs no later than 10 days after the publication of a notice of exemption in notice of exemption proceedings. This notice is a short document providing notification to the carrier and the Board that a party intends to make an OFA. Extending this requirement to petition and application proceedings would be a relatively low burden on potential offerors, as they would only be required to indicate their interest and to make a minimal financial responsibility showing, as discussed further below, at this stage. The Board also believes that setting the deadlines for NOIs at 10 days after the publication of notice that a petition has been filed and 45 days after the filing of an application would provide potential offerors adequate time to consider whether or not they want to participate in the OFA process in a particular proceeding and have the financial resources to do so. This small burden on potential offerors would also be balanced by the benefit NOIs would provide to the Board and to abandoning or discontinuing carriers by notifying them that a party is interested in an OFA and providing the identity of that party. Providing this notice to carriers would allow carriers to more timely assemble the financial information that, under 49 CFR 1125.27(a), they will be required to provide a potential offeror on request. Identifying potential offerors at an early stage may also provide an opportunity for carriers to work with those seeking to make an OFA and allow the parties to come to a mutually beneficial agreement outside of the OFA process.

3. *Preliminary showing of financial responsibility.* Third, the Board proposes to amend its regulations at 49 CFR 1152.27(c)(1) to require a preliminary showing of financial responsibility with the filing of an NOI, before the railroad is required to provide financial information to the potential offeror. The Board has identified an initial minimal financial responsibility showing as a useful tool to ensure offerors are legitimately interested in, and capable of, participating in the OFA process and are not seeking to abuse the Board's processes or cause delay in abandonment or discontinuance proceedings. The Board proposes calculating the amounts required for this showing using the following formulas.

For a potential OFA to subsidize service, the Board proposes that the preliminary financial responsibility showing at the NOI stage be calculated as a minimum maintenance cost for the line per mile for the one-year mandatory subsidy period. To determine this amount, the Board proposes multiplying the standard per-mile per-year maintenance cost for rail lines by the length of the line in miles. As discussed below, the Board proposes setting the standard per-mile per-year maintenance cost at $4,000. The potential offeror would then provide the Board with evidence of its preliminary financial responsibility at that level.

In the past, the Board has accepted base maintenance costs for rail line of between $4,000 and $11,000 per mile per year. *See Wis. Cent. Ltd.—Aban.—in Ozaukee, Sheboygan, & Manitowoc Ctys., Wis.,* AB 303 (Sub-No. 27), slip op. at 6 (STB served Oct. 18, 2004) (accepting forecast year maintenance-of-way and structures cost of approximately $4,300 per mile in granting petition for abandonment exemption); *Union Pac. R.R.—Aban.—in Harris, Fort Bend, Austin, Wharton, & Colo. Ctys., Tex.,* AB 33 (Sub-No. 156), slip op. at app. (STB served Nov. 8, 2000) (accepting total forecast year costs for maintenance-of-way and structures of $529,833 in granting application for abandonment exemption for 49.42-mile rail line, for a maintenance cost of just under $11,000 per mile per year); *SWKR Operating Co.—Aban. Exemption—in Cochise Cty., Ariz.,* AB 441 (Sub-No. 2X), slip op. at 6 (STB served Feb. 14, 1997) (accepting rail line maintenance costs of just over $6,000 per-mile per-year in granting petition for abandonment exemption and stating that ''[w]e know from extensive experience that $6,000 per mile/per year is a reasonable figure for maintenance by a Class III railroad.''). We believe that it is appropriate to use the lowest end of this range so as not to unintentionally discourage parties that have a legitimate interest in pursuing an OFA too early in the process. In addition, while the maintenance cost per mile will naturally vary for each rail line subject to an OFA, the purpose here is to set a standard cost that can be applied easily in each case. We believe that requiring potential offerors to specifically identify that value and provide the Board with evidence to support it would create additional complexity that is contrary to the purpose of the preliminary financial responsibility showing. We therefore propose to set the per-mile per-year maintenance cost to be used in the preliminary financial responsibility calculation at a standard $4,000.

For a potential OFA to purchase a line, the Board proposes that the preliminary financial responsibility showing at the NOI stage be calculated as the sum of (a) the current rail steel scrap price per ton, multiplied by 132 tons per track mile as the estimated weight of the track, multiplied by the total track length in miles, plus (b) the $4,000 minimum maintenance cost per mile described above, multiplied by the total track length in miles, multiplied by two (because an OFA purchaser is responsible for operating the acquired line for at least two years).[6] As noted previously, although the Board is declining to propose rebuttable presumptions or specific requirements for a showing of financial responsibility, these elements would be consistent with the Board precedent that an offeror must at least demonstrate some ability to purchase and operate the line, or, if there is no active service, at least maintain the line.

The current rail steel scrap price is available at no charge from Web sites that track steel prices. The Board proposes requiring the potential offeror to use one of these publicly available sources to determine the price of steel and then submit to the Board documentation showing the source the offeror uses, with a requirement that this source price be dated within 30 days of the submission of the NOI. We propose to set the estimated weight of the steel per mile of track at 132 tons per mile of track.[7] The Board believes that this amount, which is at or near the low end of the weight range for track materials generally associated with the OFA process, would be a reasonable standard weight to be used in this calculation at the NOI stage. The Board proposes to set a standard weight to be used in this calculation in order to simplify the preliminary financial responsibility calculation and avoid requiring offerors to determine actual weights of rail. The length of the track would be taken from the carrier's filing.

[6] OFAs to purchase rail lines normally include the value of the land. Because the value of land varies widely across the country and is not easily identified at this stage, the Board does not propose to include land value in the preliminary financial responsibility calculation.

[7] Seventy-five pounds per yard of rail equals 25 pounds per foot. Twenty-five pounds per foot multiplied by 5,280 feet per mile equals 132,000 pounds per mile. One hundred thirty-two thousand pounds per mile multiplied by two (the number of rails per track) equals 264,000 pounds, or 132 tons, of rail per mile of track.

The potential offeror would calculate the total cost as described above and provide evidence of its financial responsibility at that level.

Upon receipt of the potential offeror's NOI with the preliminary financial responsibility evidence, the Board would review the information submitted. If the Board finds the information is inadequate to determine the potential offeror's preliminary financial responsibility, it would issue a decision within 10 days of the receipt of the information, either requesting further information from the potential offeror or rejecting the potential offeror's NOI. If after 10 days the Board has not issued a decision on the NOI, the potential offeror would be presumed to be preliminarily financially responsible for the minimum subsidy or purchase cost of the line, and the carrier would be required to provide the potential offeror with the information required under 49 CFR 1152.27(a) upon request. Being preliminarily financially responsible under this process would not create any presumption that the party will be found financially responsible under 49 CFR 1152.27(c)(1)(iv) if an OFA is submitted later.

The Board believes this calculation would result in an amount that is a reasonable measure of interest and capability. We acknowledge that the result of this calculation would be an amount somewhat below (in some cases substantially below) the actual subsidy or purchase price of the line, but the purpose is merely to discourage abusive OFAs. Additionally, the Board believes doing this calculation at the NOI stage, while representing an extra step, would not be a significant burden on potential offerors. This calculation could be done without the need for any additional information from the carrier or the Board beyond what is in the carrier's filing.

As noted above in the discussion of comments on this proposal, governmental entities would continue to be presumptively financially responsible under 49 CFR 1152.27(c)(1)(ii)(B), although this presumption is rebuttable at the OFA stage. Governmental entities would therefore not be subject to this proposed requirement, but they would still be required to file the NOI described above.

4. *Escrow requirement.* Fourth, the Board proposes to require offerors to demonstrate in their OFA that they have placed in escrow with a reputable financial institution 10% of the preliminary financial responsibility amount calculated at the NOI stage. The deposit into escrow would allow the offeror to show the abandoning or discontinuing carrier and the Board that its offer and interest in the line are legitimate. The Board has identified escrow as the best option for this financial demonstration because, similar to the use of escrow in other significant financial transactions, it would require the offeror to make a concrete showing of its finances and interest in the OFA without giving funds over to the Board or to the involved carrier. The Board would not administer this process, and the funds would never go to either the Board or the abandoning or discontinuing carrier as a penalty. If at any time before consummation of the transaction the offeror were to decide to end its involvement in the OFA process, it would be entitled to return of the escrowed funds. The escrowed funds would be given over to the carrier involved in the OFA transaction only as part of the purchase or subsidy price of the line if and when the OFA is successfully completed.

The Board believes that 10% of the preliminary financial responsibility amount calculated at the NOI stage would be the appropriate amount for an escrow deposit for several reasons. Although, as noted, the proposed preliminary financial responsibility amount will be lower than the eventual amount of the subsidy or purchase price, it is an amount that is easily identified by the offeror without the need to assess the overall value of the rail line. It is also an amount based on the length of the rail line. Ten percent of the preliminary financial responsibility amount would therefore also bear some relation to the size of the overall financial transaction. However, 10% of this amount would not likely be so burdensome as to discourage an otherwise qualified offeror from submitting an OFA. At the offer stage when this escrow deposit would be required, a qualified offeror should already have financing in place. For this reason, the Board proposes requiring governmental entities to comply with this escrow requirement. Although governmental entities are presumed financially responsible, since they too should have financing in place, the Board does believe it would be unreasonable or burdensome to require them to also meet this requirement.

Continuation of Rail Service. The Board proposes to amend 49 CFR 1152.27 to require offerors to demonstrate in their OFA that continued rail service on the line the offeror seeks to subsidize or purchase would be needed and feasible. Examples of evidence to be provided would include: (1) Evidence of a demonstrable commercial need for service, as reflected by support from shippers or receivers on the line or other evidence of an immediate and significant commercial need; (2) evidence of community support for continued rail service; (3) evidence that acquisition of freight operating rights would not interfere with any current and planned transit services; and (4) evidence that continued service is operationally feasible.

The requirement for an OFA to show evidence of a continued need for service is already laid out in Board precedent. *See LACMTA,* AB 409 (Sub-No. 5X), slip op. at 3. By explicitly placing this requirement in our regulations, the Board would be able to ensure that this requirement is addressed in all OFAs and that there is a genuine need to preserve the line for rail service in all OFA cases. Additionally, by including examples of how an offeror may demonstrate the need for continued service, the amended regulations would provide guidance to offerors to assist them in meeting this requirement in their OFAs. The Board notes that, in cases of two year out-of-service notices of exemption, the burden on the offeror to show the continued need for rail service would remain the same as in other proceedings. However, because of the nature of the exemption process, where there has been no service for at least two years, an offeror would need to present concrete evidence of a continued need for rail service.

Identity of Offerors. The Board proposes three amendments to 49 CFR 1152.27 to clarify the identity of offerors in their OFAs.

1. *Mailing address.* First, the Board proposes to require offerors to provide a mailing address, either business or personal, and other contact information, including a phone number and email address, for the offeror or a representative. The Board notes that a Post Office Box would be an acceptable mailing address for an offeror to provide.

2. *Disclosure of identity.* Second, the Board proposes to require offerors that are legal entities to include in their offer the entity's full legal name, state of organization or incorporation, and a description of the ownership of the entity.

3. *Identify entity to hold common carrier responsibility.* Third, the Board proposes to require multiple parties filing a single OFA to clearly identify which entity or individual would be assuming the common carrier obligation and to clearly identify how the parties would allocate responsibility for

financing the purchase or subsidy and, if purchased, the operation of the line.

As noted in the ANPRM, in the past the Board has encountered confusion in the OFA process over the identity of offerors. *See CSX Transp. Inc.—Aban. Exemption—in Allegany Cty., Md.,* AB 55 (Sub-No. 659X), slip op. at 1 n.2 (STB served Apr. 24, 2008) (describing confusion over proper name and existence of entity that filed OFA in 2005 but may not have been a legal entity until 2007 or the correct legal entity to receive deed for rail line). This additional information the Board proposes to require in OFAs would allow the Board and the carrier receiving an OFA to identify the individuals or entities submitting the offer. It is essential for the Board to be able to identify the parties involved in an OFA in order to assess the ability of the party or parties to carry out an OFA, including assessing the financial responsibility of the offeror(s). It is also important for a carrier receiving an OFA to be able to identify the party or parties involved in an offer so that the carrier can effectively negotiate with them. Furthermore, the benefit of this information in clarifying the identity of an offeror would far outweigh the relatively small additional burden requiring this information places on an offeror.

The Board seeks comments from all interested persons on the proposed rule. Importantly, the Board encourages interested persons to propose and discuss potential modifications or alternatives to the proposed rule. The Board will carefully consider all recommended proposals in an effort to establish the most useful changes to the OFA regulations.

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, 603(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities.'' 605(b). The impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

It is possible that the rule proposed here could have a significant economic impact on certain small entities.[8] Parties may comment on any information relevant to the burden, if any, the proposed rule will have on small entities as defined by the RFA.

Description of the reasons why the action by the agency is being considered.

On May 26, 2015, NSR filed a petition to institute a rulemaking proceeding to address abuses of Board processes. In a decision served on September 23, 2015, the Board denied NSR's petition but stated it would institute a separate rulemaking proceeding to examine the OFA process. On December 14, 2015 the Board instituted this proceeding, issuing an ANPRM requesting comments from the public and stating that, based on NSR's petition and on the Board's experiences since ICCTA was enacted in 1995, there are areas where clarifications and revisions to the Board's OFA process could enhance the process and protect it against abuse.

Succinct statement of the objectives of, and legal basis for, the proposed rule.

The objectives of this proposed rule are to update the Board's regulations regarding the OFA process and identify changes that can be made to improve the OFA process and protect it from abuse. The Board believes the changes proposed in this NPRM would achieve this by ensuring that parties that participate in the OFA process are legitimate and are doing so for the purpose intended by Congress, which is to preserve rail service. The legal basis for the proposed rule is 49 U.S.C. 1321.

Description of, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.

The proposed rule would apply to all entities making offers of financial assistance to subsidize or purchase rail lines subject to abandonment or discontinuance under the Board's regulations. In the past 20 years since ICCTA was enacted, the Board has received approximately 100 OFAs, or an average of five per year. Of those, the Board estimates that about 80, or 80%, were filed by small entities. Over the last six years, the Board has received six OFAs, or an average of one per year. Of those, the Board estimates that about four, or 66%, were filed by small entities. The majority of these small entities have been small businesses, including shippers and Class III railroads, but this has also included small governmental jurisdictions and small nonprofits. We therefore estimate that this rule will affect up to four small entities per year.

Description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.

The proposed rule would require additional information from entities interested in or submitting OFAs at two stages. First, an entity would have to file a notice of intent (NOI) soon after the railroad files for abandonment or discontinuance authority (the NOI stage). Second, entities would have to provide new information when the actual offer is submitted (the offer stage), which occurs soon after the railroad has obtained abandonment or discontinuance authority from the Board. The Board is seeking approval from the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act (PRA) for these requirements through a revision to a broader, existing OMB-approved collection, as described in the Appendix.

At the NOI stage, potential offerors would be required to submit an NOI in all notice of exemption, petition for exemption, and application proceedings, rather than only in notice of exemption proceedings as is now required. This NOI would be a simple notice to the Board and the carrier involved in the proceeding that a party is interested in making an OFA to subsidize or purchase the rail line. Potential offerors would also be required to calculate a preliminary financial responsibility amount for the line using information contained in the carrier's filing and other publicly available information, and provide to the Board evidence of their financial responsibility at that level. This calculation would require research on the part of the potential offeror to determine the current scrap price of steel, which is publicly available at no

[8] Effective June 30, 2016, for the purpose of RFA analysis, the Board defines a ''small business'' as only including those rail carriers classified as Class III rail carriers under 49 CFR 1201.1–1. *See Small Entity Size Standards Under the Regulatory Flexibility Act,* EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual operating revenues of $20 million or less in 1991 dollars, or $38,060,383 or less when adjusted for inflation using 2014 data. Class II rail carriers have annual operating revenues of up to $250 million in 1991 dollars or up to $475,754,802 when adjusted for inflation using 2014 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its Web site. 49 CFR 1201.1–1.

cost. This calculation would not require professional expertise, however, as it is intended to be relatively simple.

At the offer stage, offerors would be required to provide additional relevant identifying information depending on whether the offeror is an individual, a legal entity, or multiple parties seeking to submit a joint OFA. Offerors would also be required to address the continued need for rail service in their offer, to place 10% of the minimum subsidy or purchase price of the line (taken from the calculation done at the NOI stage) in an escrow account, and to provide evidence with their offer that they have completed the escrow requirement.

All small entities participating in the OFA process would be subject to these requirements. As discussed above, in the past these small entities have included small businesses, Class III railroads, small nonprofits, and small governmental entities. Many, but not all, entities participating in the OFA process are represented by legal counsel, though such representation is not required. These new requirements may take additional time, as detailed in the Paperwork Reduction Act analysis below, but the Board does not believe they would require additional professional expertise beyond that already required by the OFA process.

The Board estimates these new requirements would add a total annual hour burden of 42 hours and no total annual ''non-hour burden'' cost under the Paperwork Reduction Act, as detailed below and in the Appendix. The Board seeks comment on these estimates and on the actual time, costs, or expenditures of compliance with the proposed rule.

Identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.

The Board is unaware of any duplicative, overlapping, or conflicting federal rules. The Board seeks comments and information about any such rules.

Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities, including alternatives considered, such as: (1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; (4) any exemption from coverage of the rule, or any part thereof, for such small entities.

Under the proposed rule, offerors and potential offerors participating in the OFA process would be required to submit additional information as described above at the NOI stage and at the offer stage of the process. One alternative to the NOI requirements in the proposed rule would be to exempt small entities from the preliminary financial responsibility showing. An alternative to the escrow requirement would be to require small entities to place a smaller percentage of the of the minimum subsidy or purchase price of the line in escrow, or to exempt small entities from the escrow requirement altogether. But because many of the problems with OFAs have involved parties that could be classified as small entities, applying these alternatives could defeat the purpose of the proposed rule.

An alternative to the proposed rule as a whole would be to exempt small entities from compliance with the rule. This would significantly weaken the effect of the rule because, as discussed above, approximately 66% to 80% of OFAs, depending on sample size, are filed by small entities. The Board could also take no action to revise the OFA regulations, though this would not allow the Board to meet its objectives of improving the OFA process and protecting it from abuse. Commenters should, if they advance any of these or any other alternatives in their comments, address how such alternatives would be consistent or inconsistent with the goals envisioned by the proposed rules.

Paperwork Reduction Act. Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521, and Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3), the Board seeks comments about each of the proposed collections regarding: (1) Whether the collection of information, as modified in the proposed rule and further described below, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) 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, when appropriate. Information pertinent to these issues is included in the Appendix. This proposed rule will be submitted to OMB for review as required under 44 U.S.C. 3507(d) and 5 CFR 1320.11(b). Comments received by the Board regarding the information collection will also be forwarded to OMB for its review when the final rule is published.

List of Subjects in 49 CFR Part 1152

Administrative practice and procedure, Railroads, Reporting and recordkeeping requirements, Uniform System of Accounts.

It is ordered:

1. Comments are due by December 5, 2016. Reply comments are due by January 3, 2017.

2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

3. Notice of this decision will be published in the **Federal Register**.

4. This decision is effective on its service date.

Decided: September 28, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

Marline Simeon,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, subchapter B, part 1152 of the Code of Federal Regulations as follows:

PART 1152—ABANDONMENT AND DISCONTINUANCE OF RAIL LINES AND RAIL TRANSPORTATION UNDER 49 U.S.C. 10903

■ 1. The authority citation for part 1152 is revised to read as follows:

Authority: 11 U.S.C. 1170; 16 U.S.C. 1247(d) and 1248; 45 U.S.C. 744; and 49 U.S.C. 1301, 1321(a), 10502, 10903–10905, and 11161.

■ 2. Amend § 1152.27 as follows:

■ a. In paragraph (a) introductory text, add the words ''who has proven itself preliminarily financially responsible under paragraph (c)(1)(ii) of this section'' after the word ''service''.

■ b. Redesignate paragraphs (c)(1)(i) and (ii) as paragraphs (c)(1)(iii) and (iv), respectively, and add new paragraphs (c)(1)(i) and (ii).

■ c. Revise newly redesignated paragraph (c)(1)(iv)(B) and add paragraphs (c)(1)(iv)(D), (E), (F), (G), and (H).

■ d. In paragraph (c)(2)(i), add the words ''and demonstrating that they are preliminarily financially responsible as described in paragraph (c)(1)(ii) of this

section'' after the words ''(*i.e.,* subsidy or purchase)''.

■ e. In paragraph (c)(2)(iii), remove ''(c)(1)(ii)'' and add in its place ''(c)(1)(iv)''.

■ f. In paragraph (d), remove ''or a formal expression of intent under paragraph (c)(2)(i) of this section indicating an intent to offer financial assistance'' and add in its place '', or satisfaction of the preliminary financial responsibility requirement under paragraph (c)(1)(ii) of this section''.

■ g. In paragraph (e)(1), remove ''(c)(1)(i)(C)'' and add in its place ''(c)(1)(iii)(C)''.

■ h. In paragraph (e)(2), remove ''(c)(1)(i)(C)'' and add in its place ''(c)(1)(iii)(C)''.

The revisions and additions read as follows:

§ 1152.27 Financial assistance procedures.

* * * * *

(c) * * *

(1) * * *

(i) *Expression of intent to file offer.* Persons with a potential interest in providing financial assistance must, no later than 45 days after the **Federal Register** publication described in paragraph (b)(1) of this section or no later than 10 days after the **Federal Register** publication described in paragraph (b)(2)(i) of this section, submit to the carrier and the Board a formal expression of their intent to file an offer of financial assistance, indicating the type of financial assistance they wish to provide (*i.e.,* subsidy or purchase) and demonstrating that they are preliminarily financially responsible as described in paragraph (c)(1)(ii) of this section. Such submissions are subject to the filing requirements of § 1152.25(d)(1) through (3).

(ii) *Preliminary financial responsibility.* Persons submitting an expression of intent to file an offer of financial assistance as described in paragraph (c)(1)(i) or paragraph (c)(2)(i) of this section must demonstrate that they are financially responsible, under the definition set forth in paragraph (c)(1)(iv)(B) of this section, for the calculated preliminary financial responsibility amount of the rail line they seek to subsidize or purchase. If they seek to subsidize, the preliminary financial responsibility amount shall be $4,000 (representing a standard annual per-mile maintenance cost) times the number of miles of track. If they seek to purchase, the preliminary financial responsibility amount shall be the sum of: the rail steel scrap price per ton (dated within 30 days of the submission of the expression of intent), times 132 tons per track mile, times the total track length in miles; plus $4,000 times the number of miles of track times two. Persons submitting an expression of intent must provide evidentiary support for their calculations. If the Board does not issue a decision regarding the preliminary financial responsibility demonstration within ten days of receipt of the expression of intent, the party submitting the expression of intent will be presumed to be preliminarily financially responsible and, upon request, the applicant must provide the information required under paragraph (a) of this section. This presumption does not create a presumption that the party will be financially responsible for an offer submitted under paragraph (c)(1)(iv) of this section.

* * * * *

(iv) * * *

(B) Demonstrate that the offeror is financially responsible; that is, that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations. Examples of documentation the Board will accept as evidence of financial responsibility include income statements, balance sheets, letters of credit, profit and loss statements, account statements, financing commitments, and evidence of adequate insurance or ability to obtain adequate insurance. Examples of documentation the Board will not accept as evidence of financial responsibility include the ability to borrow money on credit cards and evidence of non-liquid assets an offeror intends to use as collateral. Governmental entities will be presumed to be financially responsible;

* * * * *

(D) Demonstrate that the offeror has placed in escrow with a reputable financial institution funds equaling 10% of the preliminary financial responsibility amount calculated pursuant to paragraph (c)(1)(ii) of this section;

(E) Demonstrate that there is a continued need for rail service on the line, or portion of the line, in question. Examples of evidence to be provided include: evidence of a demonstrable commercial need for service (as reflected by support from shippers or receivers on the line or other evidence of an immediate and significant commercial need); evidence of community support for continued rail service; evidence that acquisition of freight operating rights would not interfere with current and planned transit services; and evidence that continued service is operationally feasible;

(F) Identify the offeror and provide a mailing address, either business or personal, and other contact information including phone number and email address as available, for the offeror or a representative;

(G) If the offeror is a legal entity, include the entity's full name, state of organization or incorporation, and a description of the ownership of the entity; and

(H) If multiple parties seek to make a single offer of financial assistance, clearly identify which entity or individual will assume the common carrier obligation if the offer is successful, and clearly describe how the parties will allocate responsibility for financing the subsidy or purchase of the line and, if purchased, the operation of the line.

* * * * *

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix

Information Collection

Title: Preservation of Rail Service (including Offers of Financial Assistance (OFAs) and Notices of Intent to File an OFA).

OMB Control Number: 2140–0022.

Form Number: None.

Type of Review: Revision of a currently approved collection.

Summary: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521 (PRA), the Surface Transportation Board (Board) gives notice that it is requesting from the Office of Management and Budget (OMB) approval for the revision of the currently approved information collection, Preservation of Rail Service, OMB Control No. 2140–0022, as further described below. The requested revision to the currently approved collection is necessitated by this NPRM, which amends certain information collected by the Board in OFAs and notices of intent to file an OFA. *See* 49 CFR 1152.27. All other information collected by the Board in the currently approved collection is without change from its approval (currently expiring on January 31, 2019).

Respondents: Affected shippers, communities, or other interested persons seeking to preserve rail service over rail lines that are proposed or identified for abandonment, and railroads that are required to provide information to the offeror or applicant.

Number of Respondents: 40.

Frequency of Response: On occasion.

TABLE—NUMBER OF YEARLY RESPONSES

Type of filing	Number of filings
Offer of Financial Assistance	1
Notice of Intent to File an OFA	4
OFA—Railroad Reply to Request for Information	2
OFA—Request to Set Terms and Conditions	1
Request for Public Use Condition	1
Feeder Line Application	1
Trail-Use Request	27
Trail-Use Request Extension	24

Total Burden Hours (annually including all respondents): 400 hours (sum total of estimated hours per response × number of responses for each type of filing).

TABLE—ESTIMATED HOURS PER RESPONSE

Type of filing	Number of hours per response
Offer of Financial Assistance	50
Notice of Intent to File an OFA	6
OFA—Railroad Reply to Request for Information	10
OFA—Request to Set Terms and Conditions	40
Request for Public Use Condition	2
Feeder Line Application	70
Trail-Use Request	4
Trail-Use Request Extension	4

Total Annual ''Non-Hour Burden'' Cost: None identified. Filings are submitted electronically to the Board.

Needs and Uses: Under the Interstate Commerce Act, as amended by the ICC Termination Act of 1995, Public Law 104–88, 109 Stat. 803 (1995), and Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), persons seeking to preserve rail service may file pleadings before the Board to acquire or subsidize a rail line for continued service, or to impose a trail use or public use condition. Under 49 U.S.C. 10904, the filing of a notice of intent to file an OFA alerts the Board and the public that the filing of an OFA may be imminent. The filing of an OFA then starts a process of negotiations to define the financial assistance needed to purchase or subsidize the rail line sought for abandonment. In this rulemaking, the Board is proposing to seek additional information in its collection of both (a) notices of intent to file and OFA and (b) OFAs. During the OFA process, the offeror may request additional information from the railroad, which the railroad must provide. If the parties cannot agree to the sale or subsidy, either party also may file a request for the Board to set the terms and conditions of the financial assistance. Under 10905, a public use request allows the Board to impose a 180-day public use condition on the abandonment of a rail line, permitting the parties to negotiate a public use for the rail line. Under 10907, a feeder line application provides the basis for authorizing an involuntary sale of a rail line. Finally, under 16 U.S.C. 1247(d), a trail-use request, if agreed upon by the abandoning carrier, requires the Board to condition the abandonment by issuing a Notice of Interim Trail Use or Certificate of Interim Trail Use, permitting the parties to negotiate an interim trail use/rail banking agreement for the rail line.

The collection by the Board of these offers, requests, and applications, and the railroad's replies (when required), enables the Board to meet its statutory duty to regulate the referenced rail transactions.

[FR Doc. 2016–24056 Filed 10–4–16; 8:45 am]

BILLING CODE 4915–01–P

Notices

Federal Register
Vol. 81, No. 193
Wednesday, October 5, 2016

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

Food Safety and Inspection Service

Submission for OMB Review; Comment Request

September 29, 2016.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of burden 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 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.

Comments regarding this information collection received by November 4, 2016 will be considered. Written comments should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Building, 725–17th Street NW., Washington, DC 20502. Commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@OMB.EOP.GOV* or fax (202) 395–5806 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Copies of the submission(s) may be obtained by calling (202) 720–8958.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Food Safety and Inspection Service

Title: Accredited Laboratory Annual Contact Update Form.

OMB Control Number: 0583–0163.

Summary of Collection: The Food Safety and Inspection Service (FSIS) has been delegated the authority to exercise the functions of the Secretary as provided in the Federal Meat Inspection Act (FMIA) (21 U.S.C. 601 et. seq.), the Poultry Products Inspection Act (PPIA) (21 U.S.C. 451, et. seq.), and the Egg Products Inspection Act (EPIA) (21 U.S.C. 1031). These statues mandate that FSIS protect the public by verifying that meat and poultry products are safe, wholesome, not adulterated, and properly labeled and packaged.

Need and Use of the Information: FSIS will collect information using the Annual Contact Update form to maintain necessary information for responsible connected personnel at the laboratories. The completed Annual Contact Update form will also inform the Agency if a laboratory, or responsibly connected person or entity, has been charged, indicted, or convicted or any crime.

Description of Respondents: Business or other for-profit.

Number of Respondents: 60.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 15.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2016–23990 Filed 10–4–16; 8:45 am]

BILLING CODE 3410–DM–P

DEPARTMENT OF AGRICULTURE

Forest Service

Nez Perce-Clearwater National Forests; Idaho; Nez Perce-Clearwater National Forests Travel Planning Project

AGENCY: Forest Service, USDA.

ACTION: Notice of Intent (NOI) to Prepare a Supplemental Environmental Impact Statement (SEIS) for the Nez Perce-Clearwater National Forests Travel Planning Project.

SUMMARY: The Forest Service is giving notice of its intent to prepare a SEIS for the Nez Perce-Clearwater National Forests Travel Planning project on the Nez Perce-Clearwater National Forests, Idaho. A complaint was filed on December 5, 2013 against the January 2012 Clearwater National Forest Travel Planning Record of Decision (ROD). On March 11, 2015 the United States District Court for the State of Idaho issued a Memorandum Decision and Order remanding the Travel Plan, Final Environmental Impact Statement (FEIS), and Record of Decision for reconsideration and further evaluation. This SEIS will provide additional analysis in response to the Memorandum Decision and Order.

FOR FURTHER INFORMATION CONTACT: Lois Hill, Environmental Coordinator, (208) 935–4258.

SUPPLEMENTARY INFORMATION: The Forest Service is announcing its intent to prepare a SEIS for the Nez Perce-Clearwater National Forests Travel Planning project. The SEIS will supplement the analysis from the Clearwater National Forest Travel Planning FEIS (2011) by providing an updated analysis of the environmental effects. The Clearwater Travel Planning FEIS evaluated the potential effects of five alternatives, including No Action and four action alternatives.

The Nez Perce-Clearwater Forest Supervisor will issue a new ROD after evaluating the SEIS and public comments. An objection period for the new ROD will be provided, consistent with 36 CFR part 218.

Authority: This NOI is being published pursuant to regulations (40 CFR 1508.22) implementing the procedural provisions of the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321 *et seq.*).

Scoping: A NOI published on November 28, 2007 initiated the scoping period for the Clearwater National Forest Travel Planning project. A legal notice advertising the start of a 30-day scoping period was advertised in the Lewiston, Idaho *Lewiston Tribune* on November 13, 2007. The scoping period was later extended to February 29, 2008. In accordance with 40 CFR 1502.9(c)(4), there will be no scoping conducted for

this SEIS. The scope of the Final Nez Perce-Clearwater National Forests Travel Planning EIS established the scope for this SEIS.

The SEIS will be advertised for public comment as required by 40 CFR 1503.1. The Draft SEIS will be announced for public review and comment in the **Federal Register**, on the Nez Perce-Clearwater National Forests' project Web site, and in the Lewiston, Idaho *Lewiston Tribune,* as well as other local media.

Responsible Official and Lead Agency

The USDA Forest Service is the lead agency for this proposal. The Nez Perce-Clearwater Forest Supervisor is the responsible official.

Decision to Be Made is whether to adopt the proposed action, in whole or in part, or another alternative; and what mitigation measures and management requirements will be implemented.

Dated: September 27, 2016.

Cheryl F. Probert,

Forest Supervisor.

[FR Doc. 2016–24047 Filed 10–4–16; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills National Forest Advisory Board

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Black Hills National Forest Advisory Board (Board) will meet in Rapid City, South Dakota. The Board is established consistent with the Federal Advisory Committee Act of 1972, the Forest and Rangeland Renewable Resources Planning Act of 1974, the National Forest Management Act of 1976, and the Federal Public Lands Recreation Enhancement Act. Additional information concerning the Board can be found by visiting the Board's Web site at: *http://www.fs.usda.gov/main/blackhills/workingtogether/advisorycommittees.*

DATES: The meeting will be held on Wednesday, October 19, 2016, at 1:00 p.m.

All meetings are subject to cancellation. For updated status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting will be held at the Mystic Ranger District, 8221 South Highway 16, Rapid City, South Dakota.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION.** All comments, including names and addresses, when provided, are placed in the record and available for public inspection and copying. The public may inspect comments received at the Black Hills National Forest Supervisor's Office. Please call ahead at 605–440–1409 to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Scott Jacobson, Board Coordinator by phone at 605–440–1409, or by email at *sjjacobson@fs.fed.us.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to provide:

(1) Northern Long Eared Bat Listing Status and Cave Management Update;

(2) Mines/Minerals and Geology of the Black Hills Presentation;

(3) Black Hills Resilient Landscapes (BHRL) Project update;

(4) Forest Health Working Group Recommendation on BHRL;

(5) Recreation Facilities Working Group update; and

(6) Non-motorized Trails/Over Snow Working Group update.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should submit a request in writing by October 11, 2016, to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the Board may file written statements with the Board's staff before or after the meeting. Written comments and time requests for oral comments must be sent to Scott Jacobson, Black Hills National Forest Supervisor's Office, 1019 North Fifth Street, Custer, South Dakota 57730; by email to *sjjacobson@fs.fed.us,* or via facsimile to 605–673–9208.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation for access to the facility or proceedings by contacting the person listed in the section titled **FOR FURTHER INFORMATION CONTACT**. All reasonable accommodation requests are managed on a case by case basis.

Dated: September 29, 2016.

Mark Van Every,

Forest Supervisor.

[FR Doc. 2016–24096 Filed 10–4–16; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Rural Housing Service

Notice of Request for Extension of a Currently Approved Information Collection

AGENCY: Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, and Farm Service Agency, USDA.

ACTION: Proposed collection: Comments requested.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intention of USDA Farm Service Agency's (FSA) and Rural Development, henceforth collectively known as Rural Development, or individually as Housing and Community Programs, Business and Cooperative Programs, Utility Programs, to request an extension for a currently approved information collection in support of compliance with applicable acts for planning and performing construction and other development work.

DATES: Comments on this notice must be received by December 5, 2016 to be assured consideration.

FOR FURTHER INFORMATION CONTACT: William R. Downs, Supervisory Architect, Program Support Staff, RHS, U.S. Department of Agriculture, Stop 0761, 1400 Independence Avenue SW., Washington, DC 20250–0761, Telephone (202) 720–1499 or (202) 720–9619 or via email at *william.downs@wdc.usda.gov.*

SUPPLEMENTARY INFORMATION:

Title: RD 1924–A, ''Planning and Performing Construction and Other Development.''

OMB Number: 0575–0042.

Expiration Date of Approval: January 31, 2017.

Type of Request: Extension of a currently approved information collection.

Abstract: The information collection under OMB Number 0575–0042 enables the Agencies to effectively administer the policies, methods, and responsibilities in the planning and performing of construction and other development work for the related construction programs.

Section 501 of Title V of the Housing Act of 1949, as amended, authorizes the

Secretary of Agriculture to extend financial assistance to construct, improve, alter, repair, replace, or rehabilitate dwellings; farm buildings; and/or related facilities to provide decent, safe, and sanitary living conditions, as well as adequate farm buildings and other structures in rural areas.

Section 506 of the Act requires that all new buildings and repairs shall be constructed in accordance with plans and specifications as required by the Secretary and that such construction be supervised and inspected.

Section 509 of the Act grants the Secretary the power to determine and prescribe the standards of adequate farm housing and other buildings. The Housing and Urban Rural Recovery Act of 1983 amended section 509(a) and section 515 to require residential buildings and related facilities to comply with the standards prescribed by the Secretary of Agriculture, the standard prescribed by the Secretary of Housing and Urban Development, or the standards prescribed in any of the nationally recognized model building codes.

Similar authorizations are contained in sections 303, 304, 306, and 339 of the Consolidated Farm and Rural Development Act, as amended, which authorized loans and grants for essential community services.

In several sections of both acts, loan limitations are established as percentages of development cost, requiring careful monitoring of those costs. Also, the Secretary is authorized to prescribe regulations to ensure that Federal funds are not wasted or dissipated and that construction will be undertaken in an economic manner and will not be of elaborate or extravagant design or materials.

The Rural Utilities Service (RUS) is the credit Agency for rural water and wastewater development within Rural Development of the United States Department of Agriculture (USDA). The Rural-Business-Cooperative Service (RBS) is the credit Agency for rural business development within Rural Development of USDA. These Agencies adopted use of forms in RD Instruction 1924–A. Information for their usage is included in this report.

Other information collection is required to conform to numerous Pubic Laws applying to all Federal agencies, such as: Civil Rights Acts of 1964 and 1968, Davis-Bacon Act, Historic Preservation Act, Environmental Policy Act, and to conform to Executive Orders governing use of Federal funds. This information is cleared through the appropriate enforcing Agency or other executive Departments.

The Agencies provide forms and/or guidelines to assist in the collection and submission of information; however, most of the information may be collected and submitted in the form and content which is accepted and typically used in normal conduct of planning and performing development work in private industry when a private lender is financing the activity. The information is usually submitted via hand delivery or U.S. Postal Service to the appropriate Agency office. Electronic submittal of information is also possible through email or USDA's Service Center eForms Web site.

The information is used by the Agencies to determine whether a loan/grant can be approved, to ensure that the Agency has adequate security for the loans financed, to provide for sound construction and development work, and to determine that the requirements of the applicable acts have been met. The information is also used to monitor compliance with the terms and conditions of the Agencies' loan/grant programs and to monitor the prudent use of Federal funds.

If the information were not collected and submitted, the Agencies would not have control over the type and quality of construction and development work planned and performed with Federal funds. The Agencies would not be assured that the security provided for loans is adequate, nor would the Agencies be certain that decent, safe, and sanitary dwelling or other adequate structures were being provided to rural residents as required by the different acts.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .31 hours per response.

Respondents: Individuals or households, farms, business or other for-profit, non-profit institutions, and small businesses or organizations.

Estimated Number of Respondents: 14,448.

Estimated Number of Responses per Respondent: 13.

Estimated Number of Responses: 193,847.

Estimated Total Annual Burden on Respondents: 60,476 hours.

Copies of this information collection can be obtained from Jeanne Jacobs, Regulations and Paperwork Management Branch, at (202) 692–0040.

Comments: Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the function of the Agencies, including whether the information will have practical utility; (b) the accuracy of the Agencies' estimate of the burden of the proposed collection of information, including the validity of methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on 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. Comments may be sent to Jeanne Jacobs, Regulations and Paperwork Management Branch, U.S. Department of Agriculture, Rural Development, Stop 0742, 1400 Independence Avenue SW., Washington, DC 20250–0742. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Dated: September 26, 2016.

Tony Hernandez,

Administrator, Rural Housing Service.

[FR Doc. 2016–24013 Filed 10–4–16; 8:45 am]

BILLING CODE 3410–XV–P

DEPARTMENT OF COMMERCE

Economic Development Administration (EDA), National Telecommunications and Information Administration (NTIA), Bureau of Industry and Security (BIS) Membership of the Performance Review Board for EDA, NTIA and BIS

AGENCY: EDA, NTIA and BIS, Department of Commerce.

ACTION: Notice of membership on the EDA, NTIA and BIS's Performance Review Board.

SUMMARY: In accordance with 5 U.S.C. 4314(c)(4), the EDA, NTIA and BIS, Department of Commerce (DOC), announce the appointment of those individuals who have been selected to serve as members of the Performance Review Board. The Performance Review Board is responsible for (1) reviewing performance appraisals and ratings of Senior Executive Service (SES) members and (2) making recommendations to the appointing authority on other performance management issues, such as pay adjustments, bonuses and Presidential Rank Awards for SES members. The appointment of these members to the Performance Review Board will be for a period of twenty-four (24) months.

DATES: The period of appointment for those individuals selected for EDA,

NTIA and BIS's Performance Review Board begins on October 5, 2016.

FOR FURTHER INFORMATION CONTACT: Jennifer Munz, U.S. Department of Commerce, Office of Human Resources Management, Office of Executive Resources, 14th and Constitution Avenue NW., Room 51010, Washington, DC 20230, at (202) 482–4051.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 4314(c)(4), the EDA, NTIA and BIS, Department of Commerce (DOC), announces the appointment of those individuals who have been selected to serve as members of EDA, NTIA and BIS's Performance Review Board. The Performance Review Board is responsible for (1) reviewing performance appraisals and ratings of Senior Executive Service (SES) members and (2) making recommendations to the appointing authority on other performance management issues, such as pay adjustments, bonuses and Presidential Rank Awards for SES members. The appointment of these members to the Performance Review Board will be for a period of twenty-four (24) months.

DATES: The period of appointment for those individuals selected for EDA, NTIA and BIS's Performance Review Board begins on October 5, 2016. The name, position title, and type of appointment of each member of the Performance Review Board are set forth below:

1. *Department of Commerce, National Telecommunications and Information Administration (NTIA)*
   Paige Atkins, Associate Administrator for Spectrum Management, Career SES
2. *Department of Commerce, National Telecommunications and Information Administration (NTIA)*
   Leonard Bechtel, Chief Financial Officer and Director of Administration, Career SES
3. *Department of Commerce, Bureau of Industry and Security (BIS)*
   Matthew Borman, Deputy Assistant Secretary for Export Administration, Career SES
4. *Department of Commerce, National Telecommunications and Information Administration (NTIA)*
   Frank Freeman, Chief Financial Officer, First Responder Network Authority, Career SES
5. *Department of Commerce, National Telecommunications and Information Administration (NTIA)*
   Jim Gwinn, Chief Information Officer, First Responder Network Authority, Career SES
6. *Department of Commerce, Office of the Secretary, Office of the General Counsel (OS/OGC)*
   Stephen D. Kong, Chief Counsel for Economic Development, Career SES, Chairperson
7. *Department of Commerce, Office of the Secretary (OS), Office of the Deputy Secretary*
   Lauren Leonard, Director, Office of White House Liaison, Non-Career SES
8. *Department of Commerce, Bureau of Industry and Security (BIS)*
   Richard Majauskas, Deputy Assistant Secretary for Export Enforcement, Career SES
9. *Department of Commerce, Office of the Secretary (OS), Office of the Chief Financial Officer and Assistant Secretary for Administration (CFO/ASA)*
   Renee A. Macklin, Director for Program Evaluation and Risk Management, Career SES
10. *Department of Commerce, Office of the Secretary (OS), Office of the Deputy Secretary*
    Alejandro Rodriguez, Chief of Staff to the Deputy Secretary, Non-Career SES
11. *Department of Commerce, Bureau of Industry and Security (BIS)*
    Carol Rose, Chief Financial Officer and Director of Administration, Career SES

Dated: September 19, 2016.

Denise A. Yaag,

Director, Office of Executive Resources, Office of Human Resources Management, Office of the Secretary/Office of the CFO/ASA, Department of Commerce.

[FR Doc. 2016–24049 Filed 10–4–16; 8:45 am]

BILLING CODE 3510–25–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–139–2016]

Foreign-Trade Zone 7—Mayagüez, Puerto Rico; Application for Subzone; Romark Global Pharma, LLC; Manatí, Puerto Rico

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Puerto Rico Industrial Development Company, grantee of FTZ 7, requesting subzone status for the facility of Romark Global Pharma, LLC, located in Manatí, Puerto Rico. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a–81u), and the regulations of the Board (15 CFR part 400). It was formally docketed on September 29, 2016.

The proposed subzone (30 acres) is located at State Road PR–686 Km 0.5, Coto Norte Ward, Manatí. The proposed subzone would be subject to the existing activation limit of FTZ 7. No authorization for production activity has been requested at this time.

In accordance with the Board's regulations, Camille Evans of the FTZ Staff is designated examiner to review the application and make recommendations to the Executive Secretary.

Public comment is invited from interested parties. Submissions shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is November 14, 2016. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to November 29, 2016.

A copy of the application will be available for public inspection at the Office of the Executive Secretary, Foreign-Trade Zones Board, Room 21013, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230–0002, and in the ''Reading Room'' section of the Board's Web site, which is accessible via *www.trade.gov/ftz.*

For further information, contact Camille Evans at *Camille.Evans@trade.gov* or (202) 482–2350.

Dated: September 29, 2016.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2016–24098 Filed 10–4–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–88–2016]

Approval of Subzone Expansion; Tesla Motors, Inc.; Palo Alto and Fremont, California

On June 15, 2016, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the City of San Jose, California, grantee of FTZ 18, requesting expanded subzone status subject to the existing activation limit of FTZ 18, on behalf of Tesla Motors, Inc. (Subzone 18G), in Fremont, California.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (81 FR 40850, June 23, 2016). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval. Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR Sec. 400.36(f)), the application to expand Subzone 18G is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13, and further subject to FTZ 18's 2,000-acre activation limit.

Dated: September 29, 2016.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2016–24094 Filed 10–4–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Materials Processing Equipment Technical Advisory Committee; Notice of Partially Closed Meeting

The Materials Processing Equipment Technical Advisory Committee (MPETAC) will meet on October 25, 2016, 9:00 a.m., Room 3884, in the Herbert C. Hoover Building, 14th Street between Pennsylvania and Constitution Avenues NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration with respect to technical questions that affect the level of export controls applicable to materials processing equipment and related technology.

Agenda

Open Session

1. Opening remarks and introductions
2. Presentation of papers and comments by the Public
3. Discussions on results from last, and proposals from last Wassenaar meeting
4. Report on proposed and recently issued changes to the Export Administration Regulations
5. Other business

Closed Session

6. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3)

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov,* no later than October 18, 2016.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate the distribution of public presentation materials to the Committee members, the Committee suggests that presenters forward the public presentation materials prior to the meeting to Ms. Springer via email.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on April 11, 2016, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § 10(d)), that the portion of the meeting dealing with matters the premature disclosure of which would be likely to frustrate significantly implementation of a proposed agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: September 30, 2016.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2016–24139 Filed 10–4–16; 8:45 am]

BILLING CODE 3510–JT–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Sensors and Instrumentation Technical Advisory Committee; Notice of Partially Closed Meeting

The Sensors and Instrumentation Technical Advisory Committee (SITAC) will meet on October 26, 2016, 9:30 a.m., in the Herbert C. Hoover Building, Room 3884, 14th Street between Constitution and Pennsylvania Avenues NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to sensors and instrumentation equipment and technology.

Agenda

Public Session

1. Welcome and Introductions.
2. Remarks from the Bureau of Industry and Security Management.
3. Industry Presentations.
4. New Business.

Closed Session

5. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov* no later than October 19, 2016.

A limited number of seats will be available during the public session of the meeting. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that the materials be forwarded before the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on November 5, 2015 pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § 10(d), that the portion of this meeting dealing with pre-decisional changes to the Commerce Control List and U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information contact Yvette Springer on (202) 482–2813.

Dated: September 30, 2016.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2016–24099 Filed 10–4–16; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Information Systems Technical Advisory Committee; Notice of Partially Closed Meeting

The Information Systems Technical Advisory Committee (ISTAC) will meet on October 19 and 20, 2016, 9:00 a.m., in the Herbert C. Hoover Building, Room 3884, 14th Street between Constitution and Pennsylvania Avenues NW., Washington, DC. The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to information systems equipment and technology.

Wednesday, October 19

Open Session

1. Welcome and Introductions
2. Working Group Reports
3. Old Business
4. Wassenaar Proposals for 2017

5. Industry Presentation: Integrity Software
6. Industry Presentation: Embedded ADC/DAC in FPGAs
7. New Business

Thursday, October 20

Closed Session

8. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3)

The open session will be accessible via teleconference to 20 participants on a first come, first serve basis. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov,* no later than October 12, 2016.

A limited number of seats will be available for the public session. Reservations are not accepted. To the extent time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to Committee members, the Committee suggests that public presentation materials or comments be forwarded before the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the delegate of the General Counsel, formally determined on January 7, 2016, pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 § (10)(d))), that the portion of the meeting concerning trade secrets and commercial or financial information deemed privileged or confidential as described in 5 U.S.C. 552b(c)(4) and the portion of the meeting concerning matters the disclosure of which would be likely to frustrate significantly implementation of an agency action as described in 5 U.S.C. 552b(c)(9)(B) shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 §§ 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public.

For more information, call Yvette Springer at (202) 482–2813.

Dated: September 30, 2016.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2016–24136 Filed 10–4–16; 8:45 am]

BILLING CODE 4310–JT–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–533–840]

Certain Frozen Warmwater Shrimp From India: Notice of Correction to Final Results of Antidumping Duty Administrative Review; Final Determination of No Shipments; 2014–2015

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

FOR FURTHER INFORMATION CONTACT: Manuel Rey, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–5518.

SUPPLEMENTARY INFORMATION: On September 13, 2016, the Department of Commerce (the Department) published in the **Federal Register** the final results of the 2014–2015 administrative review of the antidumping duty order on certain frozen warmwater shrimp from India.[1] The period of review is February 1, 2014, through January 31, 2015. In the *Final Results,* the Department failed to assign a final cash deposit rate of 2.20 percent to the company ''Jagadeesh Marine Exports.'' As a result, we now correct the final results of the 2014–2015 administrative review to assign a cash deposit rate of 2.20 percent to this company.

This correction to the final results of administrative review is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Tariff Act of 1930, as amended.

Dated: September 29, 2016.

Paul Piquado,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2016–24122 Filed 10–4–16; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review; Final Determination of No Shipments; 2014–2015,* 81 FR 62867 (September 13, 2016) (*Final Results*).

DEPARTMENT OF COMMERCE

International Trade Administration

Membership of the International Trade Administration Performance Review Board

AGENCY: International Trade Administration, Department of Commerce.

ACTION: Notice of Membership on the International Trade Administration's Performance Review Board.

SUMMARY: The International Trade Administration (ITA), Department of Commerce (DOC), announces the appointment of those individuals who have been selected to serve as members of ITA's Performance Review Board. The Performance Review Board is responsible for reviewing performance appraisals and rating of Senior Executive Service (SES) members and making recommendations to the appointing authority on other performance management issues, such as pay adjustments, bonuses and Presidential Rank Awards for SES members. The appointment of these members to the Performance Review Board will be for a period of twenty-four (24) months.

DATES: The period of appointment for those individuals selected for ITA's Performance Review Board begins on October 5, 2016.

FOR FURTHER INFORMATION CONTACT: Jennifer Munz, U.S. Department of Commerce, Office of Human Resources Management, Office of Executive Resources, 14th and Constitution Avenue NW., Room 51010, Washington, DC 20230, at (202) 482–4051.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S. C. 4314(c)(4), the International Trade Administration (ITA), Department of Commerce (DOC), announces the appointment of those individuals who have been selected to serve as members of ITA's Performance Review Board. The Performance Review Board is responsible for (1) reviewing performance appraisals and rating of Senior Executive Service (SES) members and (2) making recommendations to the appointing authority on other performance management issues, such as pay adjustments, bonuses and Presidential Rank Awards for SES members. The appointment of these members to the Performance Review Board will be for a period of twenty-four (24) months.

The name, position title, and type of appointment of each member of ITA's Performance Review Board are set forth below by organization:

Department of Commerce, International Trade Administration (ITA)

Praveen M. Dixit, Deputy Assistant Secretary for Trade Policy and Analysis, Career SES

Christian Marsh, Deputy Assistant Secretary for AD/CVD Operations, Career SES

Jennifer L. Pilat, Director, Advocacy Center, Non-Career SES, Political Advisor

Timothy Rosado, Chief Financial and Administrative Officer, Career SES, Chairperson

Department of Commerce, Office of the Secretary (OS), Office of the Chief Financial Officer and Assistant Secretary for Administration (CFO/ASA)

Gay G. Shrum, Director for Administrative Programs, Career SES

Dated: September 19, 2016.

Denise A. Yaag,

Director, Office of Executive Resources, Office of Human Resources Management, Office of the Secretary/Office of the CFO/ASA, Department of Commerce.

[FR Doc. 2016–24044 Filed 10–4–16; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No. 160927891–6891–01]

Request for Comments on U.S. Technical Participation in the 15th Conference of the International Organization of Legal Metrology (OIML)

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice; request for comments.

SUMMARY: The National Institute of Standards and Technology (NIST) seeks comments concerning U.S. technical participation in the 15th Conference of the International Organization of Legal Metrology (OIML) held in Strasbourg, France, Wednesday, October 19 through Thursday, October 20, 2016. This conference is held once every four years and was last held in 2012. Interested parties are requested to review and submit comments on the 16 OIML Recommendations and Documents on legal measuring instruments that will be presented for ratification by the Conference. Comments may also be submitted on other issues relevant to the Conference.

DATES: Written comments should be submitted to the NIST International Legal Metrology Program no later than Wednesday, October 12, 2016, at 5:00 p.m. Eastern Time. The 15th OIML International Conference of Legal Metrology will be held in Strasbourg, France, Wednesday, October 19 through Thursday, October 20, 2016.

ADDRESSES: Written comments should be submitted via email to *ralph.richter@nist.gov* or be mailed to the International Legal Metrology Program, Office of Weights and Measures, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 2600, Gaithersburg, MD 20899–2600.

FOR FURTHER INFORMATION CONTACT: Mr. Ralph Richter, International Legal Metrology Program, Office of Weights and Measures, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 2600, Gaithersburg, MD 20899–2600; telephone: 301–975–3997; fax: 301–975–8091; email: *ralph.richter@nist.gov.*

SUPPLEMENTARY INFORMATION:

Background

The International Organization of Legal Metrology (OIML) is an intergovernmental treaty organization in which the United States and 60 other nations are members. Its principal purpose is to harmonize national laws and regulations pertaining to testing and verifying the performance of legal measuring instruments used for equity in commerce, for public and worker health and safety, and for monitoring and protecting the environment. The harmonized results promote the international trade of measuring instruments and products affected by measurement.

The U.S. Department of State has delegated technical participation in OIML to NIST. NIST coordinates participation of U.S. manufacturers, users of weighing and measuring instruments, legal metrology officials and other U.S. stakeholders in the technical work of OIML by circulating draft voluntary standards (called Recommendations) and other OIML publications for comment. NIST also leads U.S. delegations to OIML Technical Meetings.

Additional Information

All parties with an interest in the work of the OIML are requested to review and submit comments on any or all of the 16 Recommendations and Documents that will be presented for ratification by the Conference. Any submitted comments will be reviewed and considered by NIST staff in the development of U.S. positions that will be put forward at the 15th Conference of OIML. NIST will consider all feedback and will implement it into the Conference as appropriate.

Each of the 16 Recommendations and Documents that will be presented for ratification by the Conference has already gone through a multi-year development and review process involving technical experts and legal metrology experts from the United States and around the world. Ratification by the Conference is the final step in this process. The Recommendations and Documents have been divided into two categories—Category 1: Those already approved by the International Committee of Legal Metrology (CIML) between 2013 and 2015, and Category 2: Those that are expected to be submitted directly to the Conference for ratification. Because the Recommendations and Documents in Category 2 have not yet received CIML approval, the comments received on these Recommendations and Documents are of additional importance to NIST staff. The 16 Recommendations and Documents and the OIML-member nations that held the convenership of the project group responsible for their development are listed below:

Category 1

- D11, ''General requirements for measuring instruments—Environmental conditions'' (Netherlands);
- R46–3, ''Active electrical energy meters—Part 3: Test report format'' (Australia);
- R49, ''Water meters for cold potable water and hot water—Part 1: Metrological and technical requirements, Part 2: Test methods, and Part 3: Test report format'' (United Kingdom);
- R50, ''Continuous totalizing automatic weighing instruments (belt weighers)—Part 1: Metrological and technical requirements, Part 2: Test procedures, Part 3: Test report format (United Kingdom);
- R79, ''Labeling requirements for prepackages'' (South Africa);
- R100, ''Atomic absorption spectrometer systems for measuring metal pollutants'' (United States);
- R117, ''Dynamic measuring systems for liquids other than water—Part 2: Metrological controls and performance tests, and Part 3: Test report format'' (United States and Germany);
- R137–3, ''Gas meters—Part 3: Test report format (Netherlands);
- R139, ''Compressed gaseous fuels measuring systems for vehicles—Part 1: Metrological and technical requirements, Part 2: Metrological controls and performance tests, and Part 3: Test report format'' (Netherlands);
- R144, ''Instruments for continuous measuring CO and NO_X in stationary source emissions'' (Netherlands);
- R145, ''Ophthalmic instruments—Impression and applanation tonometers'' (Germany); and
- V1, ''International vocabulary of terms in legal metrology (VIML)'' (Poland).

Category 2

- R59, ''Moisture meters for cereal grains and oilseeds'' (United States and P.R. China);
- R87 ''Quantity of product in prepackages'' (South Africa);

• New Recommendation (not yet numbered) ''Protein measuring instruments for cereal grains and oilseeds'' (Australia); and

• New Recommendation (not yet numbered) ''Standard blackbody radiator for the temperature range from −50 °C to 2500 °C'' (Russian Federation).

Parties with an expressed interest in particular topics may obtain copies of the OIML Conference technical agenda, including copies of the Recommendations to be ratified, from the OIML International Conference Web site at *http://strasbourg.oiml.org,* at the OIML Web site at *www.oiml.org,* or from the NIST International Legal Metrology Program.

Authority: 15 U.S.C. 272(b).

Kevin Kimball,

NIST Chief of Staff.

[FR Doc. 2016–24076 Filed 10–4–16; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE882

Stock Status Determination for Atlantic Dusky Sharks

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

ACTION: Notice.

SUMMARY: This action serves as a notice that NMFS, on behalf of the Secretary of Commerce (Secretary), has determined that Atlantic dusky sharks (*Carcharhinus obscurus*) are still overfished and subject to overfishing.

FOR FURTHER INFORMATION CONTACT: Tobey Curtis by phone at 978–281–9273 or Karyl Brewster-Geisz by phone at 301–427–8503.

SUPPLEMENTARY INFORMATION:

Background

Atlantic dusky sharks are managed under the 2006 Consolidated Atlantic Highly Migratory Species (HMS) Fishery Management Plan (FMP) and its amendments. Dusky sharks have been a prohibited species since 2000 and may not be landed or retained in any fisheries. However, multiple commercial and recreational fisheries sometimes interact with the species as bycatch during the course of normal operations. The 2016 assessment was an update to the 2011 stock assessment for dusky sharks. Thus, no new methodology was introduced, though all model inputs were updated with more recent data (*i.e.* effort, and 2010–2015 for all the indices of relative abundance, which included observer and survey data).

Dusky sharks were first assessed in 2006, and all model results indicated that the stock had been heavily exploited, with depletion estimates between 62 and 80 percent from virgin biomass, and a rebuilding timeframe of 100 to 400 years. Dusky sharks were again assessed in 2011 through the Southeast Data, Assessment, and Review (SEDAR) process in SEDAR 21. The SEDAR 21 dusky shark assessment indicated that the species was overfished (spawning stock biomass $[SSB]_{2009}/SSB_{MSY}$ = 0.41–0.50) and was experiencing overfishing (F_{2009}/F_{MSY} = 1.39–4.35).

All documents and information regarding the 2010 SEDAR 21 benchmark assessment and 2016 update can be found on the SEDAR Web page at *http://sedarweb.org/sedar-21.*

2016 Dusky Shark Stock Assessment Update Results

The 2016 dusky shark stock assessment update used an age-structured catch-free production model since the species' prohibited status made the use of catch as an input largely impractical.

In the 2011 SEDAR 21 assessment, the reviewers determined that there were five scenarios analyzed in the assessment that were plausible. Thus, in the 2016 update, the five scenarios reflective of plausible states of nature were analyzed and projections for each scenario were conducted. The five scenarios were: (1) The base scenario; (2) a high natural mortality scenario; (3) a U-shaped natural mortality curve allowing senescence; (4) a high productivity scenario; and (5) a low productivity scenario. Under all scenarios, the 2016 update found the stock is still overfished (spawning stock fecundity $[SSF]_{2015}/SSF_{MSST}$ = 0.44–0.69). Under all scenarios, the 2016 update found the stock was also still subject to overfishing (F_{2015}/F_{MSY} = 1.08–2.92).

The assessment was peer reviewed by two reviewers. Overall, the peer reviewers determined the stock assessment to be based on the best scientific information available. Based on these results, NMFS has determined that the status of dusky sharks is overfished and overfishing is occurring.

Dated: September 30, 2016.

Emily H. Menashes,

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

[FR Doc. 2016–24077 Filed 10–4–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XE929

Fisheries of the South Atlantic; Southeast Data, Assessment, and Review (SEDAR); Stock Identification Work Group Post-Meeting Webinar for Atlantic Blueline Tilefish

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

ACTION: Notice.

SUMMARY: Atlantic stock(s) of *blueline tilefish* will be assessed through SEDAR 50. This webinar meeting is being held to provide representatives of the Scientific and Statistical Committees (SSC) of the Gulf of Mexico, South Atlantic and Mid-Atlantic Fishery Management Councils an opportunity to review *blueline tilefish* stock identification recommendations and provide guidance on addressing overlap between the biological stock and Council management boundaries.

DATES: The SEDAR 50 Stock Identification SSC Webinar Review will be held on Friday, October 28, 2016, from 12 p.m. to 3 p.m., to view the agenda see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The Webinar is open to the public. Those interested in participating should contact Julia Byrd at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing Webinar access information. Please request Webinar invitations at least 24 hours in advance of the Webinar.

SEDAR Address: South Atlantic Fishery Management Council, 4055 Faber Place Drive, Suite 201, N. Charleston, SC 29405 or at their Web site, at *www.sedarweb.org.*

FOR FURTHER INFORMATION CONTACT: Julia Byrd, SEDAR Coordinator, 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405; phone (843) 571–4366; email: *julia.byrd@safmc.net.*

SUPPLEMENTARY INFORMATION:

Agenda

The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA

Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions, have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a three-step process including: (1) Data Workshop; (2) Assessment Process utilizing Webinars; and (3) Review Workshop. The product of the Data Workshop is a data report which compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report which describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, Highly Migratory Species Management Division, and Southeast Fisheries Science Center. Participants include: Data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and non-governmental organizations (NGOs); international experts; and staff of Councils, Commissions, and state and federal agencies.

SEDAR 50 is providing an assessment of Atlantic *blueline tilefish.* During a Stock Identification Workshop held in July 2016, it was recommended that the western boundary of the Atlantic stock be extended to include the west coast of Florida. The SEDAR Steering Committee, responsible for program oversight and assessment project scheduling, recommended convening a meeting of SSC representatives to consider stock and management unit overlap between the Gulf and South Atlantic Council areas of jurisdiction and provide recommendations on risks to the stock posed by continued management per the Gulf Council jurisdiction. Each Council has identified representatives of its SSC to participate in this meeting.

The items of discussion for the Stock Identification SSC Review via Webinar are as follows:

1. Review the SEDAR 50 Stock Identification Work Group Report (SEDAR50–DW12).

2. Provide advice on the level of overlap between the Atlantic *blueline tilefish* stock and the management jurisdictions of the Gulf of Mexico and South Atlantic Fishery Management Councils.

3. Provide guidance on the risks associated with management based on the Gulf of Mexico Fishery Management Council boundary.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

This meeting is accessible to people with disabilities. Requests for auxiliary aids should be directed to the SAFMC office (see **ADDRESSES**) at least 5 business days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: September 30, 2016.

Tracey L. Thompson,

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

[FR Doc. 2016–24051 Filed 10–4–16; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection—Renewal/Revision; Comment Request; Educational Partnership Program (EPP), Ernest F. Hollings Undergraduate Scholarship Program, Dr. Nancy Foster Scholarship Program, Recruitment, Training, and Research Program

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before December 5, 2016.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Todd Christenson, 301 628 2916 or *todd.christenson@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a current information collection.

The National Oceanic and Atmospheric Administration (NOAA) Office of Education (OEd) collects, evaluates and analyzes student data for the purpose of selecting successful candidates, and for generating reports and news articles to communicate the success of its program. The OEd requires applicants to its undergraduate scholarship programs to complete an application in order to be considered. The application package requires two faculty and/or academic advisors to complete a NOAA student scholar reference form in support of the scholarship application. NOAA OEd student scholar alumni are also requested to provide information to NOAA for internal tracking purposes. NOAA OEd grant recipients are required to update the student tracker database with the required student information. The collected student data supports NOAA OEd's program performance measures. The Dr. Nancy Foster Scholarship Program and the NMFS Recruiting, Training, and Research Program also collect student data for their programs and are also covered by this notice.

II. Method of Collection

Electronic applications and electronic forms are required from participants, and the primary methods of submittal are email and Internet submission of electronic forms. Approximately 1% of the application and reference forms may be mailed to accommodate those without internet access. New student records may also be provided via spreadsheet by OEd grant recipients for

bulk upload to the student tracker database by NOAA OEd staff.

III. Data

OMB Number: 0648–0568.

Form Number: None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Individuals or households; business or other for-profit; not-for-profit institutions; State, Local or Tribal Government.

Estimated Number of Respondents: Student Performance Achievement Reporting (SPAR) database form, 8; undergraduate application form, 600; reference forms, 1200; alumni update form, 200.

Estimated Time per Response: SPAR database form, 17 hours; undergraduate application form, 8 hours; reference forms, 1 hour; alumni update form, 1 hour.

Estimated Total Annual Burden Hours: 6,336.

Estimated Total Annual Cost to Public: $300 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: September 30, 2016.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2016–24048 Filed 10–4–16; 8:45 am]

BILLING CODE 3510–00–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

[Docket No. 160810714–6714–01]

RIN 0660–XC029

The Incentives, Benefits, Costs, and Challenges to IPv6 Implementation

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice; reopening of comment period.

SUMMARY: On August 18, 2016, the National Telecommunications and Information Administration (NTIA) issued a notice and request for public comments seeking input to guide NTIA in future Internet Protocol version 6 (IPv6) promotional activities. Through this Notice, NTIA invited adopters and implementers of IPv6 as well as any other interested stakeholders to share information on the benefits, costs, and challenges they have experienced, as well as any insight into additional incentives that could aid future adoption, implementation, and support of IPv6. In response to requests for additional time in which to comment, NTIA through this notice reopens the comment period. Comments received between the October 3, 2016 due date for comments announced in the August 18, 2016 notice, and publication of this notice in the **Federal Register**, will be deemed to be timely.

DATES: Comments are due no later than 5:00 p.m. Eastern Daylight Time on October 17, 2016.

ADDRESSES: Written comments may be submitted by email to *ipv6@ntia.doc.gov.* Comments submitted by email should be machine-readable and should not be copy-protected. Written comments also may be submitted by mail to the National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Room 4725, Attn: IPv6 RFC 2016, Washington, DC 20230. Responders should include the name of the person or organization filing the comment, as well as a page number on each page of the submission. All comments received are a part of the public record and will generally be posted to *https://www.ntia.doc.gov/federal-registernotice/2016/incentives-benefits-costsand-challenges-ipv6-implementation* without change. All personal identifying information (for example, name, address) voluntarily submitted by the commenter may be publicly accessible. Please do not submit business information that is confidential or otherwise protected. NTIA will accept anonymous comments.

FOR FURTHER INFORMATION CONTACT: Ashley Heineman, National Telecommunications and Information Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Room 4701, Washington, DC 20230; telephone (202) 482–0298; email *aheineman@ntia.doc.gov.* Please direct media inquiries to NTIA's Office of Public Affairs, (202) 482–7002 or by email at *press@ntia.doc.gov.*

SUPPLEMENTARY INFORMATION: The original notice sought public comment to guide NTIA in its future efforts to engage more directly in promoting IPv6 deployment and use, with a particular focus on implementation. *See* Notice and request for public comment, *The Incentives, Benefits, Costs, and Challenges to IPv6 Implementation,* 81 FR 55182 (Aug. 18, 2016), *available at: http://www.ntia.doc.gov/files/ntia/publications/fr_ipv6_implementation_08182016.pdf.* To assist in this purpose, NTIA is asking those who have implemented IPv6 to share their experiences and to highlight in particular the factors and circumstances that supported their decision to move ahead and adopt the protocol. NTIA hopes to utilize input received through this request for comments to guide and inform future promotion efforts, including the IPv6 Best Practice Forum being organized for the 2016 Internet Governance Forum, which will be held in December 2016, in Guadalajara, Mexico.[1]

The original deadline for submission of comments was October 3, 2016. In response to requests for additional time in which to comment, NTIA reopens the comment period with this notice. Comments received between the October 3, 2016 due date for comments announced in the August 18, 2016 notice, and publication of this notice in the **Federal Register**, are deemed to be timely.

Request for Comment: NTIA invites comment on the following questions, in whole or in part:

Benefits:

1. What are the benefits of implementing IPv6? For example, what are the direct performance benefits of implementing IPv6 for end users, or for enhanced network security, as compared to IPv4?

2. What are the expected or unexpected benefits of implementing IPv6?

[1] *http://www.igf2016.mx/.*

Obstacles:

1. What are the biggest obstacles related to IPv6 implementation? For example, is it difficult to access adequate vendor support for IPv6 hardware and/or software? Does successful implementation depend directly on another service provider?

2. How does an organization overcome those obstacles?

Incentives:

1. What factors contribute to an organization's decision to implement IPv6?

2. What additional incentives would be helpful in a decision to implement IPv6?

3. If one factor made the crucial difference in deciding to implement IPv6, as opposed to not implementing IPv6, what is that factor?

Motivation:

1. What is typically the driving motivation behind an organization's decision to implement IPv6?

2. What are the job titles and/or roles of the people within an organization typically involved in a decision to implement IPv6? What are those individuals' primary motivations when it comes to implementing IPv6?

Return on Investment:

1. What is the anticipated return on an IPv6-related investment? How quickly is a return on investment expected?

2. Is return on investment a reason to implement IPv6, or is implementation considered a cost of doing business?

Implementation:

1. How long does the planning process for IPv6 implementation take?

2. How long does actual implementation of IPv6 typically take? Is implementation a single event or evolutionary?

Cost of Implementation:

1. What are the different types of costs involved in implementing IPv6? What are the typical magnitudes of each type of cost?

2. How does an organization cover those costs?

3. How does an organization justify those costs?

4. What considerations are there for cost-saving?

5. What implication does the size of an organization implementing IPv6 have on cost?

Promotional Efforts:

1. What promotional efforts, if any, should NTIA take? What would have the most impact?

2. What promotional efforts, if any, are being led by the private sector? Have they been effective?

3. Which additional stakeholders should NTIA target? What is the most effective forum?

4. Should NTIA partner with any particular stakeholder group?

Additional Issues: NTIA invites commenters to provide any additional information on other issues not identified in this RFC that could contribute to NTIA's understanding of the considerations that organizations take into account when deciding to proceed with IPv6 implementation, as well as future IPv6 promotional efforts that NTIA may undertake.

Dated: September 29, 2106.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 2016–24033 Filed 10–4–16; 8:45 am]

BILLING CODE 3510–60–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

[Docket No. CFPB–2016–0043]

Notice of a Public List of Companies Offering Existing Customers Free Access to a Credit Score

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Notice.

SUMMARY: The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) established the Office of Financial Education within the Bureau of Consumer Financial Protection (CFPB or Bureau) to develop and launch initiatives that will educate consumers and help them make better informed financial decisions.

The CFPB's Office of Financial Education is exploring how to produce a list of companies offering existing customers free access to a credit score (''the service''). The Bureau could leverage this list to bring consumer attention to the topic, and to develop content to educate, inform and empower consumers on the use and availability of credit scores and credit reports. The responses to this notice will help us to launch this public list.

DATES: Comments must be received on or before November 4, 2016 to be assured of consideration.

ADDRESSES: You may submit comments regarding the ''Notice of a Public List of Companies Offering Existing Customers Free Access to a Credit Score'', identified by title and by Docket No. CFPB–2016–0043, by any of the following methods:

- *Electronic: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Consumer Financial Protection Bureau (Attention: Office of Financial Education), 1700 G Street NW., Washington, DC 20552.
- *Hand Delivery/Courier:* Consumer Financial Protection Bureau (Attention: Office of Financial Education), 1275 First Street NE., Washington, DC 20002

Instructions: The Bureau encourages the early submission of comments. All submissions must include the document title and docket number. Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *http://www.regulations.gov.* In addition, comments will be available for public inspection and copying at 1275 First Street NE., Washington, DC 20002, on official business days between the hours of 10 a.m. and 5 p.m. eastern standard time. You can make an appointment to inspect the documents by telephoning 202–435–7275.

All submissions, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Do not include sensitive personal information such as account numbers or Social Security numbers. Comments will not be edited to remove any identifying or contact information, such as name and address information, email addresses, or telephone numbers.

FOR FURTHER INFORMATION CONTACT: For general inquiries, submission process questions or any additional information, please contact Monica Jackson, Office of the Executive Secretary, at 202–435–7275. For information about the ''Notice of a Public List of Companies Offering Existing Customers Free Access to a Credit Score'', please contact Irene Skricki, Office of Financial Education, at 202–435–7181.

SUPPLEMENTARY INFORMATION:

I. Background

Over the last few years, many financial institutions, credit card issuers, and other companies have offered consumers free access to a credit score giving consumers an important tool to manage their financial lives. The Office of Financial Education of the Consumer Financial Protection Bureau (''the Bureau''), established under Section 1013(d)(1) of Dodd-Frank, would like to highlight and build consumer awareness of this practice. A core part of the mission of the Bureau is educating and empowering consumers to take more control over their financial lives. The Bureau believes that enabling consumers to see their credit scores can be a first step

towards consumers learning about their credit history, checking their credit report, and ultimately making decisions about credit that serve their own financial and life goals. The Bureau is exploring how to produce a list of companies offering existing customers free access to a credit score (''the service''). The Bureau could leverage this list to bring consumer attention to the topic of credit scores, and follow up with content to educate, inform and empower consumers on the availability of credit scores and credit reports and how consumers can use this information. The responses to this notice will help us to launch this public list.

II. Criteria To Be Included in the Public List

If your company is a credit card issuer, fits the criteria outlined below and would like to be included in the list the Bureau plans to publish, contact us by following the instructions included in this Notice for how to submit your comments. To be included in this list, you must meet the following criteria:

- Be a credit card issuer.[1]
- Offer existing customers [2] (at least some, but not necessarily all) the ability to obtain free of charge a credit score [3] which either your company, or other lenders use, for account origination, portfolio management, or for other business purposes.
- Offer this access to a credit score on a continuous basis, as opposed to on a time-limited or promotional basis, and periodically update the score.

You may include other information you think is relevant for consumers reading the public list to understand whether the service applies to them. Depending on the information received, the Bureau may decide to include, or not to include, some or all of this information in the list.

By responding to this **Federal Register** Notice (FRN) you are stating that you meet the criteria and are consenting to include the name of your company in a public list of credit card issuers offering free access to credit scores to their existing customers. The Bureau reserves the right to conduct due diligence on a company's assertions about meeting the criteria stated in this notice. Your response to this FRN and inclusion in this public list are completely voluntary, and your choice to do so, or refrain from doing so, is not connected to supervisory activity by the Bureau.

If your company is not a credit card issuer, but offers existing consumer customers free access to a credit score, fits the criteria outlined below, and would like to be included in a list for companies in other markets, you may contact us as well. Depending on the feedback received, the Bureau may decide to expand the scope of the initial list of companies offering free credit scores beyond credit card issuers to companies in some other markets, include such companies in a future separate list, or decide not to publish a list of companies in other markets offering this service.

To be considered for this potential list, you must meet the following criteria:

- Offer or provide a consumer financial product or service;
- Offer your existing customers [4] (at least some, but not necessarily all) the ability to obtain free of charge a credit score [5] which either your company, or other lenders use, for account origination, portfolio management, or for other business purposes.
- Offer this access to a credit score on a continuous basis, as opposed to on a time-limited or promotional basis, and periodically update the score.

You may include other information you think is relevant for consumers reading the public list to understand whether the service applies to them. Depending on the information received, the Bureau may decide to include, or not to include, some or all of this information in the list.

By responding to this **Federal Register** Notice (FRN) you are stating that you meet the criteria and are consenting to include the name of your company in a public list of companies offering free access to credit scores to their existing customers. The Bureau reserves the right to conduct due diligence on a company's assertions about meeting the criteria stated in this notice. Your response to this FRN and inclusion in this public list are completely voluntary, and your choice to do so, or refrain from doing so, is not connected to supervisory activity by the Bureau.

We emphasize that these lists will be created to further inform the public about where to find a credit score, and will not be an endorsement of the financial institutions, credit card issuers, or any other company mentioned in any document the Bureau publishes.

Thank you for your contribution to improve consumer financial awareness.

Dated: September 27, 2016.

Richard Cordray,

Director, Bureau of Consumer Financial Protection.

[FR Doc. 2016–24014 Filed 10–4–16; 8:45 am]

BILLING CODE 4810–AM–P

[1] ''Credit card issuer'' refers to any entity to which a consumer is legally obligated, or would be legally obligated, under the terms of a credit card agreement. Alternatively, you can also be included in this list, if you are a bank or a credit union and you contract with a third party to issue credit cards on your behalf and under your brand name.

[2] ''Customers'' refers to individuals, not corporations or small businesses.

[3] By credit score we refer to a score that is empirically derived, demonstrably and statistically sound, and based on current data from a consumer reporting agency to predict the likelihood of certain credit behavior for the applicant.

[4] ''Customers'' refers to individuals, not corporations or small businesses.

[5] By credit score we refer to a score that is empirically derived, demonstrably and statistically sound, and based on current data from a consumer reporting agency to predict the likelihood of certain credit behavior for the applicant.

CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 16–C0005]

Best Buy Co., Inc., Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the **Federal Register** in accordance with the terms of the Consumer Product Safety Commission's regulations. Published below is a provisionally-accepted Settlement Agreement with Best Buy Co., Inc., containing a civil penalty in the amount of 3.8 million dollars ($3,800,000) within thirty (30) days of service of the Commission's final Order accepting the Settlement Agreement.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by October 20, 2016.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 16–C0005 Office of the Secretary, Consumer Product Safety Commission, 4330 East-West Highway, Room 820, Bethesda, Maryland 20814–4408.

FOR FURTHER INFORMATION CONTACT: Laura Thomson, Trial Attorney, Division of Compliance, Office of the General Counsel, Consumer Product Safety Commission, 4330 East-West Highway, Bethesda, Maryland 20814–4408; telephone (301) 504–7263.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.[1]

Dated: September 30, 2016.

Todd A. Stevenson,

Secretary.

United States of America Consumer Product Safety Commission

In the Matter of: Best Buy Co., Inc., CPSC Docket No.: 16–C0005.

Settlement Agreement

1. In accordance with the Consumer Product Safety Act, 15 U.S.C. §§ 2051 − 2089 (''CPSA'') and 16 CFR § 1118.20, Best Buy Co., Inc., and its subsidiaries (collectively, ''Best Buy''), and the United States Consumer Product Safety Commission (''Commission''), through its staff, hereby enter into this Settlement Agreement (''Agreement''). The Agreement and the incorporated attached Order resolve staff's charges set forth below.

The Parties

2. The Commission is an independent federal regulatory agency, established pursuant to, and responsible for, the enforcement of the CPSA, 15 U.S.C. §§''2051 − 2089. By executing the Agreement, staff is acting on behalf of the Commission, pursuant to 16 CFR § 1118.20(b). The Commission issues the Order under the provisions of the CPSA.

3. Best Buy is a corporation, organized and existing under the laws of the state of Minnesota, with its principal place of business in Richfield, MN.

Staff Charges

4. Between September 2010 and October 2015, Best Buy knowingly sold, offered for sale, and distributed in commerce recalled consumer products in violation of Section 19(a)(2)(B) of the CPSA, 15 U.S.C. § 2068(a)(2)(B). Over the course of five years, Best Buy sold units from 16 separate recalls of consumer products, totaling approximately 600 units of recalled products (the ''Recalled Products''), at its retail stores, online, and through Best Buy's secondary market sales channels, more than 400 of which were the Canon Cameras described in paragraph 5, below.

5. The Recalled Products include:

- Toshiba Satellite Notebook Computers, recalled on September 2, 2010 (''Toshiba Notebooks'')
- iSi North America Twist 'n Sparkle Beverage Carbonation Systems, recalled on July 5, 2012 (''Twist 'n Sparkles'')
- LG Electronics Gas Dryers, recalled on August 2, 2012 (''LG Dryers'')
- GE Dishwashers, recalled on August 9, 2012 (''GE Dishwashers'')
- Canon EOS Rebel T4i Digital Cameras, recalled on August 14, 2012 (''Canon Cameras'')
- GE Profile Front Load Washer, recalled on October 3, 2012 (''GE Washers'')
- Sauder Woodworking Company Gruga Office Chairs, recalled on November 7, 2012 (''Office Chairs'')
- LG Electronics Electric Ranges, recalled on November 8, 2012 (''LG Ranges'')
- LG Electronics Top-Loading Washing Machines, recalled on December 18, 2012 (''LG Washers'')
- Samsonite Dual-Wattage Travel Converters, recalled on February 12, 2013 (''Samsonite Converters'')
- Definitive Technology SuperCube 2000 Subwoofers, recalled on March 28, 2013 (''SuperCubes'')
- Gree Dehumidifiers, recalled on September 12, 2013, expanded in January 2014 and reannounced in May 2014 (''Dehumidifiers'')
- Frigidaire Professional Blenders, recalled on September 19, 2013 (''Blenders'')
- Schneider Electric APC Surge Arrest Surge Protector, recalled on October 3, 2013 (''Surge Protectors'')
- Coby 32-inch Flat Screen TV, recalled on December 12, 2013 (''Coby TVs''), and
- Whirlpool Jenn-Air Wall Oven, recalled on July 29, 2015 (Jenn-Air Wall Ovens'')

6. Post-recall sales of the Recalled Products resulted in one reported injury. A consumer who purchased a recalled Canon Camera at a Best Buy store developed a skin irritation, which was the hazard for which the product had been recalled eight months before the purchase.

7. On September 12, 2013, Gree dehumidifiers were recalled due to a defect that caused them to overheat and catch fire. Two weeks later, Best Buy sold a Gree dehumidifier with a model number within the scope of the recall. The unit subsequently caught fire internally. Best Buy's recordkeeping did not enable it to identify whether the sold unit bore the date range identified in the recall announcement.

8. Fifteen of the 16 Recalled Products were subject to voluntary corrective action plans taken by the manufacturers in consultation with the Commission. Each of these recalls was also publicized by each respective manufacturer and by the Commission. The remaining Recalled Product was recalled by Best Buy and other retailers in consultation with the Commission because the manufacturer had ceased operations at the time of the recall; this recall was publicized by Best Buy, the other retailers, and by the Commission.

9. The Recalled Products are ''consumer products,'' and, at all relevant times, Best Buy was a ''retailer'' of these consumer products, which were ''distributed in commerce,'' as those terms are defined or used in sections 3(a)(5), (8) and (13), of the CPSA, 15 U.S.C. 2052(a)(5), (8) and (13).

10. Under CPSA section 19(a)(2)(B), it is unlawful for any person to sell, offer for sale, manufacture for sale, distribute in commerce, or import into the United States, any consumer product that is subject to voluntary corrective action taken by the manufacturer, in consultation with the Commission, of which action the Commission has notified the public, or if the seller, distributor, or manufacturer knew, or should have known, of such voluntary corrective action.

11. Pursuant to section 20(a)(l) of the CPSA, 15 U.S.C. 2069(a)(1), any person who ''knowingly'' violates CPSA section 19 is subject to civil penalties. Under section 20(d) of the CPSA, 15 U.S.C. 2069(d), the term ''knowingly'' means: ''(1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.''

12. Best Buy sold and distributed Recalled Products because Best Buy failed to implement adequate procedures to accurately identify, quarantine, and prevent the sales of the Recalled Products across all its supply channels. For example, Best Buy added an ''Inactive'' or ''Do Not Sell'' marker to the product codes of some Recalled Products to block entry of the code into the register and prevent the sale. In some cases, however, product codes were not permanently blocked based on inaccurate information that the Recalled Product had never been, or was no longer in, inventory; at other times, the blocked codes were ''turned back on'' prematurely, and in a few cases, overridden.

13. Best Buy communications show that, in July 2011, Best Buy secondary markets personnel reported to a manager that recalled Toshiba

[1] The Commission voted (4–1) to provisionally accept the Settlement Agreement and Order regarding Best Buy Co., Inc. Chairman Kaye, Commissioner Adler, Commissioner Robinson and Commissioner Mohorovic voted to provisionally accept the Settlement Agreement and Order. Commissioner Buerkle voted to reject the Settlement Agreement and Order.

Notebooks were in inventory and sought guidance on protocol for handling the Recalled Product. Despite this information, immediate action was not taken to prevent future sales. The next month Best Buy sold at least five recalled Toshiba Notebooks, and approximately 15 the following month. Best Buy sold an additional 44 recalled Toshiba Notebooks over the next three years, the last sale occurring in October 2014.

14. In May 2013, staff notified Best Buy that it was conducting an investigation into the sale of the recalled Canon Cameras. Shortly thereafter, Best Buy notified staff of sales of additional Recalled Products. At staff's request, Best Buy then audited its sales records for the prior two years and reported sales of other Recalled Products.

15. Even though Best Buy advised staff of system enhancements Best Buy had implemented to reduce the risk of post-recall sales, Best Buy's sales of Recalled Products continued from June 2013 through October 2015 (including during staff's civil penalty investigation), during which time Best Buy sold approximately 35 units of Recalled Products.

16. Best Buy knew and/or should have known of these sales of Recalled Products.

17. Best Buy's sale and distribution of the Recalled Products was ''knowing,'' as that term is defined in section 20(d) of the CPSA, 15 U.S.C. 2069(d).

18. Pursuant to section 20 of the CPSA, 15 U.S.C. 2069, Best Buy is subject to civil penalties for its knowing sale of the Recalled Products, in violation of section 19(a)(2)(B) of the CPSA, 15 U.S.C. 2068(a)(2)(B).

Response of Best Buy

19. Best Buy's settlement of this matter does not constitute an admission of the staff's charges as set forth in paragraphs 4 through 21.

20. Before any post-recall sales were identified, Best Buy had begun enhancing its procedures to help prevent the sale of recalled products. Moreover, in connection with this matter, Best Buy worked cooperatively with CPSC staff to identify additional process enhancements to further reduce the risk of such sales.

Agreement of the Parties

21. Under the CPSA, the Commission has jurisdiction over the matter involving the Recalled Products described in this Agreement and over Best Buy.

22. The parties enter into the Agreement for settlement purposes only. The Agreement does not constitute an admission by Best Buy, or a determination by the Commission, that Best Buy knowingly violated the CPSA.

23. In settlement of staff's charges, and to avoid the cost, distraction, delay, uncertainty, and inconvenience of protracted litigation or other proceedings, Best Buy shall pay a civil penalty in the amount of 3.8 million dollars ($3,800,000) within thirty (30) calendar days after receiving service of the Commission's final Order accepting the Agreement. All payments to be made under the Agreement shall constitute debts owing to the United States and shall be made by electronic wire transfer to the United States via: *http://www.pay.gov* for allocation to and credit against the payment obligations of Best Buy under this Agreement. Failure to make such payment by the date specified in the Commission's final Order shall constitute Default.

24. All unpaid amounts, if any, due and owing under the Agreement, shall constitute a debt due and immediately owing by Best Buy to the United States, and interest shall accrue and be paid by Best Buy at the federal legal rate of interest set forth at 28 U.S.C. 1961(a) and (b), from the date of Default, until all amounts due have been paid in full (hereinafter ''Default Payment Amount'' and ''Default Interest Balance''). Best Buy shall consent to a Consent Judgment in the amount of the Default Payment Amount and Default Interest Balance, and the United States, at its sole option, may collect the entire Default Payment Amount and Default Interest Balance, or exercise any other rights granted by law or in equity, including, but not limited to, referring such matters for private collection; and Best Buy agrees not to contest, and hereby waives and discharges any defenses to, any collection action undertaken by the United States or its agents or contractors pursuant to this paragraph. Best Buy shall pay the United States all reasonable costs of collection and enforcement under this paragraph, respectively, including reasonable attorney's fees and expenses.

25. After staff receives this Agreement executed on behalf of Best Buy, staff shall promptly submit the Agreement to the Commission for provisional acceptance. Promptly following provisional acceptance of the Agreement by the Commission, the Agreement shall be placed on the public record and published in the **Federal Register**, in accordance with the procedures set forth in 16 CFR 1118.20(e). If the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar days, the Agreement shall be deemed finally accepted on the 16th calendar day after the date the Agreement is published in the **Federal Register**, in accordance with 16 CFR 1118.20(f).

26. This Agreement is conditioned upon, and subject to, the Commission's final acceptance, as set forth above, and it is subject to the provisions of 16 CFR 1118.20(h). Upon the later of: (i) Commission's final acceptance of this Agreement and service of the accepted Agreement upon Best Buy, and (ii) the date of issuance of the final Order, this Agreement shall be in full force and effect and shall be binding upon the parties.

27. Effective upon the later of: (i) The Commission's final acceptance of the Agreement and service of the accepted Agreement upon Best Buy, and (ii) and the date of issuance of the final Order, for good and valuable consideration, Best Buy hereby expressly and irrevocably waives and agrees not to assert any past, present, or future rights to the following, in connection with the matter described in this Agreement: (i) An administrative or judicial hearing; (ii) judicial review or other challenge or contest of the Commission's actions; (iii) a determination by the Commission of whether Best Buy failed to comply with the CPSA and the underlying regulations; (iv) a statement of findings of fact and conclusions of law; and (v) any claims under the Equal Access to Justice Act.

28. Best Buy represents and agrees that it has and will maintain a compliance program designed to ensure compliance with the CPSA with respect to any consumer product imported, manufactured, distributed or sold by the Firm. The compliance program does and shall contain the following elements: Written standards, policies, and procedures designed to ensure compliance with CPSA statutes and regulations; procedures to ensure that relevant information is conveyed effectively to appropriate personnel responsible for CPSA compliance; mechanisms to communicate to all applicable Best Buy employees through training programs or otherwise, company policies and procedures to prevent violations of CPSA § 19; a program for the appropriate disposition of recalled goods; management oversight of that program, including a mechanism for confidential employee reporting of compliance-related questions or concerns to either a compliance officer or to another senior manager with authority to act as necessary; senior management responsibility for, and general board oversight of, CPSA compliance; and retention of all CPSA

compliance-related records for at least five (5) years; and availability of such records to staff upon reasonable request.

29. Best Buy represents and agrees that it has and will maintain and enforce a system of internal controls and procedures designed to ensure that, with respect to all consumer products manufactured, imported, distributed, or sold by Best Buy: Information required to be disclosed by Best Buy to the Commission is recorded, processed, and reported in accordance with applicable law; all reporting made to the Commission is timely, truthful, complete, accurate, and in accordance with applicable law; and prompt disclosure is made to Best Buy's management of any significant deficiencies or material weaknesses in the design or operation of such internal controls that are reasonably likely to affect adversely, in any material respect, Best Buy's ability to record, process, and report to the Commission in accordance with applicable law.

30. Upon reasonable request of staff, Best Buy shall provide written documentation of its internal controls and procedures, including, but not limited to, the effective dates of the procedures and improvements thereto. Best Buy shall cooperate fully and truthfully with staff and shall make available all non-privileged information and materials, and personnel deemed necessary by staff to evaluate Best Buy's compliance with the terms of the Agreement.

31. The parties acknowledge and agree that the Commission may publicize the terms of the Agreement and the Order.

32. Best Buy represents that the Agreement: (i) Is entered into freely and voluntarily, without any degree of duress or compulsion whatsoever; (ii) has been duly authorized; and (iii) constitutes the valid and binding obligation of Best Buy, and each of its successors, transferees, and assigns, enforceable against Best Buy in accordance with the Agreement's terms. The individuals signing the Agreement on behalf of Best Buy represent and warrant that they are duly authorized by Best Buy to execute the Agreement.

33. The signatories represent that they are authorized to execute this Agreement.

34. The Agreement is governed by the laws of the United States.

35. The Agreement and the Order shall apply to, and be binding upon, Best Buy and each of its successors, transferees, and assigns, and a violation of the Agreement or Order may subject Best Buy, and each of its successors, transferees, and assigns, to appropriate legal action.

36. The Agreement and the Order constitute the complete agreement between the parties on the subject matter contained therein.

37. The Agreement may be used in interpreting the Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict their terms. For purposes of construction, the Agreement shall be deemed to have been drafted by both of the parties and shall not, therefore, be construed against any party for that reason in any subsequent dispute.

38. The Agreement may not be waived, amended, modified, or otherwise altered, except as in accordance with the provisions of 16 CFR § 1118.20(h). The Agreement may be executed in counterparts.

39. If any provision of the Agreement or the Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and the Order, such provision shall be fully severable. The balance of the Agreement and the Order shall remain in full force and effect, unless the Commission and Best Buy agree in writing that severing the provision materially affects the purpose of the Agreement and the Order.

BEST BUY CO., INC.

Date: September 20, 2016.

By: _____

Todd Hartman,

Senior Vice President, Deputy General Counsel and Chief Compliance Officer, Best Buy Co., Inc., 7601 Penn Ave. S., Richfield, MN 55423.

Date: September 22, 2016.

By: _____

Eric Rubel, Esq.

Arnold & Porter LLP, 601 Massachusetts Ave. NW., Washington, DC 20001–3743, Counsel for Best Buy.

U.S. CONSUMER PRODUCT SAFETY COMMISSION

Mary T. Boyle,

General Counsel.

Mary B. Murphy,

Assistant General Counsel.

Date: September 22, 2016.

By: _____

Laura Thomson,

Trial Attorney, Division of Compliance, Office of the General Counsel.

United States of America Consumer Product Safety Commission

In the Matter of: Best Buy Co, Inc.

CPSC Docket No.: 16–C0005

ORDER

Upon consideration of the Settlement Agreement entered into between Best Buy Co., Inc. (''Best Buy''), and the U.S. Consumer Product Safety Commission (''Commission''), and the Commission having jurisdiction over the subject matter and over Best Buy, and it appearing that the Settlement Agreement and the Order are in the public interest, it is:

ORDERED that the Settlement Agreement be, and is, hereby, accepted; and it is

FURTHER ORDERED that Best Buy shall comply with the terms of the Settlement Agreement and shall pay a civil penalty in the amount of 3.8 million dollars ($3,800,000) within thirty (30) days after service of the Commission's final Order accepting the Settlement Agreement. The payment shall be made by electronic wire transfer to the Commission via: *http://www.pay.gov.* Upon the failure of Best Buy to make the foregoing payment when due, interest on the unpaid amount shall accrue and be paid by Best Buy at the federal legal rate of interest set forth at 28 U.S.C. § 1961(a) and (b). If Best Buy fails to make such payment or to comply in full with any other provision of the Settlement Agreement, such conduct will be considered a violation of the Settlement Agreement and Order.

Provisionally accepted and provisional Order issued on the 30th day of September, 2016.

BY ORDER OF THE COMMISSION:

Todd A. Stevenson,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2016–24075 Filed 10–4–16; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Department of the Army

Advisory Committee on Arlington National Cemetery, Honor Subcommittee and the Remember and Explore Subcommittee Meeting Notice

AGENCY: Department of the Army, DoD.

ACTION: Notice of open subcommittee meetings.

SUMMARY: The Department of the Army is publishing this notice to announce the following Federal advisory subcommittee meetings of the Honor Subcommittee and the Remember and Explore Subcommittee of the Advisory Committee on Arlington National Cemetery (ACANC). These meetings are open to the public. For more information about the Committee and the Subcommittees, please visit *http://www.arlingtoncemetery.mil/AboutUs/FocusAreas.aspx.*

DATES: The Honor Subcommittee will meet from 8:30 a.m. to 11:00 a.m. and the Remember and Explore

Subcommittees will meet from 3:00 p.m. to 4:30 p.m. on Monday, October 24, 2016.

ADDRESSES: Arlington National Cemetery Welcome Center, Conference Room, Arlington National Cemetery, Arlington, VA 22211.

FOR FURTHER INFORMATION CONTACT: Mr. Timothy Keating; Designated Federal Officer (Alternate) for the Committee and the Subcommittees, in writing at Arlington National Cemetery, Arlington VA 22211, or by email at *timothy.p.keating.civ@mail.mil,* or by phone at 1–877–907–8585.

SUPPLEMENTARY INFORMATION: This subcommittee meeting is being held under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Sunshine in the Government Act of 1976 (U.S.C. 552b, as amended) and 41 Code of the Federal Regulations (CFR 102–3.150).

Purpose of the Meetings: The Advisory Committee on Arlington National Cemetery is an independent Federal advisory committee chartered to provide the Secretary of the Army independent advice and recommendations on Arlington National Cemetery, including, but not limited to, cemetery administration, the erection of memorials at the cemetery, and master planning for the cemetery. The Secretary of the Army may act on the committee's advice and recommendations. The primary purpose of the Honor Subcommittee is to provide independent recommendations of methods to address the long-term future of Arlington National Cemetery, including how best to extend the active burials and on what ANC should focus once all available space has been used, the placement of commemorative monuments and the manner in which to ensure the living history of the cemetery is preserved. The primary purpose of the Remember & Explore Subcommittee is improving the quality of visitors' experiences, now and for generations to come, to review and provide recommendations on preserving and caring for the marble components of the Tomb of the Unknown Soldier (TUS), and reviewing proposed commemorative monuments requested for placement in the cemetery.

Proposed Agenda: The Honor Subcommittee will receive an update on Southern Expansion charrette planning, continue to consider the various options for extending the life of active burials at ANC, and review ANC Strategic Communication plan. The Remember and Explore Subcommittee will discuss new security initiatives and effects on the visitor experience at ANC as well as receive an update on the status of the care and maintenance of the Tomb of the Unknown Soldier.

Public's Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is on a first-come basis. The Arlington National Cemetery conference room is readily accessible to and usable by persons with disabilities. For additional information about public access procedures, contact Mr. Timothy Keating, the subcommittee's Alternate Designated Federal Officer, at the email address or telephone number listed in the **FOR FURTHER INFORMATION CONTACT** section.

Written Comments and Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments or statements to the subcommittee, in response to the stated agenda of the open meeting or in regard to the subcommittee's mission in general. Written comments or statements should be submitted to Mr. Timothy Keating, the subcommittee's Alternate Designated Federal Officer, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Each page of the comment or statement must include the author's name, title or affiliation, address, and daytime phone number. Written comments or statements being submitted in response to the agenda set forth in this notice must be received by the Designated Federal Officer at least seven business days prior to the meeting to be considered by the subcommittee. The Designated Federal Officer will review all timely submitted written comments or statements with the subcommittee Chairperson, and ensure the comments are provided to all members of the subcommittee before the meeting. Written comments or statements received after this date may not be provided to the subcommittee until its next meeting. Pursuant to 41 CFR 102–3.140d, the subcommittee is not obligated to allow the public to speak or otherwise address the subcommittee during the meeting. However, interested persons may submit a written statement or a request to speak for consideration by the subcommittee. After reviewing any written statements or requests submitted, the subcommittee Chairperson and the Designated Federal Officer may choose to invite certain submitters to present their comments verbally during the open portion of this meeting or at a future meeting. The Designated Federal Officer in consultation with the subcommittee Chairperson, may allot a specific amount of time for submitters to present their comments verbally.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2016–24053 Filed 10–4–16; 8:45 am]

BILLING CODE 5001–03–P

DEPARTMENT OF DEFENSE

Department of the Army

Advisory Committee on Arlington National Cemetery Meeting Notice

AGENCY: Department of the Army, DoD.

ACTION: Notice of open committee meeting.

SUMMARY: The Department of the Army is publishing this notice to announce the following Federal advisory committee meeting of the Advisory Committee on Arlington National Cemetery (ACANC). The meeting is open to the public. For more information about the Committee, please visit *http://www.arlingtoncemetery.mil/AboutUs/FocusAreas.aspx.*

DATES: The Committee will meet from 9:30 a.m. to 3:00 p.m. on Tuesday, October 25, 2016.

ADDRESSES: Arlington National Cemetery Welcome Center, Arlington National Cemetery, Arlington, VA 22211.

FOR FURTHER INFORMATION CONTACT: Mr. Timothy Keating; Designated Federal Officer (Alternate) for the Committee and the Subcommittees, in writing at Arlington National Cemetery, Arlington VA 22211, or by email at *timothy.p.keating.civ@mail.mil,* or by phone at 1–877–907–8585.

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C., Appendix, as amended), the Sunshine in the Government Act of 1976 (U.S.C. 552b, as amended) and 41 Code of the Federal Regulations (CFR 102–3.150).

Purpose of the Meeting: The Advisory Committee on Arlington National Cemetery is an independent Federal advisory committee chartered to provide the Secretary of the Army independent advice and recommendations on Arlington National Cemetery, including, but not limited to, cemetery administration, the erection of memorials at the cemetery, and master planning for the cemetery. The

Secretary of the Army may act on the Committee's advice and recommendations.

Proposed Agenda: The Committee will review new security initiatives at ANC, receive an update on critical infrastructure and construction projects, review ANC Survey analysis and results as well as a status update on ANC's progress in completing the Secretary of the Army's Report to Congress in response to Public Law 114–158, which requires the Secretary to report to Congress on the estimated date ANC will reach full burial capacity and to provide recommendations on those legislative and non-legislative actions necessary to keep ANC open for active burials ''well into the future''.

Public's Accessibility to the Meeting: Pursuant to 5 U.S.C. 552b and 41 CFR 102–3.140 through 102–3.165, and the availability of space, this meeting is open to the public. Seating is on a first-come basis. The Arlington National Cemetery conference room is readily accessible to and usable by persons with disabilities. For additional information about public access procedures, contact Mr. Timothy Keating, the subcommittee's Alternate Designated Federal Officer, at the email address or telephone number listed in the **FOR FURTHER INFORMATION CONTACT** section.

Written Comments and Statements: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments or statements to the Committee, in response to the stated agenda of the open meeting or in regard to the Committee's mission in general. Written comments or statements should be submitted to Mr. Timothy Keating, the subcommittee's Alternate Designated Federal Officer, via electronic mail, the preferred mode of submission, at the address listed in the **FOR FURTHER INFORMATION CONTACT** section. Each page of the comment or statement must include the author's name, title or affiliation, address, and daytime phone number. Written comments or statements being submitted in response to the agenda set forth in this notice must be received by the Designated Federal Officer at least seven business days prior to the meeting to be considered by the Committee. The Designated Federal Officer will review all timely submitted written comments or statements with the Committee Chairperson, and ensure the comments are provided to all members of the Committee before the meeting. Written comments or statements received after this date may not be provided to the Committee until its next meeting.

Pursuant to 41 CFR 102–3.140d, the Committee is not obligated to allow a member of the public to speak or otherwise address the Committee during the meeting. Members of the public will be permitted to make verbal comments during the Committee meeting only at the time and in the manner described below. If a member of the public is interested in making a verbal comment at the open meeting, that individual must submit a request, with a brief statement of the subject matter to be addressed by the comment, at least three (3) days in advance to the Committee's Designated Federal Official, via electronic mail, the preferred mode of submission, at the addresses listed in the **FOR FURTHER INFORMATION CONTACT** section. The Designated Federal Official will log each request, in the order received, and in consultation with the Committee Chair determine whether the subject matter of each comment is relevant to the Committee's mission and/or the topics to be addressed in this public meeting. A 15-minute period near the end of meeting will be available for verbal public comments. Members of the public who have requested to make a verbal comment and whose comments have been deemed relevant under the process described above, will be allotted no more than three (3) minutes during this period, and will be invited to speak in the order in which their requests were received by the Designated Federal Official.

Brenda S. Bowen,

Army Federal Register Liaison Officer.

[FR Doc. 2016–24046 Filed 10–4–16; 8:45 am]

BILLING CODE 5001–03–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Advisory Panel on Streamlining and Codifying Acquisition Regulations

AGENCY: Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics), DoD.

ACTION: Notice.

SUMMARY: The Department of Defense is publishing this notice to announce the establishment of the Advisory Panel on Streamlining and Codifying Acquisition Regulations (hereafter ''the Panel''). The Panel plans to meet on a monthly basis and will provide a final report to the Secretary of Defense and Congress in 2018. The agenda and meeting times will be posted on the panel Web site *http://www.dau.mil/sec809.*

FOR FURTHER INFORMATION CONTACT: Melissa Rider, Defense Acquisition University, 9820 Belvoir Road, Fort Belvoir, VA 22060, email: *melissa.rider@dau.mil,* phone: 703–805–4967.

SUPPLEMENTARY INFORMATION: Section 809 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114–92) required the Secretary of Defense to establish ''an advisory panel on streamlining acquisition regulations.'' The Panel was seated on August 12, 2016.

By Statute, the Panel is exempt from the Federal Advisory Committee Act (5 U.S.C. Appendix). Public information, including opportunities for input will be posted and periodically updated at *http://www.dau.mil/sec809.*

Dated: September 30, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–24045 Filed 10–4–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Business Board; Notice of Federal Advisory Committee Meeting

AGENCY: DoD.

ACTION: Meeting notice.

SUMMARY: The Department of Defense is publishing this notice to announce the following Federal advisory committee meeting of the Defense Business Board. This meeting is open to the public.

DATES: The public meeting of the Defense Business Board (''the Board'') will be held on Thursday, October 20, 2016. The meeting will begin at 10:15 a.m. and end at 11:45 a.m. (Escort required; see guidance in the **SUPPLEMENTARY INFORMATION** section, ''Public's Accessibility to the Meeting.'')

ADDRESSES: Room 3E863 in the Pentagon, Washington, DC (Escort required; See guidance in the **SUPPLEMENTARY INFORMATION** section, ''Public's Accessibility to the Meeting.'')

FOR FURTHER INFORMATION CONTACT: The Board's Designated Federal Officer (DFO) is Roma Laster, Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington, DC 20301–1155, *roma.k.laster.civ@mail.mil,* 703–695–7563. For meeting information please contact Steven Cruddas, Defense Business Board, 1155 Defense Pentagon, Room 5B1088A, Washington, DC 20301–1155, *steven.m.cruddas.civ@mail.mil,* (703) 697–2168. For submitting written comments or questions to the Board, send via email

to mailbox address: *osd.pentagon.odam.mbx.defense-business-board@mail.mil.* Please include in the Subject line ''DBB October 2016 Meeting.''

SUPPLEMENTARY INFORMATION: This meeting is being held under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.140.

Purpose of the Meeting: The Board may receive presentations from its task groups on *''Logistics as a Competitive War Fighting Advantage,'' ''Future Models for Federally Funded Research and Development Center Contracts,''* and *''Best Practices for the Business of Test and Evaluation.''*

The mission of the Board is to examine and advise the Secretary of Defense on overall DoD management and governance through providing independent advice which reflects an outside private sector perspective on proven and effective best business practices that can be applied to the DoD.

Availability of Materials for the Meeting: A copy of the agenda and the terms of reference for each Task Group study may be obtained from the Board's Web site at *http://dbb.defense.gov/meetings*.

Meeting Agenda:

10:15 a.m.–11:45 a.m.—Presentations on *''Logistics as a Competitive War Fighting Advantage,'' ''Future Models for Federally Funded Research and Development Center Contracts,''* and *''Best Practices for the Business of Test and Evaluation''* followed by Board discussion, deliberations and voting, if appropriate.

Submission of written public comments is strongly encouraged, due to meeting time constraints.

Public's Accessibility to the Meeting: Pursuant to FACA and 41 CFR 102–3.140, this meeting is open to the public. Seating is limited and is on a first-come basis. All members of the public who wish to attend the public meeting must contact Steven Cruddas at the number listed in the **FOR FURTHER INFORMATION CONTACT** section no later than 12:00 p.m. on Friday, October 14, 2016 to register and make arrangements for a Pentagon escort, if necessary. Public attendees requiring escort should arrive at the Pentagon Visitor's Center, located near the Pentagon Metro Station's south exit (the escalators to the left upon exiting through the turnstiles) and adjacent to the Pentagon Transit Center bus terminal, with sufficient time to complete security screening and be admitted to the Pentagon no later than 10:00 a.m. on October 20. Note: Pentagon tour groups enter through the Visitor's Center, so long lines could form well in advance. To complete security screening, please come prepared to present two forms of identification of which one must be a pictured identification card. Government and military DoD CAC holders without Pentagon access are not required to have an escort; however, they are still required to pass through the Visitor's Center to gain access to the Building.

Special Accommodations: Individuals requiring special accommodations to access the public meeting should contact Steven Cruddas at least five (5) business days prior to the meeting so that appropriate arrangements can be made.

Procedures for Providing Public Comments

Pursuant to 41 CFR 102–3.105(j) and 102–3.140, and section 10(a)(3) of FACA, the public or interested organizations may submit written comments to the Board about its mission and topics pertaining to this public meeting.

Written comments should be received by the DFO at least five (5) business days prior to the meeting date so that the comments may be made available to the Board for their consideration prior to the meeting. Written comments should be submitted via email to the email address for public comments given in the **FOR FURTHER INFORMATION CONTACT** section in either Adobe Acrobat or Microsoft Word format. Please include in the Subject line ''DBB October 2016 Meeting.'' Please note that since the Board operates under the provisions of the FACA, as amended, all submitted comments and public presentations will be treated as public documents and may be made available for public inspection, including, but not limited to, being posted on the Board's Web site.

Dated: September 30, 2016.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2016–24072 Filed 10–4–16; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Privacy Act of 1974; System of Records

AGENCY: Office of the Under Secretary, Department of Education.

ACTION: Notice of deletion of an existing system of records.

SUMMARY: In accordance with the Privacy Act of 1974, as amended (Privacy Act) (5 U.S.C. 552a), the Department of Education (Department) deletes one system of records from its existing inventory of systems of records subject to the Privacy Act.

DATES: This deletion is effective October 5, 2016.

FOR FURTHER INFORMATION CONTACT: Mr. Emmanuel Caudillo, Senior Advisor, White House Initiative on Educational Excellence for Hispanics, Office of the Under Secretary, U.S. Department of Education, 400 Maryland Avenue SW., Washington, DC 20202. Telephone: (202) 453–5529.

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.

Individuals with disabilities may obtain this document in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the contact person listed in this section.

SUPPLEMENTARY INFORMATION: The Department deletes one system of records from its inventory of record systems subject to the Privacy Act. The deletion is not within the purview of subsection (r) of the Privacy Act, which requires submission of a report on a new or altered system of records.

The system of records notice is no longer needed because the Partners in Education program ended during the Presidential Administration transition in 2009. The White House Initiative on Educational Excellence for Hispanics, currently housed in the Office of the Under Secretary, no longer uses or maintains this system of records. Furthermore, the system of records is no longer in existence; therefore, the following system of records notice is deleted:

1. Partners in Education (18–06–05), 67 FR 4642 (January 30, 2002).

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must

have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at: *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Dated: September 30, 2016.

Ted Mitchell,

Under Secretary of Education.

For the reasons discussed in the preamble, the Under Secretary of Education deletes the following system of records:

SYSTEM NUMBER:

18–06–05.

SYSTEM NAME:

Partners in Education.

[FR Doc. 2016–24141 Filed 10–4–16; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Biological and Environmental Research Advisory Committee Meeting

AGENCY: Office of Science, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a meeting of the Biological and Environmental Research Advisory Committee (BERAC). The Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

DATES:

Thursday, October 27, 2016—9:00 a.m.–6:00 p.m.

Friday, October 28, 2016—9:00 a.m.–12:30 p.m.

ADDRESSES: Hilton Washington DC/Rockville Hotel & Executive Meeting Center, 1750 Rockville Pike, Rockville, Maryland 20852

FOR FURTHER INFORMATION CONTACT: Dr. Sharlene Weatherwax, Designated Federal Officer, BERAC, U.S. Department of Energy, Office of Science, Office of Biological and Environmental Research, SC–23/Germantown Building, 1000 Independence Avenue SW., Washington, DC 20585–1290. Phone: (301) 903–3251; fax (301) 903–5051 or email: *sharlene.weatherwax@science.doe.gov.* The most current information concerning this meeting can be found on the Web site: *http://science.energy.gov/ber/berac/meetings/.*

SUPPLEMENTARY INFORMATION:

Purpose of the Committee: To provide advice on a continuing basis to the Director, Office of Science of the Department of Energy, on the many complex scientific and technical issues that arise in the development and implementation of the Biological and Environmental Research Program.

Tentative Agenda Topics

- Report from the Office of Biological and Environmental Research (BER)
- News from the Biological Systems Science and Climate and Environmental Sciences Divisions (CESD)
- Workshop briefings on BER Exascale Requirements, Terrestrial Aquatic Interfaces, Molecular to Mesoscale Technologies, ILAMB, IA and IAV Modeling
- Overview multi-agency efforts of U.S. Global Change Research Program
- Summary of findings from the CESD Committee of Visitors
- Briefing and discussion on the Grand Challenges Subcommittee
- Briefing on the Low Dose subcommittee
- BERAC member Science Talk
- New Business
- Public Comment

Public Participation: The day and a half meeting is open to the public. If you would like to file a written statement with the Committee, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact Sharlene Weatherwax at *sharlene.weatherwax@science.doe.gov* (email) or (301) 903–5051 (fax). You must make your request for an oral statement at least five business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Committee will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

Minutes: The minutes of this meeting will be available for public review and copying within 45 days at the BERAC Web site: *http://science.energy.gov/ber/berac/meetings/berac-minutes/.*

Issued in Washington, DC, on September 29, 2016.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2016–24058 Filed 10–4–16; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Northern New Mexico

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a combined meeting of the Environmental Monitoring and Remediation Committee and Waste Management Committee of the Environmental Management Site-Specific Advisory Board (EM SSAB), Northern New Mexico (known locally as the Northern New Mexico Citizens' Advisory Board [NNMCAB]). 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, October 26, 2016 1:00 p.m.–4:00 p.m.

ADDRESSES: NNMCAB Office, 94 Cities of Gold Road, Pojoaque, NM 87506.

FOR FURTHER INFORMATION CONTACT: Menice Santistevan, Northern New Mexico Citizens' Advisory Board, 94 Cities of Gold Road, Santa Fe, NM 87506. Phone: (505) 995–0393; Fax: (505) 989–1752 or Email: *menice.santistevan@em.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.

Purpose of the Environmental Monitoring and Remediation Committee (EM&R): The EM&R Committee provides a citizens' perspective to NNMCAB on current and future environmental remediation activities resulting from historical Los Alamos National Laboratory (LANL) operations and, in particular, issues pertaining to groundwater, surface water and work required under the New Mexico Environment Department Order on Consent. The EM&R Committee will keep abreast of DOE–EM and site programs and plans. The committee will work with the NNMCAB to provide assistance in determining priorities and the best use of limited funds and time. Formal recommendations will be proposed when needed and, after consideration and approval by the full NNMCAB, may be sent to DOE–EM for action.

Purpose of the Waste Management (WM) Committee: The WM Committee reviews policies, practices and procedures, existing and proposed, so as to provide recommendations, advice,

suggestions and opinions to the NNMCAB regarding waste management operations at the Los Alamos site.

Tentative Agenda

- Call to Order and Introductions
- Approval of Agenda
- Approval of Minutes from August 24, 2016
- Sub-Committee Breakout Session
  - Election of Fiscal Year 2017 (FY17) EM&R and WM Committee Officers
  - Draft FY17 Committee Work Plans
  - General Committee Business
- Reconvene Combined Committee Meeting
- Old Business
  - Requests for Future Presentations
- New Business
  - Discussion on Committee Meeting Schedule for Calendar Year 2017
  - Other Items
- Update from DOE: FY17 Budget
- Presentation: Update on Chromium Interim Measures Project
- Public Comment Period
- Adjourn

Public Participation: The NNMCAB's Committees welcome the attendance of the public at their combined committee meeting 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 Menice Santistevan at least seven days in advance of the meeting at the telephone number listed above. Written statements may be filed with the Committees either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Menice Santistevan at the address or telephone number listed above. Requests 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 will be provided a maximum of five minutes to present their comments.

Minutes: Minutes will be available by writing or calling Menice Santistevan at the address or phone number listed above. Minutes and other Board documents are on the Internet at: *http://energy.gov/em/nnmcab/northern-new-mexico-citizens-advisory-board.*

Issued at Washington, DC, on September 29, 2016.

LaTanya R. Butler,

Deputy Committee Management Officer.

[FR Doc. 2016–24057 Filed 10–4–16; 8:45 am]

BILLING CODE 6405–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER16–2684–000]

Nippon Dynawave Packaging Co.; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of Nippon Dynawave Packaging Co.'s application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is October 19, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: September 29, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–24109 Filed 10–4–16; 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: EC16–191–000.

Applicants: Black Hills/Colorado Electric Utility Co, Peak View Wind Energy LLC.

Description: Joint Application for Section 203 Authorization of Black Hills/Colorado Electric Utility Company, LP and Peak View Wind Energy LLC.

Filed Date: 9/26/16.

Accession Number: 20160926–5248.

Comments Due: 5 p.m. ET 10/17/16.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–2721–007.

Applicants: El Paso Electric Company.

Description: Notice of Non-Material Change in Status of El Paso Electric Company.

Filed Date: 9/28/16.

Accession Number: 20160928–5194.

Comments Due: 5 p.m. ET 10/19/16.

Docket Numbers: ER12–2399–007.

Applicants: American Transmission Systems, Incorporated, PJM Interconnection, L.L.C.

Description: Compliance filing: ATSI submits SAs 4452, 4453, 4454 re: Settlement in Compliance w/ER12–2399–006 to be effective 9/25/2016.

Filed Date: 9/28/16.

Accession Number: 20160928–5151.

Comments Due: 5 p.m. ET 10/19/16.

Docket Numbers: ER15–1536–002.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Compliance filing: 2016–09–28_White Pine 1 Compliance re Resettlement Costs to be effective N/A.

Filed Date: 9/28/16.

Accession Number: 20160928–5033.

Comments Due: 5 p.m. ET 10/19/16.

Docket Numbers: ER16–1363–001.

Applicants: Arizona Public Service Company.

Description: Compliance filing: Compliance Filing of Arizona Public

Service Company to be effective 9/30/2016.

Filed Date: 9/28/16.

Accession Number: 20160928–5097.

Comments Due: 5 p.m. ET 10/19/16.

Docket Numbers: ER16–2684–000.

Applicants: Nippon Dynawave Packaging Co.

Description: Baseline eTariff Filing: MBRA Application to be effective 9/30/2016.

Filed Date: 9/29/16.

Accession Number: 20160929–5000.

Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2685–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: Limited, one-time waiver request of Midcontinent Independent System Operator, Inc.

Filed Date: 9/28/16.

Accession Number: 20160928–5200.

Comments Due: 5 p.m. ET 10/19/16.

Docket Numbers: ER16–2686–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2016–09–29_Cancel Schedule 43C Edwards 1 SSR Unit to be effective 12/1/2016.

Filed Date: 9/29/16.

Accession Number: 20160929–5020.

Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2687–000.

Applicants: Chisholm View Wind Project II, LLC.

Description: Baseline eTariff Filing: MBR Tariff to be effective 10/29/2016.

Filed Date: 9/29/16.

Accession Number: 20160929–5023.

Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2688–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 791—Agreement with Montana DOT re Armington Slope Project to be effective 9/30/2016.

Filed Date: 9/29/16.

Accession Number: 20160929–5044.

Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2689–000.

Applicants: NorthWestern Corporation.

Description: § 205(d) Rate Filing: SA 788—Agreement with Montana DOT re Lewistown 50-kV Pole Replacement to be effective 9/30/2016.

Filed Date: 9/29/16.

Accession Number: 20160929–5045.

Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2690–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Amendments to Service Agreements per Assignment of Queue Positions to be effective 5/10/2011.

Filed Date: 9/29/16.

Accession Number: 20160929–5049.

Comments Due: 5 p.m. ET 10/20/16.

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: September 29, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–24106 Filed 10–4–16; 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: RP16–1250–000.

Applicants: Equitrans, L.P.

Description: § 4(d) Rate Filing: Negotiated Rate Service Agreement—Range Resources effective 10–1–2016 to be effective 10/1/2016.

Filed Date: 9/26/16.

Accession Number: 20160926–5183.

Comments Due: 5 p.m. ET 10/11/16.

Docket Numbers: RP16–1251–000.

Applicants: Tennessee Gas Pipeline Company, L.L.C.

Description: § 4(d) Rate Filing: Pipeline Safety and Greenhouse Gas Cost Adjustment Mechanism—2016 to be effective 11/1/2016.

Filed Date: 9/27/16.

Accession Number: 20160927–5047.

Comments Due: 5 p.m. ET 10/11/16.

Docket Numbers: RP16–1252–000.

Applicants: DBM Pipeline, LLC.

Description: § 4(d) Rate Filing: Negotiated Rate Filing to be effective 9/28/2016.

Filed Date: 9/27/16.

Accession Number: 20160927–5065.

Comments Due: 5 p.m. ET 10/11/16.

Docket Numbers: RP16–1253–000.

Applicants: Trunkline Gas Company, LLC.

Description: § 4(d) Rate Filing: Revisions to Rate Schedule GPS and GTC OBA to be effective 10/29/2016.

Filed Date: 9/28/16.

Accession Number: 20160928–5030.

Comments Due: 5 p.m. ET 10/11/16.

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: RP16–1217–001.

Applicants: Equitrans, L.P.

Description: Tariff Amendment: Allocation, Expansion, and Reservation of Capacity Errata Filing to be effective 10/1/2016.

Filed Date: 9/27/16.

Accession Number: 20160927–5074.

Comments Due: 5 p.m. ET 10/11/16.

Any person desiring to protest in any of the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system by clicking on the links or querying the docket number.

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: September 28, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–24108 Filed 10–4–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER16–2687–000]

Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization; Chisholm View Wind Project II, LLC

This is a supplemental notice in the above-referenced proceeding of Chisholm View Wind Project II, LLC's application for market-based rate authority, with an accompanying rate tariff, noting that such application includes a request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability.

Any person desiring to intervene or to protest should file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant.

Notice is hereby given that the deadline for filing protests with regard to the applicant's request for blanket authorization, under 18 CFR part 34, of future issuances of securities and assumptions of liability, is October 19, 2016.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The filings in the above-referenced proceeding are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for electronic review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov.* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: September 29, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–24110 Filed 10–4–16; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #2

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER15–1536–002.
Applicants: Midcontinent Independent System Operator, Inc.
Description: Compliance filing: 2016–09–28_White Pine 1 Compliance re Resettlement Costs to be effective N/A.
Filed Date: 9/28/16.
Accession Number: 20160928–5033.
Comments Due: 5 p.m. ET 10/19/16.

Docket Numbers: ER16–2360–001.
Applicants: Great Western Wind Energy, LLC.
Description: Notice of Non-Material Change in Status of Great Western Wind Energy, LLC.
Filed Date: 9/28/16.
Accession Number: 20160928–5195.
Comments Due: 5 p.m. ET 10/19/16.

Docket Numbers: ER16–2691–000.
Applicants: Southern California Edison Company.
Description: § 205(d) Rate Filing: DSA Mirasol Development LLC Mirasol Pomona 1 Project to be effective 1/5/2017.
Filed Date: 9/29/16.
Accession Number: 20160929–5066.
Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2692–000.
Applicants: Avista Corporation.
Description: Compliance filing: Avista Corp OATT Order 827 and 828 Compliance Filing to be effective 10/14/2016.
Filed Date: 9/29/16.
Accession Number: 20160929–5081.
Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2693–000.
Applicants: Northern States Power Company, a Minnesota.
Description: § 205(d) Rate Filing: 2016–9–29 CAPX Brookings CMA–536–0.2.0—Filing to be effective 1/1/2016.
Filed Date: 9/29/16.
Accession Number: 20160929–5082.
Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2694–000.
Applicants: Orange and Rockland Utilities, Inc.
Description: Compliance filing: Docket No. ER16–896 to be effective 9/29/2016.
Filed Date: 9/29/16.
Accession Number: 20160929–5084.
Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2695–000.
Applicants: ISO New England Inc., New England Power Pool Participants Committee, Eversource Energy Service Company (as agent).
Description: Compliance filing: Amendments to ISO–NE Tariff in Compliance with Order Nos. 827 and 828 to be effective 10/5/2016.
Filed Date: 9/29/16.
Accession Number: 20160929–5085.
Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2696–000.
Applicants: Louisville Gas and Electric Company.
Description: Compliance filing: Order 827 and 828 Compliance Revised Att M and N to be effective 10/14/2016.
Filed Date: 9/29/16.
Accession Number: 20160929–5089.
Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2697–000.
Applicants: Solea PJM, LLC.
Description: Tariff Cancellation: Cancellation of MBR Tariff to be effective 9/30/2016.
Filed Date: 9/29/16.
Accession Number: 20160929–5090.
Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2698–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Amendment to Service Agreement Nos. 3352 and 3153, Queue No. W1–029 to be effective 11/4/2011.
Filed Date: 9/29/16.
Accession Number: 20160929–5098.
Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2699–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Service Agreement No. 4546, Queue Position AB1–115 to be effective 8/30/2016.
Filed Date: 9/29/16.
Accession Number: 20160929–5139.
Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2700–000.
Applicants: The Connecticut Light and Power Company.
Description: § 205(d) Rate Filing: Beacon Falls Energy Park, LLC Original Service Agreement No. IA–ES–36 to be effective 9/29/2016.
Filed Date: 9/29/16.
Accession Number: 20160929–5148.

Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2701–000.

Applicants: California Independent System Operator Corporation.

Description: § 205(d) Rate Filing: 2016–09–26 Appendix C Locational Marginal Price Overlap to be effective 10/1/2016.

Filed Date: 9/29/16.

Accession Number: 20160929–5162.

Comments Due: 5 p.m. ET 10/20/16.

Docket Numbers: ER16–2702–000.

Applicants: Entergy Louisiana, LLC.

Description: § 205(d) Rate Filing: ELL–SRMPA 11th Extension of Interim Agreement to be effective 10/1/2016.

Filed Date: 9/29/16.

Accession Number: 20160929–5172.

Comments Due: 5 p.m. ET 10/20/16.

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: September 29, 2016.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2016–24107 Filed 10–4–16; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2016–0198; FRL–9952–52]

Pesticide Program Dialogue Committee; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Pursuant to the Federal Advisory Committee Act, the Environmental Protection Agency's (EPA's) Office of Pesticide Programs is announcing a public meeting of the Pesticide Program Dialogue Committee (PPDC) on November 2–3, 2016. This meeting provides advice and recommendations to the EPA Administrator on issues associated with pesticide regulatory development and reform initiatives, evolving public policy and program implementation issues, and science issues associated with evaluating and reducing risks from use of pesticides.

DATES: The meeting will be held on Wednesday, November 2, 2016, from 9 a.m. to 5:00 p.m., and Thursday, November 3, 2016, from 9 a.m. to 12:00 p.m.

Agenda: A draft agenda will be posted on or before October 19, 2016.

Accommodations requests: To request accommodation of a disability, please contact the person listed under **FOR FURTHER INFORMATON CONTACT**, preferably at least 10 days prior to the meeting, to give EPA as much time as possible to process your request.

ADDRESSES: The PPDC Meeting will be held at 1 Potomac Yard South, 2777 S. Crystal Drive, Arlington, VA, in the lobby-level Conference Center. EPA's Potomac Yard South Bldg. is approximately 1 mile from the Crystal City Metro Station.

FOR FURTHER INFORMATION CONTACT: Dea Zimmerman, Office of Pesticide Programs (LC–8J), Environmental Protection Agency, 77 W. Jackson Boulevard, Chicago, IL 60604; telephone number: (312) 353–6344; email address: *zimmerman.dea@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you work in agricultural settings or if you are concerned about implementation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Federal Food, Drug, and Cosmetic Act (FFDCA); and the amendments to both of these major pesticide laws by the Food Quality Protection Act (FQPA) of 1996; the Pesticide Registration Improvement Act, and the Endangered Species Act. Potentially affected entities may include, but are not limited to: Agricultural workers and farmers; pesticide industry and trade associations; environmental, consumer, and farm worker groups; pesticide users and growers; animal rights groups; pest consultants; State, local, and tribal governments; academia; public health organizations; and the public. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2016–0198 is available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. Background

The PPDC is a federal advisory committee chartered under the Federal Advisory Committee Act (FACA), Public Law 92–463. EPA established the PPDC in September 1995 to provide advice and recommendations to the EPA Administrator on issues associated with pesticide regulatory development and reform initiatives, evolving public policy and program implementation issues, and science issues associated with evaluating and reducing risks from use of pesticides. The following sectors are represented on the current PPDC: Environmental/public interest and animal rights groups; farm worker organizations; pesticide industry and trade associations; pesticide user, grower, and commodity groups; Federal and State/local/tribal governments; the general public; academia; and public health organizations.

III. How can I request to participate in this meeting?

PPDC meetings are free, open to the public, and no advance registration is required. Public comments may be made during the public comment session of each meeting or in writing to the person listed under **FOR FURTHER INFORMATION CONTACT**.

Authority: 7 U.S.C. 136 *et seq.*

Dated: September 22, 2016.

Jack Housenger,

Director, Office of Pesticide Programs.

[FR Doc. 2016–24104 Filed 10–4–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPPT–2013–0677; FRL–9953–29]

Receipt of Information Under the Toxic Substances Control Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is announcing its receipt of information submitted pursuant to an Enforceable Consent Agreement (ECA) issued by EPA under the Toxic Substances Control Act (TSCA). As required by TSCA, this document identifies each chemical substance and/or mixture for which information has been received; the uses or intended uses of such chemical substance and/or mixture and the information required by the applicable protocols and methodologies for the development of information; and describes the nature of the information received. Each chemical substance and/or mixture related to this announcement is identified in Unit I. under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT:

For technical information contact: Kathy Calvo, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; telephone number: (202) 564–8089; email address: *calvo.kathy@epa.gov.*

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554–1404; email address: *TSCA-Hotline@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Chemical Substances and/or Mixtures

Information about the following chemical substance and/or mixture is provided in Unit IV.: *Octamethylcyclotetrasiloxane (D4) (CASRN 556–67–2).*

II. Federal Register Publication Requirement

Section 4(d) of TSCA (15 U.S.C. 2603(d)) requires EPA to publish a notice in the **Federal Register** reporting the receipt of information submitted pursuant to ECAs promulgated under TSCA section 4(a) (15 U.S.C. 2603).

III. Docket Information

A docket, identified by the docket identification (ID) number EPA–HQ–OPPT–2013–0677, has been established for this **Federal Register** document that announces the receipt of information. Upon EPA's completion of its quality assurance review, the information received will be added to the docket for the ECA that required the information. Use the docket ID number provided in Unit IV. to access the information in the docket for the related ECA.

The docket for this **Federal Register** document and the docket for each related ECA is available electronically at *http://www.regulations.gov* or in person at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPPT Docket is (202) 566–0280. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

IV. Information Received

This unit contains the information required by TSCA section 4(d) for the information received by EPA.

Octamethylcyclotetrasiloxane (D4) (CASRN 556–67–2)

1. *Chemical Use(s):* D4 is used as an intermediate for silicone copolymers and other chemicals. D4 is also used in industrial processing applications as a solvent (which becomes part of a product formulation or mixture), finishing agent, and an adhesive and sealant chemical. It is also used for both consumer and commercial purposes in paints and coatings, and plastic and rubber products and has consumer uses in polishes, sanitation, soaps, detergents, adhesives, and sealants.

2. *Applicable ECA:* Final Enforceable Consent Agreement for Environmental Testing for Octamethylcyclotetrasiloxane (D4) (CASRN 556–67–2).

3. *Information Received:* The following listing describes the nature of the test data received. The test data will be added to the docket for the applicable ECA and can be found by referencing the docket ID number provided. EPA reviews of information will be added to the same docket upon completion.

a. *Field Sampling of Benthic Organisms: Carrolton, KY; Gresham, OR; Iowa City, IA; and Steamboat Springs, CO.* The docket ID number assigned to this data is EPA–HQ–OPPT–2012–2009.

b. *Interim Progress Report.* The docket ID number assigned to this data is EPA–HQ–OPPT–2012–2009.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: September 29, 2016.

Maria J. Doa,

Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2016–24112 Filed 10–4–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2015–0163; FRL–9952–04]

Amendments, Extensions, and/or Issuances of Experimental Use Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted amendments, extensions, and/or issuances of experimental use permits (EUPs) to the pesticide applicants described in Unit II. of the **SUPPLEMENTARY INFORMATION** section. An EUP allows use of a pesticide for experimental or research purposes only in accordance with the limitations in the permit.

FOR FURTHER INFORMATION CONTACT: Robert McNally, Director, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *BPPDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action is directed to the public in general. Although this action may be of particular interest to those persons who conduct or sponsor research on pesticides, EPA has not attempted to describe all the specific entities that may be affected by this action.

B. How can I get copies of this document and other related information?

The dockets for these actions, identified by the docket identification (ID) numbers as shown in the body of this document, are available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC

20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. EUPs

EPA has granted amendments, extensions, and/or issuances of the following EUPs:

1. 88877–EUP–2. (EPA–HQ–OPP–2015–0374). Amendment and Extension. University of Kentucky, Department of Entomology, S–225 Agricultural Science Center North, Lexington, KY 40546–0091. This EUP allows the use of 14,400,000 male *Aedes aegypti* WB1 Strain mosquitoes weighing 34.032 ounces and containing 34.032×10^{-5} ounce of the active ingredient *Wolbachia pipientis, w*AlbB Strain to evaluate the active ingredient's effectiveness in suppressing and eliminating *Aedes aegypti* mosquitoes. The program is authorized only in the states of California and Florida over 1,549 acres. The EUP is effective from August 30, 2016, to December 31, 2017. EPA received 11 comments that consist of a mix of negative, neutral, and positive comments from private citizens, a company, and a non-governmental organization. EPA's response to these comments can be found in the docket.

2. 91163–EUP–1. (EPA–HQ–OPP–2015–0692). Issuance. Texas Corn Producers Board, 4205 North Interstate 27, Lubbock, TX 79403. This EUP allows the use of 266,000 pounds of formulated pesticide product FourSure™ and approximately 2 pounds of the active ingredients *Aspergillus flavus* strains TC16F, TC35C, TC38B, and TC46G to evaluate the effectiveness of the atoxigenic active ingredients in FourSure™ in displacing toxigenic (aflatoxin producing) *Aspergillus flavus* in cornfields. The program is authorized only in the state of Texas over 26,600 acres. The EUP is effective from August 25, 2016, to December 31, 2019, although testing will only occur in 2017, 2018, and 2019. EPA received one negative comment that was anonymous. As the anonymous commenter did not specify any particular safety concern with regard to this EUP's issuance, the comment was not considered further.

Authority: 7 U.S.C. 136 *et seq.*

Dated: September 16, 2016.

Mark A. Hartman,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 2016–24101 Filed 10–4–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2014–0009 and EPA–HQ–OPP–2014–0011; FRL–9951–70]

Pesticide Product Registration; Receipt of Applications for New Uses and New Active Ingredients; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; correction.

SUMMARY: EPA issued a notice in the **Federal Register** of August 18, 2016, concerning its receipt of applications to add new food uses on previously registered pesticide products and to register new pesticide products containing active ingredients not included in any currently registered pesticide products. This document corrects omissions within the referenced notice.

FOR FURTHER INFORMATION CONTACT: Michael Goodis, Registration Division (7505P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

The Agency included in the August 18, 2016 notice a list of those who may be potentially affected by this action.

B. How can I get copies of this document and other related information?

The docket for this action, identified by docket identification (ID) numbers EPA–HQ–OPP–2014–0009 and HQ–OPP–2014–0011, are available at *http://www.regulations.gov* or at the Office of Pesticide Programs Regulatory Public Docket (OPP Docket) in the Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC 20460–0001. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the OPP Docket is (703) 305–5805. Please review the visitor instructions and additional information about the docket available at *http://www.epa.gov/dockets.*

II. What does this correction do?

FR Doc. 2016–19758 published in the **Federal Register** of August 18, 2016 (81 FR 55192) (FRL–9950–20) is corrected as follows:

1. On page 55192, first column, under the heading **SUMMARY**, paragraph 1, line 1, correct ''EPA has received applications to register pesticide products containing active ingredients not included in any currently registered pesticide products.'' to read ''EPA has received applications to add new food uses on previously registered pesticide products and to register new pesticide products containing active ingredients not included in any currently registered pesticide products.''

2. On page 55192, second column, under the heading ''II. Registration Applications,'' paragraph 4, line 1, correct ''EPA has received applications to register pesticide products containing active ingredients not included in any currently registered pesticide products.'' to read ''EPA has received applications to add new food uses on previously registered pesticide products and to register new pesticide products containing active ingredients not included in any currently registered pesticide products.''

Authority: 7 U.S.C. 136 *et seq.*

Dated: September 16, 2016.

Daniel J. Rosenblatt,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 2016–24103 Filed 10–4–16; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0741]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the

following information collection. 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 December 5, 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 *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: 3060–0741.

Title: Technology Transitions, GN Docket No. 13–5, et al.

Form Number(s): N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 5,357 respondents; 573,767 responses.

Estimated Time per Response: 0.5–8 hours.

Frequency of Response: On occasion and one-time reporting requirements; recordkeeping and third party disclosure requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority is contained in 47 U.S.C. 251.

Total Annual Burden: 575,840 hours.

Total Annual Cost: No cost.

Privacy Impact Assessment: No impact(s).

Nature and Extent of Confidentiality: The Commission is not requesting that the respondents submit confidential information to the FCC. Respondents may, however, request confidential treatment for information they believe to be confidential under 47 CFR 0.459 of the Commission's rules.

Needs and Uses: Section 251 of the Communications Act of 1934, as amended, 47 U.S.C. 251, is designed to accelerate private sector development and deployment of telecommunications technologies and services by spurring competition. These OMB collections are designed to help implement certain provisions of section 251, and to eliminate operational barriers to competition in the telecommunications services market. Specifically, these OMB collections will be used to implement (1) local exchange carriers' (''LECs'') obligations to provide their competitors with dialing parity and non-discriminatory access to certain services and functionalities; (2) incumbent local exchange carriers' (''ILECs'') duty to make network information disclosures; and (3) numbering administration. The Commission estimates that the total annual burden of the entire collection, as revised, is 575,840 hours. This revision relates to a change in one of many components of the currently approved collection—specifically, certain reporting, recordkeeping and/or third party disclosure requirements under section 251(c)(5). In August 2015, the Commission adopted new rules concerning certain information collection requirements implemented under section 251(c)(5) of the Act, pertaining to network change disclosures. The changes to those rules applied specifically to a certain subset of network change disclosures, namely notices of planned copper retirements. The changes were designed to provide interconnecting entities adequate time to prepare their networks for the planned copper retirements and to ensure that consumers are able to make informed choices. The Commission estimated that the 2015 revisions did not result in any additional burden hours or outlays of funds for hiring outside contractors or procuring equipment. In July 2016, the Commission revised section 51.329(c) of its network change disclosure rules to make available to filers new titles applicable to copper retirement notices. The Commission estimates that the revision does not result in any additional burden hours or outlays of funds for hiring outside contractors or procuring.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2016–24069 Filed 10–4–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

FDIC Advisory Committee on Economic Inclusion (ComE–IN); Notice of Meeting

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of open meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, Public Law 92–463 (Oct. 6, 1972), 5 U.S.C. App. 2, notice is hereby given of a meeting of the FDIC Advisory Committee on Economic Inclusion, which will be held in Washington, DC The Advisory Committee will provide advice and recommendations on initiatives to expand access to banking services by underserved populations.

DATES: Thursday, October 20, 2016, from 9:00 a.m. to 3:30 p.m.

ADDRESSES: The meeting will be held in the FDIC Board Room on the sixth floor of the FDIC Building located at 550 17th Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Committee Management Officer of the FDIC, at (202) 898–7043.

SUPPLEMENTARY INFORMATION:

Agenda: The agenda will be focused on the FDIC's National Survey of Unbanked and Underbanked Households, the FDIC's Youth Savings Pilot, and expanding access to safe transaction accounts. The agenda may be subject to change. Any changes to the agenda will be announced at the beginning of the meeting.

Type of Meeting: The meeting will be open to the public, limited only by the space available on a first-come, first-served basis. For security reasons, members of the public will be subject to security screening procedures and must present a valid photo identification to enter the building. The FDIC will provide attendees with auxiliary aids (*e.g.,* sign language interpretation) required for this meeting. Those attendees needing such assistance should call (703) 562–6067 (Voice or TTY) at least two days before the meeting to make necessary arrangements. Written statements may be filed with the committee before or

after the meeting. This ComE–IN meeting will be Webcast live via the Internet at: *http://fdic.windrosemedia.com.* Questions or troubleshooting help can be found at the same link. For optimal viewing, a high speed internet connection is recommended. The ComE–IN meeting videos are made available on-demand approximately two weeks after the event.

Dated: September 30, 2016.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary, Federal Deposit Insurance Corporation.

[FR Doc. 2016–24039 Filed 10–4–16; 8:45 am]

BILLING CODE 6714–01–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 October 31, 2016.

A. Federal Reserve Bank of Dallas (Robert L. Triplett III, Senior Vice President), 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Caldwell Holding Company,* Columbia, Louisiana; to acquire Progressive National Financial Corporation, and thereby indirectly acquire Progressive National Bank, both in Mansfield, Louisiana.

Board of Governors of the Federal Reserve System, September 30, 2016.

Margaret McCloskey Shanks,

Deputy Secretary of the Board.

[FR Doc. 2016–24055 Filed 10–4–16; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–0001]

Pharmacy Compounding Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Pharmacy Compounding Advisory Committee (PCAC). The general function of the committee is to provide advice on scientific, technical, and medical issues concerning drug compounding, as well as any other product for which FDA has regulatory responsibility, and to make appropriate recommendations to the Agency. The meeting will be open to the public.

DATES: The meeting will be held on November 3, 2016, from 8:30 a.m. to 4:30 p.m.

ADDRESSES: FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (Rm. 1503), Silver Spring, MD 20993–0002. Answers to commonly asked questions, including information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FOR FURTHER INFORMATION CONTACT: Cindy Hong, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, FAX: 301–847–8533, *PCAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

Background: Section 503A of the FD&C Act (21 U.S.C. 353a) describes the conditions that must be satisfied for human drug products compounded by a licensed pharmacist in a State licensed pharmacy or a Federal facility, or licensed physician, to be exempt from the following three sections of the Federal Food, Drug, and Cosmetic Act (FD&C Act): (1) Section 501(a)(2)(B) (21 U.S.C. 351(a)(2)(B)) concerning current good manufacturing practice (CGMP); (2) section 502(f)(1) (21 U.S.C. 352(f)(1)) concerning the labeling of drugs with adequate directions for use; and (3) section 505 (21 U.S.C. 355) concerning the approval of human drug products under new drug applications (NDAs) or abbreviated new drug applications (ANDAs).

The Drug Quality and Security Act added a new section 503B to the FD&C Act (21 U.S.C. 353b), which created a new category of compounders termed ''outsourcing facilities.'' Under section 503B of the FD&C Act, outsourcing facilities are defined, in part, as facilities that meet certain conditions described in section 503B, including registration with FDA as an outsourcing facility. If these conditions are satisfied, a drug product compounded for human use by or under the direct supervision of a licensed pharmacist in an outsourcing facility is exempt from three sections of the FD&C Act: (1) Section 502(f)(1) concerning the labeling of drugs with adequate directions for use); (2) section 505 concerning the approval of human drug products under NDAs or ANDAs; and (3) section 582 concerning the drug supply chain security requirements (21 U.S.C. 360eee–1). Outsourcing facilities are not exempt from CGMP requirements in section 501(a)(2)(B).

One of the conditions that must be satisfied to qualify for the exemptions under section 503A of the FD&C Act is that a bulk drug substance (active pharmaceutical ingredient) used in a compounded drug product must meet one of the following criteria: (1) Complies with the standards of an applicable United States Pharmacopoeia (USP) or National Formulary monograph, if a monograph exists, and the USP chapter on pharmacy compounding; (2) if an applicable

monograph does not exist, is a component of a drug approved by the Secretary of Health and Human Services (the Secretary); or (3) if such a monograph does not exist and the drug substance is not a component of a drug approved by the Secretary, appears on a list developed by the Secretary through regulations issued by the Secretary (the ''503A Bulks List'') (see section 503A(b)(1)(A)(i) of the FD&C Act).

Another condition that must be satisfied to qualify for the exemptions under section 503A of the FD&C Act is that the compounded drug product is not a drug product identified by the Secretary by regulation as a drug product that presents demonstrable difficulties for compounding that reasonably demonstrate an adverse effect on the safety or effectiveness of that drug product (see section 503A(b)(3)(A) of the FD&C Act).

A condition that must be satisfied to qualify for the exemptions in section 503B of the FD&C Act is that the compounded drug is not identified (directly or as part of a category of drugs) on a list, published by the Secretary by regulation after consulting with the PCAC, of drugs or categories of drugs that present demonstrable difficulties for compounding that are reasonably likely to lead to an adverse effect on the safety or effectiveness of the drug or category of drugs, taking into account the risks and benefits to patients, or the drug is compounded in accordance with all applicable conditions identified on the list as conditions that are necessary to prevent the drug or category of drugs from presenting such demonstrable difficulties (see section 503B(a)(6)(A) and (B) of the FD&C Act).

FDA intends to discuss with the committee bulk drug substances nominated for inclusion on the 503A Bulks List and drug products nominated for inclusion on the list of drug products that present demonstrable difficulties for compounding under sections 503A and 503B of the FD&C Act (''Difficult to Compound List'').

Agenda: The committee intends to discuss five bulk drug substances nominated for inclusion on the section 503A Bulks List. FDA will discuss the following nominated bulk drug substances: Glycolic acid, trichloroacetic acid, kojic acid, diindolylmethane, and vasoactive intestinal peptide. The chart in this document describes which use(s) FDA reviewed for each of the five bulk drug substances being discussed at this advisory committee meeting. The nominators of these substances will be invited to make a short presentation supporting the nomination.

Drug	Use(s) reviewed
Diindolylmethane	Treatment of cancer.
Glycolic acid	Hyperpigmentation (including melasma) and photodamaged skin.
Trichloroacetic acid	Common warts and genital warts.
Kojic acid	Hyperpigmentation and as a chelating agent to promote wound healing.
Vasoactive intestinal peptide	A condition described as ''chronic inflammatory response syndrome''.

The committee also intends to discuss drug products that employ transdermal and topical delivery systems, which were nominated for the Difficult to Compound List. The nominators will be invited to make a short presentation supporting the nomination.

FDA intends to make background material available to the public on its Web site no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material will be available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before October 25, 2016. Oral presentations from the public will be scheduled between approximately 9:25 a.m. and 9:35 a.m., 10:25 a.m. and 10:35 a.m., 11:40 a.m. and 11:50 a.m., 1:45 p.m. and 1:55 p.m., 2:50 p.m. and 3 p.m., and 4:10 p.m. and 4:20 p.m. on November 3, 2016. Those individuals interested in making formal oral presentations should notify Cindy Hong and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before October 17, 2016. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by October 18, 2016.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact Cindy Hong at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: September 30, 2016.

Janice M. Soreth,

Acting Associate Commissioner, Special Medical Programs.

[FR Doc. 2016–24085 Filed 10–4–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2016–N–0001]

Request for Nominations for Voting Members for the Patient Engagement Advisory Committee

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for nominations.

SUMMARY: The Food and Drug Administration's (FDA) is requesting additional nominations for members to serve on the Center for Devices and

Radiological Health's (CDRH) Patient Engagement Advisory Committee (the PEAC or Committee). The Committee provides relevant skills and perspectives in order to improve communication of benefits, risks and clinical outcomes, and increase integration of patient perspectives into the regulatory process for medical devices. It performs its duties by identifying new approaches, promoting innovation, recognizing unforeseen risks or barriers, and identifying unintended consequences that could result from FDA policy.

FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees and, therefore, particularly encourages nominations of appropriately qualified candidates from these groups.

DATES: Nominations received by November 21, 2016, will be given first consideration for membership on the Committee. Nominations received after November 21, 2016, will be considered for nomination to the Committee as later vacancies occur.

ADDRESSES: All nominations for membership should be sent electronically by logging into the FDA Advisory Committee Membership Nomination Portal: *https://www.accessdata.fda.gov/scripts/FACTRSPortal/FACTRS/index.cfm* please select Academician/Practitioner in the drop down menu, to apply for membership, or by mail to Advisory Committee Oversight and Management Staff, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5103, Silver Spring, MD 20993–0002, or by FAX: 301–847–8640. Information about becoming a member on an FDA advisory committee can also be obtained by visiting FDA's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm.*

FOR FURTHER INFORMATION CONTACT: Letise Williams, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave. Bldg. 66, Rm. 5441, 301–796–8398, FAX: 301–847–8510, *Letise.Williams@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: FDA is requesting nominations for voting members for the Committee. FDA seeks to include the views of women and men, members of all racial and ethnic groups, and individuals with and without disabilities on its advisory committees and, therefore, encourages nominations of appropriately qualified candidates from these groups.

I. General Description of the Committee's Duties

The PEAC provides relevant skills and perspectives in order to improve communication of benefits, risks, and clinical outcomes and increase integration of patient perspectives into the regulatory process for medical devices.

The PEAC provides advice on issues relating to medical devices, the regulation of devices, and their use by patients. A variety of topics may be considered by the PEAC, including Agency guidance and policies, clinical trial or registry design, patient preference study design, benefit-risk determinations, device labeling, unmet clinical needs, available alternatives, patient reported outcomes and device-related quality of life or health status issues.

II. Criteria for Voting Members

The Committee consists of a core of nine voting members including the Chair. Members and the Chair are selected by the Commissioner of Food and Drugs or designee from candidates who are knowledgeable in areas such as clinical research, primary care patient experience, healthcare needs of patient groups in the United States, or are experienced in the work of patient and health professional organizations, methodologies for eliciting patient preferences, and strategies for communicating benefits, risks, and clinical outcomes to patients and research participants. Prospective members should also have an understanding of the broad spectrum of patients in a particular disease area.

Members will be invited to serve for overlapping terms of up to 4 years. Non-Federal members of this Committee serve as Special Government Employees, with the exception of the representatives from Industry.

III. Nomination Procedures

Any interested person may nominate one or more qualified individuals for membership on the Committee. Self-nominations are also accepted.

Nominations should include a cover letter; a current, complete resume or curriculum vitae for each nominee, including a current business and/or home address, telephone number, and email address if available; and should specify the advisory committee for which the nominee is recommended.

Nominations should also acknowledge that the nominee is aware of the nomination, unless self-nominated. FDA will ask potential candidates to provide detailed information concerning such matters related to financial holdings, employment, and research grants and/or contracts to permit evaluation of possible sources of conflicts of interest.

This notice is issued under the Federal Advisory Committee Act (5 U.S.C. app. 2) and 21 CFR part 14, relating to advisory committees.

Dated: September 28, 2016.

Janice M. Soreth,

Acting Associate Commissioner, Special Medical Programs.

[FR Doc. 2016–24100 Filed 10–4–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2007–D–0369]

Product-Specific Bioequivalence Recommendations; Draft and Revised Draft Guidances for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or Agency) is announcing the availability of additional draft and revised draft product-specific bioequivalence (BE) recommendations. The recommendations provide product-specific guidance on the design of BE studies to support abbreviated new drug applications (ANDAs). In the **Federal Register** of June 11, 2010, FDA announced the availability of a guidance for industry entitled ''Bioequivalence Recommendations for Specific Products'' that explained the process that would be used to make product-specific BE recommendations available to the public on FDA's Web site. The BE recommendations identified in this notice were developed using the process described in that guidance.

DATES: Although you can comment on any guidance at any time (see 21 CFR 10.115(g)(5)), to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance, submit either electronic or written comments on the draft guidance by December 5, 2016.

ADDRESSES: You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *http://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *http://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand delivery/Courier (for written/paper submissions):* Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Division of Dockets Management, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2007–D–0369 for ''Product-Specific Bioequivalence Recommendations; Draft and Revised Draft Guidances for Industry.'' Received comments will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *http://www.regulations.gov* or at the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *http://www.regulations.gov.* Submit both copies to the Division of Dockets Management. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *http://www.fda.gov/regulatoryinformation/dockets/default.htm.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Xiaoqiu Tang, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 75, Rm. 4730, Silver Spring, MD 20993–0002, 301–796–5850.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of June 11, 2010 (75 FR 33311), FDA announced the availability of a guidance for industry entitled ''Bioequivalence Recommendations for Specific Products'' that explained the process that would be used to make product-specific BE recommendations available to the public on FDA's Web site at *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm.*

As described in that guidance, FDA adopted this process as a means to develop and disseminate product-specific BE recommendations and provide a meaningful opportunity for the public to consider and comment on those recommendations. Under that process, draft recommendations are posted on FDA's Web site and announced periodically in the **Federal Register**. The public is encouraged to submit comments on those recommendations within 60 days of their announcement in the **Federal Register**. FDA considers any comments received and either publishes final recommendations or publishes revised draft recommendations for comment. Recommendations were last announced in the **Federal Register** on June 17, 2016 (81 FR 39672). This notice announces draft product-specific BE recommendations, either new or revised, that are posted on FDA's Web site.

II. Drug Products for Which New Draft Product-Specific BE Recommendations Are Available

FDA is announcing the availability of a new draft guidance for industry on product-specific BE recommendations for drug products containing the following active ingredients:

TABLE 1—NEW DRAFT PRODUCT-SPECIFIC BE RECOMMENDATIONS FOR DRUG PRODUCTS

Acetaminophen; Oxycodone hydrochloride
Alectinib hydrochloride
Betamethasone dipropionate
Betamethasone valerate
Captopril
Carbidopa; levodopa
Cholic acid
Clobetasol propionate (multiple reference listed drugs)
Cobicistat; Elvitegravir; Emtricitabine; Tenofovir alafenamide fumarate
Crotamiton (multiple reference listed drugs)
Desonide
Dexlansoprazole
Elbasvir; grazoprevir
Eltrombopag Olamine
Esomeprazole magnesium
Fluticasone propionate
Halobetasol propionate
Hydrocodone bitartrate (multiple reference listed drugs)
Hydrocortisone valerate
Ibuprofen
Iron dextran
Methylphenidate hydrochloride
Morphine sulfate
Olopatadine hydrochloride
Oxymorphone hydrochloride
Prochlorperazine

TABLE 1—NEW DRAFT PRODUCT-SPECIFIC BE RECOMMENDATIONS FOR DRUG PRODUCTS—Continued

Pyrazinamide
Rolapitant hydrochloride
Triamcinolone acetonide (multiple reference listed drugs)
Umeclidinium bromide

III. Drug Products for Which Revised Draft Product-Specific BE Recommendations Are Available

FDA is announcing the availability of a revised draft guidance for industry on product-specific BE recommendations for drug products containing the following active ingredients:

TABLE 2—REVISED DRAFT PRODUCT-SPECIFIC BE RECOMMENDATIONS FOR DRUG PRODUCTS

Bacitracin
Buprenorphine
Clonidine
Cyclosporine
Dexlansoprazole
Diclofenac Epolamine
Erythromycin
Estradiol (multiple reference listed drugs)
Ethinyl Estradiol; Norelgestromin
Fentanyl
Granisetron
Icosapent ethyl
Lansoprazole
Lidocaine
Menthol; Methyl Salicylate
Mesalamine
Methylphenidate
Morphine sulfate
Nicotine
Nitroglycerin (multiple reference listed drugs)
Omega-3-acid ethyl esters
Oxybutynin
Oxycodone HCl
Pantoprazole sodium
Rivastigmine
Rotigotine
Scopolamine
Selegiline
Testosterone

For a complete history of previously published **Federal Register** notices related to product-specific BE recommendations, go to *http://www.regulations.gov* and enter Docket No. FDA–2007–D–0369.

These draft guidances are being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). These draft guidances, when finalized, will represent the current thinking of FDA on the product-specific design of BE studies to support ANDAs. They do not establish any rights for any person and are not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations.

IV. Electronic Access

Persons with access to the Internet may obtain the draft guidance at either *http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm* or *http://www.regulations.gov.*

Dated: September 30, 2016.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2016–24050 Filed 10–4–16; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Prospective Grant of Exclusive Patent License: Development of Anti-CD70 Chimeric Antigen Receptors for the Treatment of CD70 Expressing Cancers

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The National Cancer Institute, National Institutes of Health, Department of Health and Human Services, is contemplating the grant of an Exclusive Patent License to Kite Pharma, Inc. (''Kite'') located in Santa Monica, CA to practice the inventions embodied in the patent applications listed in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: Only written comments and/or applications for a license which are received by the NCI Technology Transfer Center on or before October 20, 2016 will be considered.

ADDRESSES: Requests for copies of the patent applications, inquiries, and comments relating to the contemplated Exclusive Patent License should be directed to: Andrew Burke, Ph.D., Licensing and Patenting Manager, NCI Technology Transfer Center, 9609 Medical Center Drive, RM 1E530 MSC 9702, Bethesda, MD 20892–9702 (for business mail), Rockville, MD 20850–9702 Telephone: (240) 276–5530; Facsimile: (240) 276–5504; Email: *andy.burke@nih.gov*

SUPPLEMENTARY INFORMATION: United States Provisional Patent Application No. 62/088,882, filed December 8, 2014, entitled ''Anti-CD70 Chimeric Antigen Receptors'' [HHS Reference No. E–021–2015/0–US–01]; and PCT Application No. PCT/US2015/025047 filed April 9, 2015 entitled ''Anti-CD70 Chimeric Antigen Receptors'' [HHS Reference No. E–021–2015/0–PCT–02] (and U.S. and foreign patent applications claiming priority to the aforementioned applications).

The patent rights in these inventions have been assigned to the government of the United States of America.

The prospective Exclusive Patent License territory may be worldwide and the field of use may be limited to the development, manufacture and commercialization of retrovirally-engineered anti-CD70 chimeric antigen receptor (CAR)-based autologous peripheral blood T cell therapy products, as set forth in the Licensed Patent Rights, for the treatment of CD70 expressing cancers in humans.

The present invention describes certain CARs targeting CD70. CARs are hybrid proteins comprised of extracellular antigen binding domains and intracellular signaling domains designed to activate the cytotoxic functions of CAR-transduced T cells upon antigen stimulation.

CD70 is a co-stimulatory molecule that provides proliferative and survival cues to competent cells upon binding to its cognate receptor, CD27. Its expression is primarily restricted to activated lymphoid cells; however, recent research has demonstrated that several cancers, including renal cell carcinoma, glioblastoma, non-Hodgkin's lymphoma, and chronic myelogenous leukemia also express CD70 under certain circumstances. Due to its limited expression in normal tissues, CARs targeting CD70 may be useful in adoptive cell therapy protocols for the treatment of select cancers.

This notice is made in accordance with 35 U.S.C. 209 and 37 CFR part 404. The prospective Exclusive Patent License will be royalty bearing and may be granted unless within fifteen (15) days from the date of this published notice, the National Cancer Institute receives written evidence and argument that establishes that the grant of the license would not be consistent with the requirements of 35 U.S.C. 209 and 37 CFR part 404.

Complete applications for a license in the prospective field of use that are timely filed in response to this notice will be treated as objections to the grant of the contemplated Exclusive Patent License. Comments and objections submitted to this notice will not be made available for public inspection and, to the extent permitted by law, will not be released under the *Freedom of Information Act,* 5 U.S.C. 552.

Dated: September 29, 2016.

Richard U. Rodriguez,

Associate Director, Technology Transfer Center. National Cancer Institute.

[FR Doc. 2016–24030 Filed 10–4–16; 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 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 Allergy and Infectious Diseases Special Emphasis Panel; Consortium for Food Allergy Research: Leadership Center (UM2).

Date: November 16–18, 2016.

Time: 7:30 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The William F. Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: Andrea L. Wurster, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, Room 3G33B, National Institutes of Health, NIAID, 5601 Fishers Lane, MSC 9823, Bethesda, MD 20899823, (240) 669–5062, *wurstera@mail.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: September 29, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–24026 Filed 10–4–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; 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 Child Health and Human Development Special Emphasis Panel.

Date: November 9, 2016.

Time: 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, 6710 B, Rm 2133, Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Joanna Kubler-Kielb, Scientific Review Officer, Scientific Review Branch, Eunice Kennedy Shriver National Institute of Child Health and Human Development, 6710B Bethesda Drive, Bethesda, MD 20892, 301–435–6916, *kielbj@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: September 29, 2016.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–24027 Filed 10–4–16; 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 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 Allergy and Infectious Diseases Special Emphasis Panel; Cooperative Study Group for Autoimmune Disease Prevention (CSGADP).

Date: November 3–4, 2016.

Time: Time: 8:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health 4H100, 5601 Fishers Lane, Rockville, MD 20892.

Contact Person: Thomas F. Conway, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activates, Room 3G51, National Institutes of Health, NIAID, 5601 Fishers Lane, MSC 9823, Bethesda, MD 20892–9823, 240–507–9685, *thomas.conway@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: September 29, 2016.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–24025 Filed 10–4–16; 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 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: Center for Scientific Review Special Emphasis Panel; RFA–AI–

16–040: Revision Applications for US-South Africa Program for Collaborative Biomedical Research.

Date: October 19, 2016.

Time: 1:00 p.m. to 3:30 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Robert Freund, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5216, MSC 7852, Bethesda, MD 20892, 301–435–1050, *freundr@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, 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: September 28, 2016.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–24023 Filed 10–4–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, And Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (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 Heart, Lung, and Blood Institute Special Emphasis Panel; NHLBI Clinical Trial Pilot Studies (R34).

Date: October 27, 2016.

Time: 8:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Chang Sook Kim, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7188, Bethesda, MD 20892–7924, 301–435–0287, *carolko@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: September 29, 2016.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–24024 Filed 10–4–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Pain and Chemosensory Processes.

Date: October 24–25, 2016.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: John Bishop, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5182, MSC 7844, Bethesda, MD 20892, (301) 408–9664, *bishopj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–16–171: Innovation for HIV Vaccine Discovery.

Date: October 25, 2016.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Robert Freund, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5216, MSC 7852, Bethesda, MD 20892, 301–435–1050, *freundr@csr.nih.gov.*

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Chemo/Dietary Prevention Study Section.

Date: October 27, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Marriott Courtyard Gaithersburg Washingtonian Ctr., 204 Boardwalk Place, Gaithersburg, MD 20878.

Contact Person: Svetlana Kotliarova, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6214, Bethesda, MD 20892, 301–594–7945, *kotliars@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Temporal Dynamics of Neurophysiological Patterns as Potential Targets for Treating Cognitive Deficits in Brain Disorders.

Date: October 27, 2016.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Kirk Thompson, Ph.D., Scientific Review Officer, center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5184, MSC 7844, Bethesda, MD 20892, 301–435–1242, *kgt@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–15–356: Major Opportunities for Research in Epidemiology of Alzheimer's Disease and Cognitive Resilience (R01).

Date: October 31, 2016.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20814, (Virtual Meeting).

Contact Person: George Vogler, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3140, MSC 7770, Bethesda, MD 20892, (301) 237–2693, *voglergp@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; RFA Panel: Molecular and Cellular Substrates of Complex Brain Disorders.

Date: November 3, 2016.

Time: 8:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Pier 2620 Hotel, 2620 Jones Street, San Francisco, CA 94133.

Contact Person: Deborah L. Lewis, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4183, MSC 7850, Bethesda, MD 20892, 301–408–9129, *lewisdeb@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel, Shared and High-End Mass Spectrometers.

Date: November 3, 2016.

Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Doubletree Hotel Bethesda, (Formerly Holiday Inn Select), 8120 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Sudha Veeraraghavan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, 301–435–1504, *sudha.veeraraghavan@nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Drug Discovery for Aging, Neuropsychiatric and Neurologic Disorders.
Date: November 3–4, 2016.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Embassy Row Hotel, 2015 Massachusetts Ave. NW., Washington, DC 20036.
Contact Person: Yuan Luo, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207, MSC 7846, Bethesda, MD 20892, 301–915–6303, *luoy2@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Biochemistry and Biophysics of Biological Macromolecules Fellowship Applications.
Date: November 3–4, 2016.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: David R. Jollie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7806, Bethesda, MD 20892, (301) 437–7927, *jollieda@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Physiology and Pathobiology of Cardiovascular and Respiratory Systems.
Date: November 3–4, 2016.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Ritz-Carlton Hotel at Pentagon City, 1250 South Hayes Street, Arlington, VA 22202.
Contact Person: Abdelouahab Aitouche, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4222, MSC 7812, Bethesda, MD 20892, 301–435–2365, *aitouchea@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Fellowships: Behavioral Neuroscience.
Date: November 3–4, 2016.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Embassy Suites DC Convention Center, 900 10th St. NW., Washington, DC 20001.
Contact Person: Mei Qin, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5213, Bethesda, MD 20892, *qinmei@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR 16–064: R21 Grants for New Investigators to Promote Diversity in Health-Related Research.
Date: November 3, 2016.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Lorien Hotel & Spa, 1600 King Street, Alexandria, VA 22314.
Contact Person: Jonathan K. Ivins, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040A, MSC 7806, Bethesda, MD 20892, (301) 594–1245, *ivinsj@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Small Business: Aging and Development, Auditory, Vision and Low Vision Technologies.
Date: November 3–4, 2016.
Time: 8:00 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: Embassy Suites DC Convention Center, 900 10th Street NW., Washington, DC 20001.
Contact Person: Paek-Gyu Lee, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4201, MSC 7812, Bethesda, MD 20892, (301) 613–2064, *leepg@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR–14–080: International Research in Infectious Diseases including AIDS, (IRIDA).
Date: November 3, 2016.
Time: 8:30 a.m. to 5:30 p.m.
Agenda: To review and evaluate grant applications.
Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.
Contact Person: Tera Bounds, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3214, MSC 7808, Bethesda, MD 20892, 301–435–2306, *boundst@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Animal Models for Stem Cell-Based Medicine (RO1, R21, R24).
Date: November 3, 2016.
Time: 10:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: Charles Selden, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive Room 5187 MSC 7840, Bethesda, MD 20892, 301–451–3388, *seldens@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR 14–281: Connectomes Related to Human Disease.
Date: November 3, 2016.
Time: 11:00 a.m. to 2:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: Cristina Backman, Ph.D., Scientific Review Officer, ETTN IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5211, MSC 7846, Bethesda, MD 20892, *cbackman@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Synthetic Psychoactive Drugs and Strategic Approaches to Counteract Their Deleterious Effects.
Date: November 3, 2016.
Time: 1:00 p.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).
Contact Person: Jasenka Borzan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7814, Bethesda, MD 20892–7814, 301–435–1787, *borzanj@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: September 28, 2016.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–24022 Filed 10–4–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Minority Health and Health Disparities; 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 materials, 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 Minority Health and Health Disparities Special Emphasis Panel; Clinical Research

Education and Career Development (CRECD) Program.

Date: November 21, 2016.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892.

Contact Person: Xinli Nan, Ph.D., Scientific Review Officer, National Institute on Minority Health and Health Disparities, National Institutes of Health, Scientific Review Branch, OERA, 6707 Democracy Blvd., Suite 800, Bethesda, MD 20892, (301) 594–7784, *Xinli.Nan@nih.gov*.

Dated: September 28, 2016.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2016–24028 Filed 10–4–16; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Agency Information Collection Activities: Submission for OMB Review; Comment Request

Periodically, the Substance Abuse and Mental Health Services Administration (SAMHSA) will publish a summary of information collection requests under OMB review, in compliance with the Paperwork Reduction Act (44 U.S.C. Chapter 35). To request a copy of these documents, call the SAMHSA Reports Clearance Officer on (240) 276–1243.

Project: National Center of Excellence for Infant and Early Childhood Mental Health Consultation—NEW

The Substance Abuse and Mental Health Services Administration's (SAMHSA), Center for Mental Health Services, in partnership with the Health Resources and Services Administration (HRSA) and the Administration for Children and Families (ACF), announces the establishment of the National Center of Excellence (CoE) for Infant and Early Childhood Mental Health Consultation (IECMHC), a new program to advance the implementation of high-quality infant and early childhood mental health consultation across the nation through the development of tools, resources, training, technical assistance, and collaborative public and private partnerships. Its primary goals will be to promote the healthy social and emotional development of infants and young children and to prevent mental, emotional and behavioral disorders within this age group. Major activities for the CoE include convening a national expert workgroup and to lead the workgroup in developing a state-of-the-art Toolkit of the latest research and best practices for IECMHC (*e.g.,* training, implementation, evaluation and financing) for early childhood settings, including early care and education and home visiting programs. The CoE will also create a dissemination and training plan for the Toolkit, and provide intensive training and technical assistance to states and tribes to help them build their capacity to implement, fund and evaluate IECMHC efforts successfully.

To monitor the reach, implementation and impact of the CoE's multiple efforts, learn which practices work for which populations, and gauge overall applicability and utility of the Toolkit to infant and early childhood mental health consultation, the CoE intends to employ a variety of standardized process and outcome measures that have been specifically designed to reduce participant burden. Measures will explore the related professional background and experience of IECMHC participants, degree of satisfaction with IECMHC trainings and technical assistance (TTA), usefulness of the TTA, areas for improvement, scope of IECMHC implementation across the State or Tribe, and IECMHC impact on childcare and pre-K expulsion rates.

Data-collection efforts will focus on two types of respondents: (1) Mental health consultants employed at maternal and child health, behavioral health, child care, Head Start, education and child welfare agencies, and (2) State or tribal representatives who have been selected to lead the implementation, expansion and sustainability of IECMHC in their state or tribal community.

The mental health consultants will be asked to provide background information on their prior experience in the IECMHC field, feedback immediately following the trainings, and follow-up feedback approximately two months after receiving training and/or technical assistance. Specific sample questions will include level of satisfaction with the training/technical assistance, perceptions of knowledge acquired, intentions to use training content, extent of implementation of content, and opinions regarding the training's cultural appropriateness for its audience.

State/tribal representatives will be asked to report on the reach and impact of the IECMHC program in the past year, level of satisfaction with IECMHC, suggested improvements for the program, and emerging state/tribal needs that the program could address. IECMHC mentors, whose primary role will be to work with the state/tribal representatives to implement the IECMHC Toolkit, will gather specific information from the representatives, including recommended IECMHC professional standards for mental health consultants, state- or tribal-level evaluations of IECMHC impact, and financing for the continuation of IECMHC. For programs also receiving funding from the Maternal Infant and Early Childhood Home Visiting (MIECHV) program, representatives will be asked to report on selected MIECHV outcome measures relating to maternal and newborn health; school readiness and achievement; and coordination and referrals for other community resources and supports.

SAMHSA will use this data to determine whether funded activities are progressing as expected, provide guidance to improve how work is being conducted, assess the impact of IECMHC on child-serving systems, and inform subsequent national, state, tribal and community policy and planning decisions.

ESTIMATE OF RESPONDENT BURDEN

[Note: Total burden is annualized over the 3-year clearance period]

Instrument	Number of respondents	Average number of responses per respondent per year	Total number of responses	Hours per response	Total annual burden hours
Service Pre-Assessment Form	150	6	900	.167	150.30
Training Feedback Form	112	6	672	.167	112.22
Training Follow-up Form	112	4	448	.167	74.82
Technical Assistance Follow-up Form	30	6	180	.167	30.06

ESTIMATE OF RESPONDENT BURDEN—Continued

[Note: Total burden is annualized over the 3-year clearance period]

Instrument	Number of respondents	Average number of responses per respondent per year	Total number of responses	Hours per response	Total annual burden hours
IECMHC Cumulative Services Assessment Form	17	1	17	.333	5.66
IECMHC Annual and Quarterly Benchmark Data Collection Forms	17	4	68	1.5	102.00
Totals	438	27	2,285		475.06

Written comments and recommendations concerning the proposed information collection should be sent by November 4, 2016 to the SAMHSA Desk Officer at the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB). To ensure timely receipt of comments, and to avoid potential delays in OMB's receipt and processing of mail sent through the U.S. Postal Service, commenters are encouraged to submit their comments to OMB via email to: *OIRA_Submission@omb.eop.gov.* Although commenters are encouraged to send their comments via email, commenters may also fax their comments to: 202–395–7285. Commenters may also mail them to: Office of Management and Budget, Office of Information and Regulatory Affairs, New Executive Office Building, Room 10102, Washington, DC 20503.

Summer King,

Statistician.

[FR Doc. 2016–24012 Filed 10–4–16; 8:45 am]

BILLING CODE 4162–20–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0098]

Agency Information Collection Activities: NAFTA Regulations and Certificate of Origin

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; Extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: NAFTA Regulations and Certificate of Origin (CBP Forms 434, 446, and 447). CBP is proposing that this information collection be extended with a change to the burden hours. There is no change to the information collected. This document is published to obtain comments from the public and affected agencies.

DATES: Written comments should be received on or before November 4, 2016 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Paperwork Reduction Act Officer, U.S. Customs and Border Protection, Regulations and Rulings, Office of Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, or via email (*CBP_PRA@cbp.dhs.gov*). Please note contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs please contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP Web site at *https://www.cbp.gov/.* For additional help: *https://help.cbp.gov/app/home/search/1.*

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** (81 FR 33541) on May 26, 2016, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10. CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden, including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

Title: NAFTA Regulations and Certificate of Origin.

OMB Number: 1651–0098.

Form Number: CBP Forms 434, 446, and 447.

Abstract: On December 17, 1992, the U.S., Mexico and Canada entered into an agreement, ''The North American Free Trade Agreement'' (NAFTA). The provisions of NAFTA were adopted by the U.S. with the enactment of the North American Free Trade Agreement Implementation Act of 1993 (PL. 103–182).

CBP Form 434, *North American Free Trade Certificate of Origin,* is used to certify that a good being exported either from the United States into Canada or Mexico or from Canada or Mexico into the United States qualifies as an originating good for purposes of preferential tariff treatment under NAFTA. This form is completed by exporters and/or producers and furnished to CBP upon request. CBP

Form 434 is provided for by 19 CFR 181.11 and is accessible at: *https://www.cbp.gov/newsroom/publications/forms.*

CBP Form 446, *NAFTA Verification of Origin Questionnaire,* is a questionnaire that CBP personnel use to gather sufficient information from exporters and/or producers to determine whether goods imported into the United States qualify as originating goods for the purposes of preferential tariff treatment under NAFTA. CBP Form 446 is provided for by 19 CFR 181.72 and is accessible at: *https://www.cbp.gov/newsroom/publications/forms.*

CBP Form 447, *North American Free Trade Agreement Motor Vehicle Averaging Election,* is used to gather information required by 19 CFR 181 Appendix, Section 11, (2) ''Information Required When Producer Chooses to Average for Motor Vehicles''. This form is provided to CBP when a manufacturer chooses to average motor vehicles for the purpose of obtaining NAFTA preference. CBP Form 447 is accessible at: *https://www.cbp.gov/newsroom/publications/forms.*

Current Actions: This submission is being made to extend the expiration date for CBP Forms 434, 446, and 447 and to revise the burden hours as a result of updated estimates for the time per response for CBP Forms 434 and 446. There are no changes to the forms or the information collected.

Type of Review: Extension with a change to the burden hours.

Affected Public: Businesses.

Form 434, NAFTA Certificate of Origin:

Estimated Number of Respondents: 40,000.

Estimated Number of Responses per Respondent: 3.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 240,000.

Form 446, NAFTA Questionnaire:

Estimated Number of Respondents: 400.

Estimated Number of Responses per Respondent: 1.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 800.

Form 447, NAFTA Motor Vehicle Averaging Election:

Estimated Number of Respondents: 11.

Estimated Number of Responses per Respondent: 1.28.

Estimated Time per Response: 1 hour.

Estimated Total Annual Burden Hours: 14.

Dated: September 29, 2016.

Seth Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2016–24018 Filed 10–4–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[1651–0083]

Agency Information Collection Activities: United States-Caribbean Basin Trade Partnership Act (CBTPA)

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: 30-Day notice and request for comments; Extension of an existing collection of information.

SUMMARY: U.S. Customs and Border Protection (CBP) of the Department of Homeland Security will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act: United States-Caribbean Basin Trade Partnership Act (CBTPA) (Form 450). CBP is proposing that this information collection be extended with a change to the burden hours. There is no change to the information collected. This document is published to obtain comments from the public and affected agencies.

DATES: Written comments should be received on or before November 4, 2016 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments on this proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget. Comments should be addressed to the OMB Desk Officer for Customs and Border Protection, Department of Homeland Security, and sent via electronic mail to *oira_submission@omb.eop.gov* or faxed to (202) 395–5806.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should be directed to Paperwork Reduction Act Clearance Officer, U.S. Customs and Border Protection, Regulations and Rulings, Office of Trade, 90 K Street NE., 10th Floor, Washington, DC 20229–1177, or via email (*CBP_PRA@cbp.dhs.gov*). Please note contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs please contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP Web site at *https://www.cbp.gov/.* For additional help: *https://help.cbp.gov/app/home/search/1.*

SUPPLEMENTARY INFORMATION: This proposed information collection was previously published in the **Federal Register** (81 FR 43615) on July 5, 2016, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.10. CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). The comments should address: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden, including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs to respondents or record keepers from the collection of information (total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the CBP request for OMB approval. All comments will become a matter of public record. In this document, CBP is soliciting comments concerning the following information collection:

Title: United States-Caribbean Basin Trade Partnership Act.

OMB Number: 1651–0083.

Form Number: CBP Form 450.

Abstract: The provisions of the United States-Caribbean Basin Trade Partnership Act (CBTPA) were adopted by the U.S. with the enactment of the Trade and Development Act of 2000 (PL.106–200). The objective of the CBTPA is to expand trade benefits to countries in the Caribbean Basin. For preferential duty treatment under CBTPA, importers are required to have a CBTPA Certification of Origin (CBP Form 450) in their possession at the time of the claim, and to provide it to CBP upon request. CBP Form 450 collects data such as contact information for the exporter, importer and producer, and information about the goods being claimed.

This collection of information is provided for by 19 CFR 10.224. CBP Form 450 is accessible at: *http://forms.cbp.gov/pdf/CBP_Form_450.pdf.*

Current Actions: This submission is being made to extend the expiration date and to revise the burden hours as a result of an increase in time estimated per response from 15 minutes to 2 hours. There are no changes to CBP Form 450 or to the data collected on this form.

Type of Review: Extension with a change to the burden hours.

Affected Public: Businesses.

Estimated Number of Respondents: 15.

Estimated Number of Responses per Respondent: 286.13.

Estimated Total Annual Responses: 4,292.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 8,584.

Dated: September 29, 2016.

Seth Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2016–24019 Filed 10–4–16; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–5971–N–01]

Notice of Certain Operating Cost Adjustment Factors for 2017

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice.

SUMMARY: This notice establishes operating cost adjustment factors (OCAFs) for project-based rental assistance contracts issued under Section 8 of the United States Housing Act of 1937 and renewed under the Multifamily Assisted Housing Reform and Affordability Act of 1997 (MAHRA) with an anniversary date on or after February 11, 2017. OCAFs are annual factors used primarily to adjust the rents for contracts renewed under section 515 or section 524 of MAHRA.

DATES: *Effective Date:* February 11, 2017.

FOR FURTHER INFORMATION CONTACT: Stan Houle, Program Analyst, Office of Asset Management and Portfolio Oversight, Department of Housing and Urban Development, 451 7th Street SW., Washington, DC 20410; telephone number 202–402–2572 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

I. OCAFs

Section 514(e)(2) and section 524(c)(1) of MAHRA (42 U.S.C. 1437f note) require HUD to establish guidelines for the development of OCAFs for rent adjustments. Sections 524(a)(4)(C)(i), 524(b)(1)(A), and 524(b)(3)(A) of MAHRA, all of which prescribe the use of the OCAF in the calculation of renewal rents, contain similar language. HUD has therefore used a single methodology for establishing OCAFs, which vary from State to State.

MAHRA gives HUD broad discretion in setting OCAFs, referring, for example, in sections 524(a)(4)(C)(i), 524(b)(1)(A), 524(b)(3)(A) and 524(c)(1) simply to ''an operating cost adjustment factor established by the Secretary.'' The sole limitation to this grant of authority is a specific requirement in each of the foregoing provisions that application of an OCAF ''shall not result in a negative adjustment.'' Contract rents are adjusted by applying the OCAF to that portion of the rent attributable to operating expenses exclusive of debt service.

The OCAFs provided in this notice are applicable to eligible projects having a contract anniversary date of February 11, 2017 or after and were calculated using the same method as those published in HUD's 2016 OCAF notice published on October 13, 2015 (79 FR 59502). Specifically, OCAFs are calculated as the sum of weighted average cost changes for wages, employee benefits, property taxes, insurance, supplies and equipment, fuel oil, electricity, natural gas, and water/sewer/trash using publicly available indices. The weights used in the OCAF calculations for each of the nine cost component groupings are set using current percentages attributable to each of the nine expense categories. These weights are calculated in the same manner as in the October 13, 2015, notice. Average expense proportions were calculated using three years of audited Annual Financial Statements from projects covered by OCAFs. The expenditure percentages for these nine categories have been found to be very stable over time, but using three years of data increases their stability. The nine cost component weights were calculated at the state level, which is the lowest level of geographical aggregation with enough projects to permit statistical analysis. These data were not available for the Western Pacific Islands, so data for Hawaii were used as the best available indicator of OCAFs for these areas.

The best current price data sources for the nine cost categories were used in calculating annual change factors. State-level data for fuel oil, electricity, and natural gas from Department of Energy surveys are relatively current and continue to be used. Data on changes in employee benefits, insurance, property taxes, and water/sewer/trash costs are only available at the national level. The data sources for the nine cost indicators selected used were as follows:

- *Labor Costs:* First quarter, 2016 Bureau of Labor Statistics (BLS) ECI, Private Industry Wages and Salaries, All Workers (Series ID CIU2020000000000I) at the national level and Private Industry Benefits, All Workers (Series ID CIU2030000000000I) at the national level.
- *Property Taxes:* Census Quarterly Summary of State and Local Government Tax Revenue—Table 1 *http://www2.census.gov/govs/qtax/2016/q1t1.xls.* 12-month property taxes are computed as the total of four quarters of tax receipts for the period from April through March. Total 12-month taxes are then divided by the number of occupied housing units to arrive at average 12-month tax per housing unit. The number of occupied housing units is taken from the estimates program at the Bureau of the Census. *http://www.census.gov/housing/hvs/data/histtab8.xls.*
- *Goods, Supplies, Equipment:* May 2015 to May 2016 Bureau of Labor Statistics (BLS) Consumer Price Index, All Items Less Food, Energy and Shelter (Series ID CUUR0000SA0L12E) at the national level.
- *Insurance:* May 2015 to May 2016 Bureau of Labor Statistic (BLS) Consumer Price Index, Tenants and Household Insurance Index (Series ID CUUR0000SEHD) at the national level.
- *Fuel Oil:* October 2015–March 2016 U.S. Weekly Heating Oil and Propane Prices report. Average weekly residential heating oil prices in cents per gallon excluding taxes for the period from October 5, 2015 through March 28, 2016 are compared to the average from October 13, 2014 through March 30, 2015. For the States with insufficient fuel oil consumption to have separate estimates, the relevant regional Petroleum Administration for Defense Districts (PADD) change between these two periods is used; if there is no regional PADD estimate, the U.S. change between these two periods is used. *http://www.eia.gov/dnav/pet/pet_pri_wfr_a_EPD2F_prs_dpgal_w.htm.*

• *Electricity:* Energy Information Agency, February 2016 ''Electric Power Monthly'' report, Table 5.6.B. *http://www.eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_5_06_b.*

• *Natural Gas:* Energy Information Agency, Natural Gas, Residential Energy Price, 2015–2016 annual prices in dollars per 1,000 cubic feet at the state level. Due to EIA data quality standards several states were missing data for one or two months in 2015; in these cases, data for these missing months were estimated using data from the surrounding months in 2015 and the relationship between that same month and the surrounding months in 2014. *http://www.eia.gov/dnav/ng/ng_pri_sum_a_EPG0_PRS_DMcf_a.htm.*

• *Water and Sewer:* May 2015 to May 2016 Consumer Price Index, All Urban Consumers, Water and Sewer and Trash Collection Services (Series ID CUUR0000SEHG) at the national level.

The sum of the nine cost component percentage weights equals 100 percent of operating costs for purposes of OCAF calculations. To calculate the OCAFs, state-level cost component weights developed from AFS data are multiplied by the selected inflation factors. For instance, if wages in Virginia comprised 50 percent of total operating cost expenses and increased by 4 percent from 2015 to 2016, the wage increase component of the Virginia OCAF for 2017 would be 2.0 percent (50% * 4%). This 2.0 percent would then be added to the increases for the other eight expense categories to calculate the 2016 OCAF for Virginia. For states where the OCAF is less than 1.0 percent, the OCAF is floored at 1. The OCAFs for 2017 are included as an Appendix to this Notice.

II. MAHRA OCAF Procedures

Sections 514 and 515 of MAHRA, as amended, created the Mark-to-Market program to reduce the cost of federal housing assistance, to enhance HUD's administration of such assistance, and to ensure the continued affordability of units in certain multifamily housing projects. Section 524 of MAHRA authorizes renewal of Section 8 project-based assistance contracts for projects without restructuring plans under the Mark-to-Market program, including projects that are not eligible for a restructuring plan and those for which the owner does not request such a plan. Renewals must be at rents not exceeding comparable market rents except for certain projects. As an example, for Section 8 Moderate Rehabilitation projects, other than single room occupancy projects (SROs) under the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11301 *et seq.*), that are eligible for renewal under section 524(b)(3) of MAHRA, the renewal rents are required to be set at the lesser of: (1) The existing rents under the expiring contract, as adjusted by the OCAF; (2) fair market rents (less any amounts allowed for tenant-purchased utilities); or (3) comparable market rents for the market area.

III. Findings and Certifications

Environmental Impact

This issuance sets forth rate determinations and related external administrative requirements and procedures that do not constitute a development decision affecting the physical condition of specific project areas or building sites. Accordingly, under 24 CFR 50.19(c)(6), this notice is categorically excluded from environmental review under the National Environmental Policy Act of 1969 (42 U.S.C. 4321).

Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance Number for this program is 14.195.

Dated: September 29, 2016.

Edward L. Golding,

Principal Deputy, Assistant Secretary for Housing.

Appendix

Operating Cost Adjustment Factors For 2017

State	OCAF (%)
Alabama	2.1
Alaska	0.5
Arizona	2.1
Arkansas	2.3
California	2.2
Colorado	1.7
Connecticut	1.1
Delaware	1.7
District of Columbia	2.0
Florida	2.0
Georgia	2.0
Hawaii	0.0
Idaho	2.3
Illinois	1.5
Indiana	2.0
Iowa	2.1
Kansas	2.0
Kentucky	1.9
Louisiana	1.8
Maine	1.4
Maryland	2.1
Massachusetts	1.8
Michigan	1.7
Minnesota	1.8
Mississippi	2.1
Missouri	2.2
Montana	2.1
Nebraska	2.3
Nevada	2.2
New Hampshire	1.8
New Jersey	1.3
New Mexico	1.6
New York	0.4
North Carolina	2.0
North Dakota	2.4
Ohio	1.9
Oklahoma	2.0
Oregon	2.2
Pacific Islands	0.0
Pennsylvania	2.0
Puerto Rico	1.9
Rhode Island	2.1
South Carolina	2.1
South Dakota	2.1
Tennessee	2.0
Texas	2.0
Utah	2.2
Vermont	0.6
Virgin Islands	2.0
Virginia	2.0
Washington	2.2
West Virginia	2.6
Wisconsin	1.8
Wyoming	2.2
US Average	1.9

[FR Doc. 2016–24070 Filed 10–4–16; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

U.S. Geological Survey

[GX14MB00G7400]

Agency Information Collection Activities: Request for Comments

AGENCY: U.S. Geological Survey (USGS), Interior.

ACTION: Notice of a renewal of a currently approved information collection (1028–0098).

SUMMARY: We (the U.S. Geological Survey) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act (PRA) of 1995, and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. This collection is scheduled to expire on January 31, 2017.

DATES: To ensure that your comments are considered, we must receive them on or before December 5, 2016.

ADDRESSES: You may submit comments on this information collection to the Information Collection Clearance Officer, U.S. Geological Survey, 12201 Sunrise Valley Drive MS 807, Reston,

VA 20192 (mail); (703) 648–7197 (fax); or *gs-info_collections@usgs.gov* (email). Please reference 'Information Collection 1028–0098, Nonindigenous Aquatic Species Sighting Reporting Form and Alert Registration Form in all correspondence.

FOR FURTHER INFORMATION CONTACT: Pam Fuller at (352) 264–3481 (telephone); *pfuller@usgs.gov* (email); or by mail at U.S. Geological Survey, 7920 NW 71st Street, Gainesville, Florida 32653. You may also find information about this ICR at *www.reginfo.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

America is under siege by many harmful non-native species of plants, animals, and microorganisms. More than 6,500 nonindigenous species are now established in the United States, posing risks to native species, valued ecosystems, and human and wildlife health. These invaders extract a huge cost, an estimated $120 billion per year, to mitigate their harmful impacts. The current annual environmental, economic, and health-related costs of invasive species exceed those of all other natural disasters combined.

Through its Invasive Species Program (*http://www.usgs.gov/ecosystems/invasive_species/*), the USGS plays an important role in federal efforts to combat invasive species in natural and semi-natural areas through early detection and assessment of newly established invaders; monitoring of invading populations; and improving understanding of the ecology of invaders and factors in the resistance of habitats to invasion. The USGS provides the tools, technology, and information supporting efforts to prevent, contain, control, and manage invasive species nationwide. To meet user needs, the USGS also develops methods for compiling and synthesizing accurate and reliable data and information on invasive species for inclusion in a distributed and integrated web-based information system.

As part of the USGS Invasive Species Program, the Nonindigenous Aquatic Species (NAS) database (*http://nas.er.usgs.gov/*) functions as a repository and clearinghouse for occurrence information on nonindigenous aquatic species from across the United States. It contains locality information on more than 1,900 species of vertebrates, invertebrates, and vascular plants introduced since 1850. Taxa include foreign species as well as those native to North America that have been transported outside of their natural range. The NAS Web site provides immediate access to new occurrence records through a real-time interface with the NAS database. Visitors to the Web site can use a set of predefined queries to obtain lists of species according to state or hydrologic basin of interest. Fact sheets, distribution maps, and information on new occurrences are continually posted and updated. Dynamically generated species distribution maps show the spatial accuracy of the locations reported, population status, and links to more information about each report.

Information is collected from the public regarding the local occurrences of nonindigenous aquatic species, primarily fish, in open waters of the United States. This is vital information for early detection and rapid response for the possible eradication of organisms that may be considered invasive in a natural environment such as a lake, river, stream, or pond. Because it is not possible for USGS scientists to monitor all open waters for harmful nonindigenous organisms, the public can help by serving as the ''eyes and ears'' for the USGS's Nonindigenous Aquatic Species Program.

Members of the public who wish to report the occurrence of a suspected nonindigenous aquatic species, usually encountered through fishing or some other outdoor recreational activity, may fill out and submit a form (*http://nas.er.usgs.gov/SightingReport.aspx*) posted on our Web site. The information requested includes type of organism, date and location of sighting, photograph(s) if available, and basic observer contact information (to allow the USGS to contact the observer in the event additional information, such as Photos or more specific location details are needed).

NAS program staff maintains an alert system that contacts individuals via email when species occurrences are new to a county, drainage (HUC8), or state. The alerts contain information on the specimen occurrence, such as the date and location of the occurrence, where the species is newly introduced, and any comments included by the reporter. In order for individuals (private or public citizens) to receive these alerts, they must register their first and last name (fictitious or real), email address, and a password on our alert registration form (*https://nas.er.usgs.gov/AlertSystem/Register.aspx*). Custom alerts are sent via email to individuals based on the alert types they chose in the alert sign-up page, and these custom alerts can be altered by the registered individual by logging in to the alert login page (*https://nas.er.usgs.gov/AlertSystem/AlertLogin.aspx*).

The USGS does not actively solicit or require observation or contact information from the public. Participation in the reporting process and the alert system is completely voluntary. The personally identifiable information given by individuals in these forms is stored internally in our sighting report and alert system databases, with all passwords encrypted to protect users' security.

II. Data

OMB Control Number: 1028–0098.
Form Number: NA.
Title: Nonindigenous Aquatic Species Sighting Reporting Form and Alert Registration Form.
Type of Request: Renewal of existing information collection.
Affected Public: State and local government employees and private individuals.
Respondent's Obligation: None. Participation is voluntary.
Frequency of Collection: Occasional.
Estimated Total Number of Annual Responses: We estimate 600 users (400 individuals and 200 state/local/tribal governments) per year for the sighting report form, and 80 users (50 individuals and 30 state/local/tribal governments) per year for the alert registration form.
Estimated Time per Response: We estimate 3 minutes for the sighting report form, and 1 minute for the alert registration form.
Estimated Annual Burden Hours: We estimate 30 hours for the sighting report form, and 2 hours for the alert registration form; a total of 32 hours for the two forms.
Estimated Reporting and Recordkeeping ''Non-Hour Cost'' Burden: There are no ''non-hour cost'' burdens associated with this IC.
Public Disclosure Statement: The PRA (44 U.S.C. 3501, *et seq.*) provides that an agency may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number and current expiration date.

III. Request for Comments

We are soliciting comments as to: (a) Whether the proposed collection of information is necessary for the agency to perform its duties, including whether the information is useful; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, usefulness, and clarity of the information to be collected; and (d) how to minimize the burden on the respondents, including the use of automated collection techniques or other forms of information technology.

Please note that the comments submitted in response to this notice are a matter of public record. Before including your personal mailing address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment, including your personally identifiable information, may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifiable information from public view, we cannot guarantee that we will be able to do so.

William Lellis,

Associate Director, Ecosystems, U.S. Geological Survey.

[FR Doc. 2016–24064 Filed 10–4–16; 8:45 am]

BILLING CODE 4338–11–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

[XXXD5198NI DS61100000 DNINR0000.000000 DX61104]

Exxon Valdez Oil Spill Public Advisory Committee Charter Renewal

AGENCY: Office of the Secretary, Interior.

ACTION: Notice.

SUMMARY: The U.S. Department of the Interior announces the renewal of the *Exxon Valdez* Oil Spill Public Advisory Committee.

FOR FURTHER INFORMATION CONTACT: Philip Johnson, U.S. Department of the Interior, Office of Environmental Policy and Compliance, 1689 C Street, Suite 119, Anchorage, Alaska 99501–5126, 907–271–5011.

SUPPLEMENTARY INFORMATION: The Court Order establishing the *Exxon Valdez* Oil Spill Trustee Council also requires a public advisory committee. The Public Advisory Committee was established to advise the Trustee Council and began functioning in October 1992. The Public Advisory Committee consists of 10 members representing the following principal interests: Aquaculturists/mariculturists, commercial fishers, commercial tourism, recreation users, conservationists/environmentalists, Native landowners, sport hunters/fishers, subsistence users, scientists/technologists, and public-at-large. In order to ensure that a broad range of public viewpoints continues to be available to the Trustee Council, and in keeping with the settlement agreement, the continuation of the Public Advisory Committee is recommended.

In accordance with the provisions of the Federal Advisory Committee Act, as amended (5 U.S.C., App. 2), and in consultation with the General Services Administration, the Secretary of the Interior hereby renews the Charter of the *Exxon Valdez* Oil Spill Public Advisory Committee.

Certification Statement: I hereby certify that the renewal of the Charter of the *Exxon Valdez* Oil Spill Public Advisory Committee is necessary and in the public interest in connection with the performance of duties mandated by the settlement of *United States* v. *State of Alaska,* No. A91–081 CV, and is in accordance with the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended and supplemented.

Dated: September 28, 2016.

Sally Jewell,

Secretary of the Interior.

[FR Doc. 2016–24143 Filed 10–4–16; 8:45 am]

BILLING CODE 4334–63–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLIDC000000. 16XL1109AF .L10100000.DF0000.241A.00; 4500099889]

Notice of Cancellation of Public Meeting, Coeur d'Alene District Resource Advisory Council, Idaho

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of cancellation of public meeting.

SUMMARY: The Bureau of Land Management (BLM) Coeur d'Alene District Resource Advisory Council meeting has been cancelled.

DATES: The Bureau of Land Management (BLM) Coeur d'Alene District Resource Advisory Council meeting scheduled for October 4 and 5, 2016 in Orofino, Idaho is cancelled. Any rescheduling will be announced through a subsequent **Federal Register** notice and local news media.

FOR FURTHER INFORMATION CONTACT: Suzanne Endsley, RAC Coordinator, Coeur d'Alene District, 3815 Schreiber Way, Coeur d'Alene, ID 83815. Telephone: (208) 769–5004. Email: *sendsley@blm.gov*.

SUPPLEMENTARY INFORMATION: The 15-member RAC advises the Secretary of the Interior, through the Bureau of Land Management, on a variety of planning and management issues associated with public land management in Idaho.

Authority: 43 CFR 1784.4–1

Dated: September 23, 2016.

Linda Clark,

BLM Coeur d'Alene District Manager.

[FR Doc. 2016–24097 Filed 10–4–16; 8:45 am]

BILLING CODE 4310–GG–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLNML00000 L12200000.DF0000 16XL1109AF]

Notice of Public Meeting, Las Cruces District Resource Advisory Council Meeting, New Mexico

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: In accordance with the Federal Land Policy and Management Act and the Federal Advisory Committee Act, the Bureau of Land Management's (BLM), Las Cruces District Resource Advisory Council (RAC) will meet as indicated below.

DATES: The RAC will convene for a field trip on October 25 and a RAC meeting on October 26, at the BLM Las Cruces District Office, 1800 Marquess Street, Las Cruces, New Mexico. The field trip will introduce the RAC to the public land resources in the Potrillo Mountains. BLM and RAC members will depart for the field trip from the District Office at 8:00 a.m. and return by 5:00 p.m. The following day, the RAC will convene for a meeting at the District Office from 9:00 a.m. to 12:00 p.m. Both the field trip and meeting are open to the public. However, members of the public are required to provide their own transportation for the field trip. In addition, the public may send written comments to the RAC at the BLM Las Cruces District Office, 1800 Marquess Street, Las Cruces, NM 88001. Please RSVP for the field trip to Deborah Stevens.

FOR FURTHER INFORMATION CONTACT: Deborah Stevens, BLM Las Cruces District, 1800 Marquess Street, Las Cruces, NM 88001, 575–525–4421. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8229, 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 10-member Las Cruces District RAC advises the Secretary of the Interior, through the

BLM, on a variety of planning and management issues associated with public land management in New Mexico.

Planned agenda items include updates on current and proposed projects in the Las Cruces District, including lands/realty, planning, and energy projects.

A half-hour public comment period, during which the public may address the Council, will begin at 11:30 a.m. Depending on the number of individuals wishing to comment and time available, the time for individual oral comments may be limited.

Melanie Barnes,

Acting Deputy State Director, Lands and Resources.

[FR Doc. 2016–24092 Filed 10–4–16; 8:45 am]

BILLING CODE 4310–FB–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–INTERP–21788; PPWOIEADC0, PPMVSIE1Y.Y00000 (166)]

Proposed Information Collection; After School Place-Based STEM Learning Partnership Evaluation Survey

AGENCY: National Park Service, Interior.

ACTION: Notice; request for comments.

SUMMARY: We (National Park Service, NPS) will ask the Office of Management and Budget (OMB) to approve the information collection (IC) described below. As required by the Paperwork Reduction Act of 1995 and as part of our continuing efforts to reduce paperwork and respondent burden, we invite the general public and other Federal agencies to take this opportunity to comment on this IC. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB Control Number.

DATES: You must submit comments on or before December 5, 2016.

ADDRESSES: Send your comments on the IC to Madonna L. Baucum, Information Collection Clearance Officer, National Park Service, 12201 Sunrise Valley Drive (MS–242), Reston, VA 20192 (mail); or *madonna_baucum@nps.gov* (email). Please reference ''1024–New STEM Survey'' in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this IC, contact Lynne Murdock, Natural Resources Interpretive Specialist, 1201 Eye Street NW., 8th Floor, #39, Washington, DC 20005 (mail); *lynne_murdock@nps.gov* (email), or at (202) 513–7195 (phone).

SUPPLEMENTARY INFORMATION:

I. Abstract

Under 54 U.S.C. 100101 (National Park Service Act Organic Act), we must preserve America's natural wonders unimpaired for future generations, while also making them available for the enjoyment of the visitor. The NPS' commitment to future generations includes a commitment to engaging children in science at some of the country's most beautiful and ecologically intact sites while improving the quality of STEM—or science, technology, engineering, and mathematics—instruction. The study of the After School Place-Based STEM Learning Partnership will provide insight into how STEM education programs can strengthen students' interest and engagement in STEM, develop skills and knowledge around ecological monitoring, and encourage students to see themselves as active participants in building scientific knowledge. The study is part of an interagency agreement between the U.S. Department of Education (ED) and the NPS, and a project implemented in partnership with the Bureau of Indian Education (BIE), the 21st Century Community Learning Center (CCLC), and the National Environmental Education Foundation. The study will include a student survey to assess the following outcomes:

- Confidence in the ability to participate in environmental monitoring and citizen science activities/ discussions,
- Interest in pursuing or participating in classes, activities or discussions related to general STEM and/or environmental science,
- Recognition of the relevance of STEM and environmental science to students' lives and communities, and
- Interest in environmental science and/or in pursuing additional STEM-related classes, activities and/or careers.

The study sample will include students who participate in STEM education programs delivered in partnership with eight national parks and their partner schools.

II. Data

OMB Control Number: 1024—New.

Title: After School Place-Based STEM Learning Partnership Evaluation Survey.

Service Form Number(s): None.

Type of Request: New.

Description of Respondents: Students, grades K–12.

Respondent's Obligation: Voluntary

Frequency of Collection: One-time.

Activity	Number of respondents	Number of annual responses	Completion time per response	Total annual burden hours
Program Evaluation Survey—Students	300	300	15 minutes	75
Totals	300	300		75

Estimated Annual Nonhour Burden Cost: None.

III. Comments

We invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this IC. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Dated: September 29, 2016.

Madonna L. Baucum,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2016–24037 Filed 10–4–16; 8:45 am]

BILLING CODE 4310–EH–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–475 and 731–TA–1177 (Review)]

Aluminum Extrusions From China; Scheduling of Full Five-Year Reviews

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the scheduling of full reviews pursuant to the Tariff Act of 1930 (''the Act'') to determine whether revocation of the antidumping duty and countervailing duty orders on aluminum extrusions from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The Commission has determined to exercise its authority to extend the review period by up to 90 days.

DATES: *Effective Date:* September 29, 2016.

FOR FURTHER INFORMATION CONTACT: Justin Enck ((202) 205–3363), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these reviews may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—On July 5, 2016, the Commission determined that responses to its notice of institution of the subject five-year reviews were such that full reviews should proceed (81 FR 45304, July 13, 2016); accordingly, full reviews are being scheduled pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)). A record of the Commissioners' votes, the Commission's statement on adequacy, and any individual Commissioner's statements are available from the Office of the Secretary and at the Commission's Web site.

Participation in the reviews and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in these reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the reviews need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

For further information concerning the conduct of these reviews and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A and B (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207).

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the reviews. A party granted access to BPI following publication of the Commission's notice of institution of the reviews need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the reviews will be placed in the nonpublic record on January 10, 2017, and a public version will be issued thereafter, pursuant to section 207.64 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the reviews beginning at 9:30 a.m. on Thursday, January 26, 2017, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before January 19, 2017. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should participate in a prehearing conference to be held on January 25, 2017, at the U.S. International Trade Commission Building, if deemed necessary. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 business days prior to the date of the hearing.

Written submissions.—Each party to the reviews may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.65 of the Commission's rules; the deadline for filing is January 18, 2017. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.67 of the Commission's rules. The deadline for filing posthearing briefs is February 6, 2017. In addition, any person who has not entered an appearance as a party to the reviews may submit a written statement of information pertinent to the subject of the reviews on or before February 6, 2017. On March 1, 2017, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before March 3, 2017, but such final comments must not contain new factual information and must otherwise comply with section 207.68 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's Handbook on E-Filing, available on the Commission's Web site at *https://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific

request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

The Commission has determined that these reviews are extraordinarily complicated and therefore has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. 1675(c)(5)(B).

Authority: These reviews are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

By order of the Commission.

Issued: September 30, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–24059 Filed 10–4–16; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–808 (Third Review)]

Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Russia

Determination

On the basis of the record[1] developed in the subject five-year review, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that revocation of the antidumping duty order on hot-rolled flat-rolled carbon-quality steel products from Russia would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.

Background

The Commission, pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)), instituted this review on May 2, 2016 (81 FR 26256) and determined on August 5, 2016 that it would conduct an expedited review (81 FR 58531, August 25, 2016).

The Commission made this determination pursuant to section 751(c) of the Act (19 U.S.C. 1675(c)). It completed and filed its determination in this review on September 29, 2016. The views of the Commission are contained in USITC Publication 4639 (September 2016), entitled *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Russia: Investigation No. 731–TA–808 (Third Review).*

By order of the Commission.

Issued: September 29, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–23994 Filed 10–4–16; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–443F]

Established Aggregate Production Quotas for Schedule I and II Controlled Substances and Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2017

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Final order.

SUMMARY: This final order establishes the initial 2017 aggregate production quotas for controlled substances in schedules I and II of the Controlled Substances Act (CSA) and the assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine.

DATES: Effective October 5, 2016.

FOR FURTHER INFORMATION CONTACT: Michael J. Lewis, Diversion Control Division, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152, Telephone: (202) 598–6812.

SUPPLEMENTARY INFORMATION:

Legal Authority

Section 306 of the Controlled Substances Act (CSA) (21 U.S.C. 826) requires the Attorney General to establish aggregate production quotas for each basic class of controlled substance listed in schedules I and II and for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. The Attorney General has delegated this function to the Administrator of the DEA pursuant to 28 CFR 0.100.

Background

The 2017 aggregate production quotas and assessment of annual needs represent those quantities of schedule I and II controlled substances and the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine that may be manufactured in the United States in 2017 to provide for the estimated medical, scientific, research, and industrial needs of the United States, lawful export requirements, and the establishment and maintenance of reserve stocks. These quotas include imports of ephedrine, pseudoephedrine, and phenylpropanolamine, but do not include imports of controlled substances for use in industrial processes.

On July 22, 2016, a notice titled ''Proposed Aggregate Production Quotas for Schedule I and II Controlled Substances and Assessment of Annual Needs for the List I Chemicals Ephedrine, Pseudoephedrine, and Phenylpropanolamine for 2017'' was published in the **Federal Register**. 81 FR 47821. This notice proposed the 2017 aggregate production quotas for each basic class of controlled substance listed in schedules I and II and the 2017 assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine. All interested persons were invited to comment on or object to the proposed aggregate production quotas and the proposed assessment of annual needs on or before August 22, 2016.

Comments Received

Thirteen comments were received from five DEA-registered manufacturers and four non-DEA registered entities within the published comment period regarding 22 different schedule I and II controlled substances. The DEA received two comments from two non-DEA registered entities within the published comment period regarding the proposed assessment of annual needs for the list I chemical ephedrine (for sale). Commenters stated that the proposed aggregate production quotas for acetyl fentanyl, AH-7921, amphetamine (for conversion), amphetamine (for sale), beta-hydroxythiofentanyl, butyryl fentanyl, cocaine, codeine (for conversion), codeine (for sale), dihydrocodeine, ecgonine, hydrocodone (for sale), hydromorphone, levorphanol, lisdexamfetamine, marihuana, meperidine, methylphenidate, nabilone, opium tincture, oxycodone (for sale), and sufentanil, as well as, the proposed assessment of annual needs for ephedrine (for sale) were insufficient to provide for the estimated medical, scientific, research, and industrial needs

of the United States, export requirements, and the establishment and maintenance of reserve stocks.

The DEA received one comment from a DEA-registrant and three comments by non-DEA registered entities regarding the proposed removal of the additional 25% of the estimated medical, scientific, and research needs for the United States. Two of the commenters requested that the DEA continue to include the additional 25%, one commenter requested transparency in the process of setting aggregate production quotas, and the last commenter agreed with the DEA that the additional 25% should not be included in aggregate production quotas values. The DEA has considered these comments, as well as the ones for specific controlled substances and ephedrine (for sale), in establishing the 2017 aggregate production quotas and assessment of annual needs.

Determination of 2017 Aggregate Production Quotas and Assessment of Annual Needs

In determining the 2017 aggregate production quotas and assessment of annual needs, the DEA has taken into consideration the above comments along with the factors set forth in 21 CFR 1303.11 and 21 CFR 1315.11, in accordance with 21 U.S.C. 826(a), and other relevant factors, including the 2016 manufacturing quotas, current 2016 sales and inventories, anticipated 2017 export requirements, industrial use, and additional applications for 2017 quotas, as well as information on research and product development requirements. Based on this information, the DEA has removed the additional 25% from the aggregate production quotas before determining that adjustments to the proposed aggregate production quotas for 4-anilino-n-phenethyl-piperidine, amphetamine (for conversion), amphetamine (for sale), cocaine, dihydrocodeine, ecgonine, etorphine hydrochloride, hydromorphone, levorphanol, lysergic acid dimethylamide, nabilone, opium tincture, and oripavine are warranted. Adjustment to the proposed annual assessment of needs for ephedrine (for sale) was also determined to be warranted. This final order reflects those adjustments.

Regarding acetyl fentanyl, AH-7921, beta-hydroxythiofentanyl, butyryl fentanyl, codeine (for conversion), codeine (for sale), hydrocodone (for sale), lisdexamfetamine, marihuana, meperidine, methylphenidate, oxycodone (for sale), and sufentanil, the DEA has determined that the proposed aggregate production quotas are sufficient to provide for the 2017 estimated medical, scientific, research, and industrial needs of the United States, export requirements, and the establishment and maintenance of reserve stocks. This final order establishes these aggregate production quotas at the same amounts as proposed.

In accordance with 21 U.S.C. 826, 21 CFR 1303.11, and 21 CFR 1315.11, the Administrator hereby establishes the 2017 aggregate production quotas for the following schedule I and II controlled substances and the 2017 assessment of annual needs for the list I chemicals ephedrine, pseudoephedrine, and phenylpropanolamine, expressed in grams of anhydrous acid or base, as follows:

Basic class	2017 Established quotas (g)
Schedule I	
[1-(5-fluoropentyl)-1H-indazol-3-yl](naphthalen-1-yl)methanone (THJ-2201)	15
1-(1-Phenylcyclohexyl)pyrrolidine	10
1-(5-Fluoropentyl)-3-(1-naphthoyl)indole (AM2201)	30
1-(5-Fluoropentyl)-3-(2-iodobenzoyl)indole (AM694)	30
1-[1-(2-Thienyl)cyclohexyl]piperidine	15
1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200)	35
1-Benzylpiperazine	25
1-Butyl-3-(1-naphthoyl)indole (JWH-073)	45
1-Cyclohexylethyl-3-(2-methoxyphenylacetyl)indole (SR-18 and RCS-8)	45
1-Hexyl-3-(1-naphthoyl)indole (JWH-019)	45
1-Methyl-4-phenyl-4-propionoxypiperidine	2
1-Pentyl-3-(1-naphthoyl)indole (JWH-018 and AM678)	35
1-Pentyl-3-(2-chlorophenylacetyl)indole (JWH-203)	30
1-Pentyl-3-(2-methoxyphenylacetyl)indole (JWH-250)	30
1-Pentyl-3-(4-chloro-1-naphthoyl)indole (JWH-398)	30
1-Pentyl-3-(4-methyl-1-naphthoyl)indole (JWH-122)	30
1-Pentyl-3-[(4-methoxy)-benzoyl]indole (SR-19, RCS-4)	30
1-Pentyl-3-[1-(4-methoxynaphthoyl)]indole (JWH-081)	30
2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine (2C-E)	30
2-(2,5-Dimethoxy-4-methylphenyl)ethanamine (2C-D)	30
2-(2,5-Dimethoxy-4-nitro-phenyl)ethanamine (2C-N)	30
2-(2,5-Dimethoxy-4-n-propylphenyl)ethanamine (2C-P)	30
2-(2,5-Dimethoxyphenyl)ethanamine (2C-H)	30
2-(4-Bromo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25B-NBOMe; 2C-;B-NBOMe; 25B; Cimbi-36)	25
2-(4-Chloro-2,5-dimethoxyphenyl)ethanamine (2C-C)	30
2-(4-Chloro-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25C-NBOMe; 2C-C-NBOMe; 25C; Cimbi-82)	25
2-(4-Iodo-2,5-dimethoxyphenyl)ethanamine (2C-I)	30
2-(4-Iodo-2,5-dimethoxyphenyl)-N-(2-methoxybenzyl)ethanamine (25I-NBOMe; 2C-I-NBOMe; 25I; Cimbi-5)	5
2,5-Dimethoxy-4-ethylamphetamine (DOET)	25
2,5-Dimethoxy-4-n-propylthiophenethylamine	25
2,5-Dimethoxyamphetamine	25
2-[4-(Ethylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-2)	30
2-[4-(Isopropylthio)-2,5-dimethoxyphenyl]ethanamine (2C-T-4)	30
3,4,5-Trimethoxyamphetamine	25

Basic class	2017 Established quotas (g)
3,4-Methylenedioxyamphetamine (MDA)	55
3,4-Methylenedioxymethamphetamine (MDMA)	50
3,4-Methylenedioxy-N-ethylamphetamine (MDEA)	40
3,4-Methylenedioxy-N-methylcathinone (methylone)	40
3,4-Methylenedioxypyrovalerone (MDPV)	35
3-FMC; 3-Fluoro-N-methylcathinone	25
3-Methylfentanyl	2
3-Methylthiofentanyl	2
4-Bromo-2,5-dimethoxyamphetamine (DOB)	25
4-Bromo-2,5-dimethoxyphenethylamine (2-CB)	25
4-FMC; Flephedrone	25
4-Methoxyamphetamine	150
4-Methyl-2,5-dimethoxyamphetamine (DOM)	25
4-Methylaminorex	25
4-MEC; 4-Methyl-N-ethylcathinone	25
4-Methyl-N-methylcathinone (mephedrone)	45
4-Methyl-α-pyrrolidinopropiophenone (4-MePPP)	25
5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol	50
5-(1,1-Dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (cannabicyclohexanol or CP-47,497 C8-homolog)	40
5-Fluoro-UR144, XLR11	25
5-Methoxy-3,4-methylenedioxyamphetamine	25
5-Methoxy-N,N-diisopropyltryptamine	25
5-Methoxy-N,N-dimethyltryptamine	25
AB-PINACA	15
Acetyl-alpha-methylfentanyl	2
Acetyldihydrocodeine	2
Acetylmethadol	2
AH-7921	30
Allylprodine	2
alpha-Ethyltryptamine	25
alpha-Methylfentanyl	2
alpha-Methylthiofentanyl	2
alpha-Methyltryptamine (AMT)	25
alpha-Pyrrolidinobutiophenone (α-PBP)	25
alpha-Pyrrolidinopentiophenone (α-PVP)	25
Alphacetylmethadol	2
Alphameprodine	2
Alphamethadol	2
Aminorex	25
APINCA, AKB48	25
Benzylmorphine	2
beta-Hydroxy-3-methylfentanyl	2
beta-Hydroxyfentanyl	2
beta-Hydroxythiofentanyl	30
Betacetylmethadol	2
Betameprodine	2
Betamethadol	4
Betaprodine	2
Bufotenine	3
Butylone	25
Butyryl fentanyl	30
Cathinone	24
Codeine methylbromide	5
Codeine-N-oxide	305
Desomorphine	25
Diethyltryptamine	25
Difenoxin	8,750
Dihydromorphine	1,566,000
Dimethyltryptamine	35
Dipipanone	5
Fenethylline	5
gamma-Hydroxybutyric acid	56,200,000
Heroin	25
Hydromorphinol	2
Hydroxypethidine	2
Ibogaine	5
Lysergic acid diethylamide (LSD)	15
Marihuana	472,000
Mescaline	25
Methaqualone	10
Methcathinone	25

Basic class	2017 Established quotas (g)
Methyldesorphine	5
Methyldihydromorphine	2
Morphine methylbromide	5
Morphine methylsulfonate	5
Morphine-N-oxide	350
N,N-Dimethylamphetamine	25
N-(1-Amino-3,3-dimethyl-1-oxobutan-2-yl)-1-pentyl-1H-indazole-3-carboxamide (ADB-PINACA)	50
N-(1-Amino-3-methyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide (AB-FUBINACA)	50
N-(1-Amino-3-methyl-1-oxobutan-2-yl)-1-(cyclohexylmethyl)-1H-indazole-3-carboxamide (AB-CHMINACA)	15
N-(1-phenethylpiperidin-4-yl)-N-phenylacetamide (acetyl fentanyl)	100
N-Ethyl-1-phenylcyclohexylamine	5
N-Ethylamphetamine	24
N-Hydroxy-3,4-methylenedioxyamphetamine	24
Naphyrone	25
Noracymethadol	2
Norlevorphanol	52
Normethadone	2
Normorphine	40
Para-fluorofentanyl	5
Parahexyl	5
Pentedrone	25
Pentylone	25
Phenomorphan	2
Pholcodine	5
Psilocybin	30
Psilocyn	50
Quinolin-8-yl 1-(5-fluoropentyl)-1H-indole-3-carboxylate (5-fluoro-PB-22; 5F-PB-22)	20
Quinolin-8-yl 1-pentyl-1H-indole-3-carboxylate (PB-22; QUPIC)	20
Tetrahydrocannabinols	409,000
Thiofentanyl	2
Tilidine	25
Trimeperidine	2
UR-144	25
Schedule II	
1-Phenylcyclohexylamine	4
1-Piperidinocyclohexanecarbonitrile	4
4-Anilino-N-phenethyl-4-piperidine (ANPP)	1,750,000
Alfentanil	4,200
Alphaprodine	2
Amobarbital	20,100
Amphetamine (for conversion)	12,000,000
Amphetamine (for sale)	42,400,000
Carfentanil	10
Cocaine	103,400
Codeine (for conversion)	40,000,000
Codeine (for sale)	45,000,000
Dextropropoxyphene	15
Dihydrocodeine	281,100
Dihydroetorphine	2
Diphenoxylate (for conversion)	15,000
Diphenoxylate (for sale)	820,000
Ecgonine	99,000
Ethylmorphine	2
Etorphine hydrochloride	32
Fentanyl	1,750,000
Glutethimide	2
Hydrocodone (for conversion)	122,000
Hydrocodone (for sale)	58,410,000
Hydromorphone	5,140,800
Isomethadone	4
Levo-alphacetylmethadol (LAAM)	3
Levomethorphan	10
Levorphanol	8,300
Lisdexamfetamine	19,000,000
Meperidine	3,706,000
Meperidine Intermediate-A	5
Meperidine Intermediate-B	9
Meperidine Intermediate-C	5
Metazocine	15

Basic class	2017 Established quotas (g)
Methadone (for sale)	23,700,000
Methadone Intermediate	25,600,000
Methamphetamine	1,539,100
[900,000 grams of levo-desoxyephedrine for use in a non-controlled, non-prescription product; 600,000 grams for methamphetamine mostly for conversion to a schedule III product; and 39,100 grams for methamphetamine (for sale)]	
Methylphenidate	73,000,000
Morphine (for conversion)	27,300,000
Morphine (for sale)	41,000,000
Nabilone	19,000
Noroxymorphone (for conversion)	17,700,000
Noroxymorphone (for sale)	400,000
Opium (powder)	90,000
Opium (tincture)	907,200
Oripavine	22,000,000
Oxycodone (for conversion)	2,610,000
Oxycodone (for sale)	108,510,000
Oxymorphone (for conversion)	22,300,000
Oxymorphone (for sale)	4,200,000
Pentobarbital	27,500,000
Phenazocine	5
Phencyclidine	20
Phenmetrazine	2
Phenylacetone	20
Racemethorphan	2
Racemorphan	2
Remifentanil	3,000
Secobarbital	172,002
Sufentanil	4,000
Tapentadol	21,000,000
Thebaine	100,000,000
List I Chemicals	
Ephedrine (for conversion)	50,000
Ephedrine (for sale)	5,360,000
Phenylpropanolamine (for conversion)	15,000,000
Phenylpropanolamine (for sale)	8,500,000
Pseudoephedrine (for conversion)	40
Pseudoephedrine (for sale)	200,000,000

The Administrator also establishes aggregate production quotas for all other schedule I and II controlled substances included in 21 CFR 1308.11 and 1308.12 at zero. In accordance with 21 CFR 1303.13 and 21 CFR 1315.13, upon consideration of the relevant factors, the Administrator may adjust the 2017 aggregate production quotas and assessment of annual needs as needed.

Dated: September 26, 2016.

Chuck Rosenberg,

Acting Administrator.

[FR Doc. 2016–23988 Filed 10–4–16; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On September 29, 2016, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Northern District of California in the lawsuit entitled *United States* v. *Chemoil Corporation,* Civil Action No. 16–5538.

The United States alleges that in 2011, 2012, and 2013 Chemoil violated Section 211(*o*) of the Clean Air Act (''CAA''), 42 U.S.C. § 7545(*o*), and the Renewable Fuel Standard, 40 CFR part 80 (''RFS2''), by exporting renewable fuel without retiring at least 72.7 million Biomass-Based Diesel (D4) credits (Renewable Identification Numbers or ''RINs'') which it was required to do in order to meet its Renewable Volume Obligation (''RVO''). The United States further alleges that Chemoil failed to submit to the Environmental Protection Agency required reports related to its export activity. To remedy these alleged violations, the proposed Consent Decree requires Chemoil to pay a civil penalty of $27 million and retire 65 million D4 RINs in addition to the 7.7 million RINs Chemoil retired in March of this year.

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, Environmental Enforcement Section and should refer to *United States* v. *Chemoil Corporation,* D.J. Ref. No. 90–5–2–1–11066. 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.*

To submit comments:	*Send them to:*
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: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $8.00 (25 cents per page reproduction cost) payable to the United States Treasury.

Bob Brook,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2016–24020 Filed 10–4–16; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Clean Air Act

On September 29, 2016, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the Western District of Pennsylvania, Erie Docket, in the lawsuit entitled *United States* v. *Erie Coke Corporation,* Case No. 1:16–cv–238.

The Consent Decree resolves the claims of the United States set forth in the complaint against Erie Coke Corporation for injunctive relief and civil penalties in connection with the company's coke by-product recovery plant located in Erie, Pennsylvania, pursuant to Section 113 of the Clean Air Act (''CAA''), 42 U.S.C. 7413. Under the proposed Consent Decree, Erie Coke would perform injunctive relief to inventory, monitor, and control benzene emissions. It will also pay a civil penalty of $500,000.

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. *Erie Coke Corporation,* D.J. Ref. No. 90–5–2–1–09614/1. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

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: *https://www.usdoj.gov/enrd/Consent_Decrees.html.* 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 $17.25 (25 cents per page reproduction cost) payable to the United States Treasury. For a paper copy without the appendices and signature pages, the cost is $15.75.

Robert Brook,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division

[FR Doc. 2016–24111 Filed 10–4–16; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Notice of Lodging Proposed Consent Decree

In accordance with Departmental Policy, 28 CFR 50.7, notice is hereby given that a proposed Consent Decree in *United States* v. *FKT Resort Management LLC, et al.,* No. 2:16–cv–00496–JAW, was lodged with the United States District Court for the District of Maine on September 28, 2016.

The proposed Consent Decree concerns a complaint filed by the United States against Defendants FKT Resort Management LLC, FKT Bayley Family Limited Partnership, Fred W. Bayley, Kathleen M. Bayley, Thomas R. Bayley, Bayley Hill Deer & Trout Farm, Inc., and Bayley's Campground, Inc., pursuant to 33 U.S.C. 1311, 1319, 1344, to obtain injunctive relief from and impose civil penalties against the Defendants for violating the Clean Water Act by discharging pollutants without a permit into waters of the United States. The proposed Consent Decree resolves these allegations against Defendants FKT Resort Management LLC, FKT Bayley Family Limited Partnership, Fred W. Bayley, Kathleen M. Bayley, Thomas R. Bayley, Bayley Hill Deer & Trout Farm, Inc., and Bayley's Campground, Inc. by requiring those Defendants to restore the impacted areas, perform mitigation, and to pay a civil penalty.

The Department of Justice will accept written comments relating to the proposed Consent Decree for thirty (30) days from the date of publication of this Notice. Please address comments to Amy J. Dona, Trial Attorney for the United States Department of Justice, Environment and Natural Resources Division, Environmental Defense Section, Post Office Box 7611, Washington, DC 20044, and refer to *United States* v. *FKT Resort Management LLC, et al.,* DJ #90–5–1–1–19988.

The proposed Consent Decree may be examined at the Clerk's Office, United States District Court for the District of Maine, 156 Federal Street, Portland, ME 04101. In addition, the proposed Consent Decree may be examined electronically at *http://www.justice.gov/enrd/consent-decrees.*

Cherie L. Rogers,

Assistant Section Chief, Environmental Defense Section, Environment and Natural Resources Division.

[FR Doc. 2016–24021 Filed 10–4–16; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

[OMB Number 1110—NEW]

Agency Information Collection Activities; Proposed eCollection eComments Requested; A Newly Approved Data Collection, National Use-of-Force Data Collection

AGENCY: Federal Bureau of Investigation, Department of Justice.

ACTION: 60-day notice.

SUMMARY: The Department of Justice (DOJ), Federal Bureau of Investigation (FBI) Criminal Justice Information Services (CJIS) Division, will be submitting the following information collection request to the Office of Management and Budget) for review and approval in accordance with the Paperwork Reduction Act of 1995.

DATES: Comments are encouraged and will be accepted for 60 days until December 5, 2016.

FOR FURTHER INFORMATION CONTACT: To ensure that comments on the information collection are received,

OMB recommends that written comments be emailed to *useofforcepublicnotice@ic.fbi.gov*.

If you have additional comments especially on the estimated public burden or associated response time, suggestions, or copy of the proposed information collection instrument with instructions or additional information, please contact Ms. Amy Blasher, Unit Chief, FBI CJIS Division, Module D–3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306.

SUPPLEMENTARY INFORMATION: Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the FBI, including whether the information will have practical utility.
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used.
- Evaluate whether and, if so, how the quality, utility, and clarity of the information to be collected can be enhanced.
- 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:* A newly approved data collection.

(2) *The Title of the Form/Collection:* National Use-of-Force Data Collection.

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The form number is unnumbered. The applicable component within the DOJ is the FBI CJIS Division.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* The FBI has a long-standing tradition of providing crime statistics collected from local, state, tribal, and federal law enforcement agencies on Law Enforcement Officers Killed and Assaulted (LEOKA) and justifiable homicides which enable transparency and accountability. To provide a better understanding of the incidents of use of force by law enforcement, the Uniform Crime Reporting (UCR) Program is proposing a new data collection for law enforcement agencies to provide information on incidents where use of force by a law enforcement officer (as defined by the LEOKA Program) has led to the death or serious bodily injury of a person, as well as when a law enforcement officer discharges a firearm at or in the direction of a person.

The current LEOKA definition of a law enforcement officer is: ''All local, county, state, and federal law enforcement officers (such as municipal, county police officers, constables, state police, highway patrol, sheriffs, their deputies, federal law enforcement officers, marshals, special agents, etc.) who are sworn by their respective government authorities to uphold the law and to safeguard the rights, lives, and property of American citizens. They must have full arrest powers and be members of a public governmental law enforcement agency, paid from government funds set aside specifically for payment to sworn police law enforcement organized for the purposes of keeping order and for preventing and detecting crimes, and apprehending those responsible.''

The definition of ''serious bodily injury'' will be based, in part, on 18 United States Code (U.S.C.), Section 2246(4), to mean ''bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.'' These actions include the use of a firearm; an electronic control weapon (*e.g.,* Taser); an explosive device; pepper or OC (oleoresin capsicum) spray or other chemical agent; a baton; an impact projectile; a blunt instrument; hands-fists-feet; or canine.

Local, state, tribal and federal law enforcement agencies will provide information on characteristics of the incident, subjects of the use of force, and the officers that applied force in the incident. Agencies will also be asked to positively affirm, on a monthly basis, whether they did or did not have any use of force that resulted in a fatality, a serious bodily injury to a person, or firearm discharges at or in the direction of a person. Enrollment information from agencies and state points of contact will be collected at the initiation of the collection and updated no less than annually to assist with the managing of this data. The process for developing a robust national collection on use of force involves a multistage, collaborative approach. With this request, the FBI proposes a pilot study. The pilot study will be conducted in two phases, each with its own focus. The pilot study design will be informed by pretesting activities conducted under the FBI's generic clearance [OMB 1110–0057] as discussed briefly here. Both pretesting and pilot efforts will rely upon effective collaboration between the FBI and the Bureau of Justice Statistics (BJS) to achieve and maintain a high level of data quality in an efficient manner.

Pretesting

Pretesting activities will be conducted prior to the initiation of a pilot study and will allow for finalization of the data collection instructions and associated instructions before the pilot data collection. These activities will provide the preliminary information needed to both construct the sample of targeted agencies for the pilot study and identify early problem areas that can be resolved prior to formal testing. The pretesting consists of three parts: Cognitive testing of survey items (including those relating to the time of the incident and measures of serious bodily harm), testing of questionnaire design (to better assess respondent burden and functionality), and a canvass of state UCR program managers (to assist with developing the sample frame for the proposed pilot). Cognitive testing will be conducted in a manner to capture differences in measurement by region and law enforcement agency type, should they exist. Testing of questionnaire design will include follow-up with respondents to assess any difficulty with definitions or administration. Canvassing state UCR programs will indicate the means by which use-of-force statistics are reported—either through the UCR Program itself or directly from state and local law enforcement agencies.

Pilot

The purpose of the pilot study is to evaluate the quality of information collected through the use-of-force data collection tool against information collected through coding of state law enforcement records. Instructions and manuals, as well as training modules and curricula, all serve to help guide individuals at law enforcement agencies to translate their local records into a uniform manner when reporting. However, it may be difficult to communicate coding schemes based upon a common set of definitions. Therefore, after providing basic instructions to respondents, the pilot study will evaluate the accuracy of codes assigned by respondents to identify concepts with less consensus

across locations and types of law enforcement agencies and thereby improve coding instructions. Potential sources of nonresponse and incomplete information will also be evaluated. Both phases of the pilot will include a set of target agencies and states that will allow for sufficient data to evaluate intercoder reliability in the application of definitions and guidance. The phases of the pilot differ by the mode of submission for incident data, the addition of site visits, and the number of sites recruited.

Phase 1

The first phase of the pilot will provide a prospective comparison of reported incidents in the use-of-force data collection through the use-of-force data collection tool to the original records voluntarily provided by the reporting agency to the FBI. Those agencies that are recruited and agree to participate in the pilot study will understand that local records will be forwarded to the FBI upon submission of statistical information to the use of force data collection tool. The local case information will be redacted of any personally identifiable information prior to being forwarded to the FBI, and all local records will be destroyed upon completion of the pilot study.

The goal of this review is to ascertain whether the agencies are applying the definitions and using the provided instructions in a uniform manner. The records review and comparison will also identify problematic areas where instructions need more detail or more training should be provided to agencies. The data will also be used in the planning of the second phase of the pilot that will involve a site visit to a subset of agencies. Finally, the FBI will work with state UCR program managers in the pilot states to identify any potential problems with local and state record-keeping that impedes the ability to provide the use-of-force information to the FBI.

Phase II

The second phase of the pilot will include the set of agencies recruited for the first phase, as well as two additional states recruited to provide their use-of-force data in a bulk data submission. These states will be nominated based upon the information gained from the canvass of state UCR program managers during pretesting. The FBI will also continue to accept agencies and states that voluntarily provide data to the data collection.

In addition to the records review and comparison begun during Phase 1, Phase II will include targeted, on-site visits with a subsample of pilot agencies. The subsample will be selected to include different geographic areas. The primary goal of the on-site visits is to ascertain the level and source of underreporting of within-scope incidents—especially those with serious bodily injury or firearm discharges. The on-site visits will also allow for an assessment of local record-keeping capabilities and changes to the data collection process.

At the conclusion of Phase II, the FBI will release a report detailing the results of its data collection, analysis, and recommendations to inform the design of a main study.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* An estimated 701,486 law enforcement officers will participate in the National Use-of-Force Data Collection. The estimated burden hours per incident is 0.63 for completion.

(6) *An estimate of the total public burden (in hours) associated with the collection:* Two separate burden estimates are provided for the proposed collection—one for the pilot study and a second for the annual collection to include all law enforcement agencies. Burden estimates were based on sources from the FBI UCR Program, the BJS, and the Centers for Disease Control (CDC). The BJS has recently estimated that approximately 1,400 fatalities attributed to a law enforcement use of force occur annually (Planty, et al., 2015, *Arrest-Related Deaths Program: Data Quality Profile, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5260*≤). In addition, the CDC estimates the incidences of fatal and nonfatal injury—including those due to legal intervention—from emergency department data. In their piece entitled, ''The real risks during deadly police shootouts: Accuracy of the naïve shooter,'' Lewinski, et al. (2015) estimates law enforcement officers miss their target approximately 50 percent of the time at the firing range and was used as a simple estimate for the number of firearm discharges at or in the direction of a person, but did not strike the individual. In addition, the UCR Program collects counts of the number of law enforcement sworn and civilian employees in law enforcement agencies.

The table below uses a rate per officer to estimate the anticipated number of reports that could be received within the two pilot phases and an annual collection. Because the nonfatal injury due to legal intervention estimate from the CDC does not provide any overt measure of severity, these injuries are estimated to be as high as 82,283 or as low as 5,546. Based upon these estimates, the FBI is requesting 52,416 burden hours for an annual collection of this data.

ESTIMATED BURDEN FOR PILOT STUDY

Timeframe	Reporting group	Approximate number of officers	Rate per officer		Estimated number of incidents		Estimated burden hours		
			Maximum	Minimum	Maximum	Minimum	Estimated burden hours per incident	Maximum	Minimum
Pilot I (3 months)	Large agencies	178,557	0.122	0.012	5,294	554	0.63	3,336	349
	Pilot I States	54,781	0.122	0.012	6,497	679	0.63	4,093	428
Pilot II (3 months)	Large agencies	178,557	0.122	0.012	5,294	554	0.63	3,336	349
	Pilot I & II States	82,172	0.122	0.012	9,746	1,019	0.63	6,140	642
Pilot Total (6 months)					26,831	2,806	0.63	16,905	1,768
Estimated Burden for All Law Enforcement Agencies in Annual Collection									
Collection (Annual)	All agencies	701,486	0.122	0.012	83,200	8,700	0.63	52,416	5,481

If additional information is required contact: Ms. Amy Blasher, Unit Chief, United States DOJ, FBI CJIS Division, Crime Data Modernization Team, Module D–3, 1000 Custer Hollow Road, Clarksburg, West Virginia 26306.

Dated: October 3, 2016.

Jerri Murray,

Department Clearance Office for PRA, U.S. Department of Justice.

[FR Doc. 2016–24173 Filed 10–4–16; 8:45 am]

BILLING CODE 4410–02–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

184th Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans; Notice of Meeting

Pursuant to the authority contained in Section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the 184th open meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans (also known as the ERISA Advisory Council) will be held on November 9–10, 2016.

The meeting will take place in C5521 Room 4, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210 on November 9, from 1 p.m. to approximately 5:00 p.m. On November 10, the meeting will start at 9:00 a.m. and conclude at approximately 4:00 p.m., with a break for lunch. The morning session on November 10 will be in C5521 Room 4. The afternoon session on November 10 will take place in Room S–2508 at the same address. The purpose of the open meeting on November 9 and the morning of November 10 is for the Advisory Council members to finalize the recommendations they will present to the Secretary. At the November 10 afternoon session, the Council members will receive an update from the Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA) and present their recommendations.

The Council recommendations will be on the following issues: (1) Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation and (2) Cybersecurity Considerations for Benefit Plans. Descriptions of these topics are available on the Advisory Council page of the EBSA Web site at *www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council.*

Organizations or members of the public wishing to submit a written statement may do so by submitting 30 copies on or before November 1, 2016 to Larry Good, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Suite N–5623, 200 Constitution Avenue NW., Washington, DC 20210. Statements also may be submitted as email attachments in rich text, Word, or pdf format transmitted to *good.larry@dol.gov.* It is requested that statements not be included in the body of an email. Statements deemed relevant by the Advisory Council and received on or before November 1 will be included in the record of the meeting and will be available by contacting the EBSA Public Disclosure Room. Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed.

Individuals or representatives of organizations wishing to address the Advisory Council should forward their requests to the Executive Secretary or telephone (202) 693–8668. Oral presentations will be limited to ten minutes, time permitting, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact the Executive Secretary by November 1, 2016 at the address indicated.

Signed at Washington, DC.

Dated: September 28, 2016.

Judith Mares,

Deputy Assistant Secretary, Employee Benefits Security Administration.

[FR Doc. 2016–24102 Filed 10–4–16; 8:45 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

Proposed Extension of Existing Collection; Comment Request

AGENCY: Division of Federal Employees' Compensation, Office of Workers' Compensation Programs.

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95) [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. Currently, the Office of Workers' Compensation Programs is soliciting comments concerning the proposed collection: Notice of Law Enforcement Officer's Injury or Occupational Disease (CA–721) and Notice of Law Enforcement Officer's Death (CA–722). A copy of the proposed information collection request can be obtained by contacting the office listed below in the **ADDRESSES** section of this Notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section below on or before December 5, 2016.

ADDRESSES: Ms. Yoon Ferguson, U.S. Department of Labor, 200 Constitution Ave. NW., Room S–3323, Washington, DC 20210, telephone/fax (202) 354–9647, Email *Ferguson.Yoon@dol.gov.* Please use only one method of transmission for comments (mail, fax, or Email).

SUPPLEMENTARY INFORMATION:

I. Background

The Federal Employees' Compensation Act (FECA) provides, under 5 U.S.C. 8191, *et seq.* and 20 CFR 10.735, that non-Federal law enforcement officers injured or killed under certain circumstances are entitled to the benefits of the Act, to the same extent as if they were employees of the Federal Government. The CA–721 and CA–722 are used by non-Federal law enforcement officers and their survivors to claim compensation under the FECA. Form CA–721 is used for claims for injury. Form CA–722 is used for claims for death. This information collection is currently approved for use through December 31, 2016.

II. Review Focus

The Department of Labor is particularly interested in comments which:

* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

* evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

* enhance the quality, utility and clarity of the information to be collected; and

* minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

III. Current Actions

The Department of Labor seeks the extension of approval to collect this information to determine eligibility for benefits.

Type of Review: Extension.

Agency: Office of Workers' Compensation Programs.

Title: Notice of Law Enforcement Officer's Injury or Occupational Disease (CA–721), Notice of Law Enforcement Officer's Death (CA–722).

OMB Number: 1240–0022.

Agency Number: CA–721 and CA–722.

Affected Public: Individuals or Households; Business or other for-profit; State, Local or Tribal Government.

Total Respondents: 7.

Total Annual Responses: 7.

Average Time per Response: 60–90 minutes.

Estimated Total Burden Hours: 9.

Frequency: On occasion.

Total Burden Cost (capital/startup): $0.

Total Burden Cost (operating/maintenance): $4.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: September 29, 2016.

Yoon Ferguson,

Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.

[FR Doc. 2016–24123 Filed 10–4–16; 8:45 am]

BILLING CODE 4510–CH–P

NUCLEAR REGULATORY COMMISSION

[NRC–2014–0276]

General Use of Locks in the Protection and Control of: Facilities, Radioactive Materials, Classified Information, Classified Matter, and Safeguards Information

AGENCY: Nuclear Regulatory Commission.

ACTION: Regulatory guide; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing Revision 1 to Regulatory Guide (RG) 5.12, ''General Use of Locks in Protection and Control of: Facilities Radioactive Materials, Classified Information, Classified Matter, and Safeguards Information.'' This RG describes methods and procedures that the staff of the NRC considers acceptable for the selection, use, and control of locking devices in the protection of areas, facilities, certain radioactive materials, and specific types of information (*e.g.* classified matter, National Security Information (NSI), Restricted Data (RD), Formerly Restricted Data (FRD), Safeguards Information (SGI)).

DATES: Revision 1 to RG 5.12 is available on October 5, 2016.

ADDRESSES: Please refer to Docket ID NRC–2014–0276 when contacting the NRC about the availability of information regarding this document. You may obtain publically-available information related to this document, using the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2014–0276. Address questions about NRC dockets to Carol Gallagher; telephone: 301–415–3463; email: *Carol.Gallagher@nrc.gov.* For technical questions, contact the individuals listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Document 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 ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document. Revision 1 to RG 5.12, and the regulatory analysis may be found in ADAMS under Accession Nos. ML15357A411 and ML14002A222, 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.

Regulatory guides are not copyrighted, and NRC approval is not required to reproduce them.

FOR FURTHER INFORMATION CONTACT: Al Tardiff, Office of Nuclear and Incident Response, telephone: 301–287–3616; email: *Al.Tardiff@nrc.gov;* and Mekonen Bayssie, Office of Nuclear Regulatory Research, telephone: 301–415–1699, email: *Mekonen.Bayssie@nrc.gov.* Both are staff members of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Discussion

The NRC is issuing a revision to an existing guide in the NRC's ''Regulatory Guide'' series. This series was developed to describe and make available to the public information regarding methods that are acceptable to the NRC staff for implementing specific parts of the agency's regulations, techniques that the NRC staff uses in evaluating specific issues or postulated events, and data that the NRC staff needs in its review of applications for permits and licenses.

Revision 1 of RG 5.12 was issued with a temporary identification of Draft Regulatory Guide, DG–5027. It incorporates new information, lessons learned, and operating experience since the guide was originally issued in 1973, particularly new locking technologies and standards for locks and keys. Some specific items addressed include the basic characteristics of a lock that licensees should consider when selecting locks, and information on when licensees should change combinations or keys. In addition, references in the RG were updated, a reference to an industry dictionary of lock terminology was added to aid in reader understanding of the technical aspects of lock systems, and the relevant regulations were identified. Furthermore, the title of the guide was revised to include the broadened scope of the guide. The original scope of the guide included control and protection of facilities and special nuclear material (SNM). The revised scope of the guide now includes control and protection of: (1) Classified information/matter, (2) safeguards information, (3) an aggregated Category 1 or Category 2 quantity of radioactive material listed in appendix A to part 37 of title 10 of the *Code of Federal Regulations* (10 CFR), and (4) spent nuclear fuel.

II. Additional Information

The DG–5027, was published in the **Federal Register** on January 2, 2015 (80 FR 53) for a 60-day public comment period. The public comment period closed on March 3, 2015. Public comments on DG–5027 and the NRC staff's responses to the public comments are available in ADAMS under Accession No. ML15357A410.

III. Congressional Review Act

This RG is a rule as defined in the Congressional Review Act (5 U.S.C. 801–808). However, the Office of Management and Budget has not found it to be a major rule as defined in the Congressional Review Act.

IV. Backfitting and Issue Finality

This RG provides updated guidance on the methods acceptable to the NRC staff for complying with the NRC's regulations associated with the use of locks in the protection and control of facilities, special nuclear materials, classified matter, and safeguards information. The RG applies to current and future applicants for, and holders of:

- Licenses issued under 10 CFR part 70 to possess or use, at any site or contiguous sites subject to licensee control, a formula quantity of strategic special nuclear material, as defined in 10 CFR 70.4;
- operating licenses for nuclear power reactors under 10 CFR part 50;
- approvals issued under subparts B, C, E, and F of 10 CFR part 52;
- operating licenses for nuclear non-power reactors under 10 CFR part 50;
- licenses for industrial radiography under 10 CFR part 34;
- licenses for medical use of byproduct material under 10 CFR part 35;
- licenses for irradiators under 10 CFR part 36;
- licenses authorizing the possession of an aggregated Category 1 or Category 2 quantity of radioactive material listed in appendix A to 10 CFR part 37;
- licenses for well logging under 10 CFR part 39;
- licenses, certificates, and other NRC approvals, who protect safeguards information regulated by the Commission under 10 CFR 73.21–73.23; and
- licenses, certificates, and other NRC approvals, who may protect Secret and Confidential NSI, RD, and FRD received or developed in conjunction with activities licensed, certified, or regulated by the Commission under 10 CFR part 95.

Holders of approvals under only parts 34, 35, 36, 37, 39, and 95 of the NRC's regulations and holders of non-power reactor operating licenses under 10 CFR part 50, are not protected by backfitting or issue finality provisions.

Issuance of this RG does not constitute backfitting under 10 CFR parts 50 or 70 and is not otherwise inconsistent with the issue finality provisions in 10 CFR part 52. As discussed in the ''Implementation'' section of this RG, the NRC has no current intention to impose the RG on current holders of 10 CFR part 50 operating licenses; 10 CFR part 52, subpart B, C, E, or F approvals; or 10 CFR part 70 licenses.

The RG could be applied to applications for 10 CFR part 50 operating licenses; 10 CFR part 52, subpart B, C, E, or F approvals; or licenses issued under part 70. Such action would not constitute backfitting as defined in 10 CFR 50.109 or 10 CFR 70.76 or be otherwise inconsistent with the applicable issue finality provision in 10 CFR part 52, inasmuch as such applicants are not within the scope of entities protected by 10 CFR 50.109, 10 CFR 70.76, or the relevant issue finality provisions in 10 CFR part 52. Backfitting restrictions were not intended to apply to every NRC action that substantially changes settled expectations, and applicants have no reasonable expectation that future requirements may change, *see* 54 FR 15372; April 18, 1989, at 15385–86. Although the issue finality provisions in part 52 are intended to provide regulatory stability and issue finality, the matters addressed in this RG (concerning certain security requirements in part 73) are not within the scope of issues that may be resolved for design certification, design approval or a manufacturing license, and therefore are not subject to issue finality protections in part 52.

Dated at Rockville, Maryland, this 29th day of September, 2016.

For the Nuclear Regulatory Commission.

Thomas H. Boyce,

Chief, Regulatory Guidance and Generic Issues Branch, Division of Engineering, Office of Nuclear Regulatory Research.

[FR Doc. 2016–23992 Filed 10–4–16; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2016–99]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing recent Postal Service filings for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* October 6, 2016.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's Web site (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2016–99; *Filing Title:* Notice of the United States Postal Service of Filing Modification to Global Expedited Package Services 3 Negotiated Service Agreement; *Filing Acceptance Date:* September 28, 2016; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Kenneth R. Moeller; *Comments Due:* October 6, 2016.

This notice will be published in the **Federal Register**.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2016–24017 Filed 10–4–16; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78974; File No. SR–MIAX–2016–34]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 519C, Mass Cancellation of Trading Interest

September 29, 2016.

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 September 22, 2016, Miami International Securities Exchange LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Exchange Rule 519C, Mass Cancellation of Trading Interest.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 519C, Mass Cancellation of Trading Interest, to adopt new section (b) to provide that Exchange staff, upon request from a Member,[4] may remove all quotations [5] and cancel all orders [6] in the System [7] and block new incoming quotations and orders from entering the System. The block will remain in effect until the Member contacts Exchange staff [8] to have the block removed. The Exchange is also proposing to make technical amendments to the Rule as described below.

The proposal would allow a Member to submit a request to remove all of its outstanding quotations and cancel all of its open orders and block all new inbound quotations and orders by firm name or Market Participant Identifier (''MPID''). The form of such requests includes, but is not limited to, email or a phone call from authorized individuals. The removal of quotes and the cancellation of orders as described herein does not disconnect Members from the Exchange's System.

The Exchange is also proposing to make technical amendments to Exchange Rule 519C. The Exchange proposes to add a new heading entitled ''Cancel'' to the first paragraph, and also proposes to identify the first paragraph with the letter ''(a)'' for clarity and ease of reference. Additionally, the Exchange proposes to make a clarifying change to the wording of the first paragraph. The paragraph currently states that, ''[a] Member may cancel all of its quotations and/or all or any subset of its orders [. . .].'' The Exchange proposes to replace the word ''cancel'' with ''remove'' and to insert the word ''cancel'' after ''and/or,'' as this language more accurately describes the actions being performed by the Exchange. Further, this language is consistent with the rule text of another exchange that offers similar functionality.[9] Additionally, the Exchange is proposing to insert language indicating that a Member may effect the removal of its quotations and/or the cancellation of its orders, ''by firm name or by Market Participant Identifier (''MPID'')''.

The purpose of the proposed rule change is to add an additional risk control mechanism for Members. The Exchange has a number of other rules covering risk management processes available to Members and it believes this capability will provide Members with an additional risk management tool and enhance transparency in the Exchange's rules. Additionally, the proposed technical change to the rule adds greater clarity and precision to the rule text.

2. Statutory Basis

MIAX believes that its proposed rule change is consistent with Section 6(b) of the Act [10] in general, and furthers the objectives of Section 6(b)(5) of the Act [11] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The proposed rule adds another risk protection tool for Members and

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The term ''Member'' means an individual or organization approved to exercise trading rights associated with a Trading Permit. Members are deemed ''members'' under the Act. *See* Exchange Rule 100.

[5] The term ''quotation'' or ''quote'' means a bid or offer entered by a Market Maker that is firm and may update the Market Maker's previous quote, if any. The Rules of the Exchange provide for the use of different types of quotes, including Standard quotes and eQuotes, as more fully described in Exchange Rule 517. A Market Maker may, at times, choose to have multiple types of quotes active in an individual option. *See* Exchange Rule 100.

[6] The term ''order'' means a firm commitment to buy or sell option contracts. *See* Exchange Rule 100.

[7] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

[8] The Exchange's Help Desk would receive such communication. The Help Desk is the Exchange's control room consisting of Exchange staff authorized to make certain trading determinations on behalf of the Exchange. The Help Desk shall report to and be supervised by a senior executive officer of the Exchange. *See* Exchange Rule 100.

[9] *See* BOX Options Exchange LLC (''BOX''), Rule 7280.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

provides that the Exchange may take action on their behalf. The proposed rule protects investors and the public interest by increasing the number of risk protection tools available to Members on the Exchange. The Exchange notes that a similar rule is currently operative on another exchange.[12]

The technical amendments organize the rule text and clarify the actions being performed by the Exchange and are intended to remove impediments to and perfect the mechanisms of a free and open market by adding precision and ease of reference to the Exchange's rules, thus promoting transparency and clarity for Exchange Members. Additionally, harmonizing the language in the rule text to that of another exchange that offers similar functionality will minimize any confusion regarding the actions being performed by the Exchange under the proposed rule.

The Exchange notes that the proposed rule change will not relieve Exchange Market Makers of their continuous quoting obligations under Exchange Rule 604 and under Reg NMS Rule 602.[13] Specifically, any interest that is executable against a Member's quotes and orders that is received by the Exchange prior to the time the removal of quotes or cancellation of orders request is received by the System will automatically execute at the price up to the Member's size. Market Makers that request their quotes be removed will not be relieved of the obligation to provide continuous two-sided quotes on a daily basis, nor will it prohibit the Exchange from taking disciplinary action against a Market Maker for failing to meet their continuous quoting obligation each trading day.

The proposed rule change is intended to remove impediments to and perfect the mechanisms of a free and open market by introducing additional risk protection tools for Exchange Members and by adding precision and ease of reference to the Exchange's rules, thus promoting transparency and clarity for Exchange Members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes the proposed rule change will not impose any burden on intra-market competition because every Member of the Exchange has the opportunity to benefit from the procedure described in the proposed rule. The proposed rule is meant to provide all Members with the same protection in the event the Member is experiencing an issue that would require the Member to withdraw its quotations and cancel its orders from the market and prevent new quotations and orders from being received in order to ensure a fair and orderly market on the Exchange.

The Exchange believes the proposed rule change will not impose any burden on inter-market competition because the process of cancellation of quotations and orders on the Exchange is substantially similar to processes currently operative on other exchanges.[14]

For all the reasons stated, 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.

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

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 after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act [15] and Rule 19b–4(f)(6) [16] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2016–34 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–MIAX–2016–34. 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–MIAX–2016–34 and should be submitted on or before October 26, 2016.

[12] *See supra* note 9.

[13] 17 CFR 242.602.

[14] *See supra* note 9.

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–23997 Filed 10–4–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78992; File Nos. SR–NYSE–2016–57; SR–NYSEMKT–2016–80; SR–NYSEArca–2016–119]

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE MKT LLC; NYSE Arca, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment No. 2 Thereto, Amending and Restating the Second Amended and Restated Certificate of Incorporation of the Exchanges' Ultimate Parent Company, Intercontinental Exchange, Inc.

September 29, 2016.

I. Introduction

On August 17, 2016, each of New York Stock Exchange LLC (''NYSE''), NYSE MKT LLC (''NYSE MKT''), and NYSE Arca, Inc. (''NYSE Arca'' and, with NYSE and NYSE MKT, the ''Exchanges'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend and restate the Second Amended and Restated Certificate of Incorporation (''ICE Certificate'') of the Exchanges' ultimate parent company, Intercontinental Exchange, Inc. (''ICE''), to increase ICE's authorized share capital and to make other, non-substantive changes. The proposed rule changes were published for comment in the **Federal Register** on August 30, 2016.[3] On August 25, 2016, the Exchanges each filed Amendment No. 1 to its respective proposed rule change.[4] On August 29, 2016, the Exchanges each filed Amendment No. 2 to its respective proposed rule change.[5] The Commission received no comments on the proposed rule changes, as amended. This order approves the proposed rule changes, as modified by Amendment No. 2.

II. Description of the Proposed Rule Change

The Exchanges propose to revise the ICE Certificate[6] to increase the total number of authorized shares of ICE common stock, par value $0.01 per share (''Common Stock''), and to make other, non-substantive changes. More specifically, the Exchanges propose to make the following amendments to the ICE Certificate:

- In Article IV, Section A, the total number of shares of stock that ICE is authorized to issue would be changed from 600,000,000 to 1,600,000,000 shares, and the portion of that total constituting Common Stock would be changed from 500,000,000 to 1,500,000,000 shares.
- In Article V, Section A.5, the reference to ''this Section A of ARTICLE VI'' would be corrected to refer to ''this Section A of ARTICLE V''.
- References to the ''Second Amended and Restated Certificate of Incorporation'' would be changed throughout to refer to the ''Third Amended and Restated Certificate of Incorporation,'' and related technical and conforming changes would be made to the recitals and signature page of the ICE Certificate.

The Exchanges state that the proposed amendments to the ICE Certificate were approved by the board of directors of ICE (''ICE Board'') on August 1, 2016.[7] The Exchanges further state that the amendments to the ICE Certificate would be effective when filed with the Department of State of Delaware, which would not occur until approval of the amendments by the stockholders of ICE is obtained at a Special Meeting of Stockholders on October 12, 2016.[8]

According to the Exchanges, the trading price of ICE's Common Stock has risen significantly since ICE's initial public offering in 2005, and the ICE Board believes that such price appreciation may impact the liquidity of ICE's Common Stock, making it more difficult to efficiently trade and potentially less attractive to certain investors.[9] Accordingly, the ICE Board approved pursuing a 5-for-1 stock split by way of a stock dividend, pursuant to which the holders of record of shares of Common Stock would receive, by way of a dividend, four shares of Common Stock for each share of Common Stock held by such holder (''Stock Dividend''). The Exchanges state that the ICE Board's approval of the Stock Dividend was contingent upon Commission and ICE stockholder approval of the proposed amendments to the ICE Certificate.

Further, the Exchanges state that the number of shares of Common Stock proposed to be issued in the Stock Dividend exceeds ICE's authorized but unissued shares of Common Stock. The proposed rule changes would increase ICE's authorized shares of Common Stock and shares of capital stock to allow ICE to effectuate the Stock Dividend.

According to the Exchanges, the proposed changes to the ICE Certificate would not alter the limitations on voting and ownership set forth in Section V of the ICE Certificate.[10] Such limitations were introduced at the time of ICE's acquisition of the Exchanges, to ''minimize the potential that a person could improperly interfere with or restrict the ability of the Commission, the Exchange, or its subsidiaries to effectively carry out their regulatory oversight responsibilities under the Act.''[11]

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule changes, as modified by Amendment No. 2, are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[12]

The Commission finds that the proposed rule changes by the Exchanges to modify the ICE Certificate are consistent with the requirements of Section 6 of the Act and the rules and regulations thereunder applicable to a national securities exchange.[13] In

[17] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release Nos. 78661 (August 24, 2016), 81 FR 59699 (August 30, 2016) (''NYSE Notice''); 78663 (August 24, 2016), 81 FR 59696 (August 30, 2016); and 78662 (August 24, 2016), 81 FR 59674 (August 30, 2016).

[4] On August 26, 2016, the Exchanges withdrew Amendment No. 1.

[5] Amendment No. 2 made technical, non-substantive changes to the ICE Certificate to remove unnecessary underlining and to italicize a comma. Because Amendment No. 2 adds clarification and does not materially alter the substance of the proposed rule changes or raise unique or novel regulatory issues, Amendment No. 2 is not subject to notice and comment.

[6] ICE owns 100% of the equity interest of Intercontinental Exchange Holdings, Inc., which in turn owns 100% of the equity interest of NYSE Holdings LLC. NYSE Holdings LLC owns 100% of the equity interest of NYSE Group, Inc., which in turn directly owns 100% of the equity interest of each Exchange. ICE is a publicly traded company listed on the NYSE.

[7] *See, e.g.,* NYSE Notice, *supra* note 3.

[8] *See id.*

[9] *See id.*

[10] *See id.*

[11] *See* Securities Exchange Act Release No. 70210 (August 15, 2013), 78 FR 51758 (August 21, 2013) (SR–NYSE–2013–42; SR–NYSEMKT–2013–50; and SR–NYSEArca–2013–62), at 51760.

[12] In approving the proposed rule changes, the Commission has considered their impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[13] Certain provisions of the ICE Certificate are considered rules of NYSE, NYSE MKT, and NYSE Arca if they are stated policies, practices, or interpretations, as defined in Rule 19b–4 under the Act, of NYSE, NYSE MKT, and NYSE Arca, and

particular, the Commission finds that the proposed rule changes are consistent with Section 6(b)(1) of the Act, which, among other things, requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members with the provisions of the Act, the rule and regulations thereunder, and the rules of the exchange.[14] The proposed revisions to the ICE Certificate are intended to increase ICE's authorized shares of Common Stock and shares of capital stock and thus would allow ICE to effectuate the Stock Dividend. The Exchanges represent that the proposed rule changes would not alter the limitations on voting and ownership set forth in Section V of the ICE Certificate, which are designed to ''minimize the potential that a person could improperly interfere with or restrict the ability of the Commission, the Exchange, or its subsidiaries to effectively carry out their regulatory oversight responsibilities under the Act.'' [15]

In addition, the Commission finds that the proposed rule changes are consistent with Section 6(b)(5) of the Act,[16] which requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. As noted above, the proposed rule changes would revise the ICE Certificate to increase ICE's authorized share capital and thus would facilitate ICE's proposed Stock Dividend. In addition, the proposed rule changes would correct an erroneous reference, which may reduce potential confusion and enhance the clarity of the ICE Certificate.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[17] that the proposed rule changes (SR–NYSE–2016–57; SR–NYSEMKT–2016–80; SR–NYSEArca–2016–119), as modified by Amendment No. 2, be, and hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–24016 Filed 10–4–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78984; File No. SR–SCCP–2016–01]

Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Notice of Filing of Proposed Rule Change To Amend the By-Laws of Nasdaq, Inc. To Implement Proxy Access

September 29, 2016.

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 September 15, 2016, Stock Clearing Corporation of Philadelphia (''SCCP'') 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 clearing agency. 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

SCCP is filing this proposed rule change with respect to amendments of the By-Laws (the ''By-Laws'') of its parent corporation, Nasdaq, Inc. (''Nasdaq'' or the ''Company''), to implement proxy access. The proposed amendments will be implemented on a date designated by the Company following approval by the Commission. The text of the proposed rule change is available on SCCP's Web site at *http://nasdaqphlx.cchwallstreet.com/nasdaqomxphlx/sccp/,* at the principal office of SCCP, 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, SCCP 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. SCCP 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

At Nasdaq's 2016 annual meeting held on May 5, 2016, Nasdaq's stockholders considered a stockholder proposal submitted under Rule 14a–8 under the Act.[3] The proposal, which passed with 73.52% of the votes cast, requested that Nasdaq's Board of Directors (the ''Board'') take steps to implement a ''proxy access'' by-law. Proxy access by-laws allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on a board and have those candidates included in a company's proxy materials. Such provisions allow stockholders to nominate candidates without undertaking the expense of a proxy solicitation.

Following the 2016 annual meeting, the Nominating & Governance Committee (the ''Committee'') of the Board and the Board reviewed the voting results on the stockholder proposal and discussed proxy access generally. The Committee ultimately recommended to the Board, and the Board approved, certain changes to Nasdaq's By-Laws to implement proxy access. Nasdaq now proposes to make these changes by adopting new Section 3.6 of the By-Laws and making certain conforming changes to current Sections 3.1, 3.3 and 3.5 of the By-Laws, all of which are described further below.

In developing its proposal, Nasdaq has generally tried to balance the relative weight of arguments for and against proxy access provisions. On the one hand, Nasdaq recognizes the significance of this issue to some investors, who see proxy access as an important accountability mechanism that allows them to participate in board elections through the nomination of stockholder candidates that are

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must be filed with the Commission pursuant to Section 19(b)(4) of the Act and Rule 19b–4 thereunder. *See* 15 U.S.C. 78c(a)(27); 15 U.S.C. 78s(b); and 17 CFR 240.19b–4.

[14] 15 U.S.C. 78f(b)(1).

[15] *See supra* note 11.

[16] 15 U.S.C. 78f(b)(5).

[17] 15 U.S.C. 78s(b)(2).

[18] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* 17 CFR 240.14a–8, which establishes procedures pursuant to which stockholders of a public company may have their proposals placed alongside management's proposals in the company's proxy materials for presentation to a vote at a meeting of stockholders.

presented in a company's proxy statement. On the other hand, Nasdaq's proposed proxy access provision includes certain procedural requirements that ensure, among other things, that the Company and its stockholders will have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees will comply with applicable laws, regulations and other requirements.

Proposed Section 3.6(a) of the By-Laws

To respond to feedback from its stockholders, Nasdaq proposes to amend its By-Laws to, as set forth in the first sentence of proposed Section 3.6(a), require the Company to include in its proxy statement, its form proxy and any ballot distributed at the stockholder meeting, the name of, and certain Required Information [4] about, any person nominated for election (the ''Stockholder Nominee'') to the Board by a stockholder or group of stockholders (the ''Eligible Stockholder'') [5] that satisfies the requirements set forth in the proxy access provision of Nasdaq's By-Laws.[6] To utilize this provision, the Eligible Stockholder must expressly elect at the time of providing a required notice to the Company of the proxy access nomination (the ''Notice of Proxy Access Nomination'') to have its nominee included in the Company's proxy materials. Stockholders will be eligible to submit proxy access nominations only at annual meetings of stockholders when the Board solicits proxies with respect to the election of directors.

The next two sentences of Section 3.6(a) provide some additional clarification on the term ''Eligible Stockholder.'' First, in calculating the number of stockholders in a group seeking to qualify as an Eligible Stockholder, two or more of the following types of funds shall be counted as one stockholder: (i) Funds under common management and investment control, (ii) funds under common management and funded primarily by the same employer, or (iii) funds that are a ''group of investment companies'' as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Company Act of 1940, as amended.[7] Nasdaq views this as a stockholder-friendly provision that will make it easier for such funds to participate in a proxy access nomination since they will not have to comply with the procedural requirements in the proxy access provision multiple times. Second, in the event that the Eligible Stockholder consists of a group of stockholders, any and all requirements and obligations for an individual Eligible Stockholder shall apply to each member of the group, except that the Required Ownership Percentage (discussed further below) shall apply to the ownership of the group in the aggregate. Generally, the applicable requirements and obligations relate to information that each member of the nominating group must provide to Nasdaq about itself, as discussed further below. Nasdaq believes it is reasonable to require each member of the nominating group to provide such information so that both the Company and its stockholders are fully informed about the entire group making the proxy access nomination.

The final sentence of proposed Section 3.6(a) allows Nasdaq to omit from its proxy materials any information or Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law or regulation. This provision allows Nasdaq to comply with Rule 14a–9 under the Act [8] and to protect its stockholders from information that is materially untrue or that violates any law or regulation. The final sentence of proposed Section 3.6(a) also explicitly allows Nasdaq to solicit against, and include in the proxy statement its own statement relating to, any Stockholder Nominee. This provision merely clarifies that just because Nasdaq must include a proxy access nominee in its proxy materials if the proxy access provisions are satisfied, Nasdaq does not necessarily have to support that nominee.

Proposed Section 3.6(b) of the By-Laws

Proposed Section 3.6(b) of the By-Laws establishes the deadline for a timely Notice of Proxy Access Nomination. Specifically, such a notice must be addressed to, and received by, Nasdaq's Corporate Secretary no earlier than one hundred fifty (150) days and no later than one hundred twenty (120) days before the anniversary of the date that Nasdaq issued its proxy statement for the previous year's annual meeting of stockholders. The Company believes this notice period will provide stockholders an adequate window to submit nominees via proxy access, while also providing the Company adequate time to diligence [sic] a proxy access nominee before including them in the proxy statement for the next annual meeting of stockholders.

Proposed Section 3.6(c) of the By-Laws

Proposed Section 3.6(c) specifies that the maximum number of Stockholder Nominees nominated by all Eligible Stockholders that will be included in Nasdaq's proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two and 25% of the total number of directors in office (rounded down to the nearest whole number) as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with the proxy access provision of the By-Laws (the ''Final Proxy Access Nomination Date''). In the event that one or more vacancies for any reason occurs after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board resolves to reduce the size of the Board in connection therewith, the maximum number of Stockholder Nominees included in Nasdaq's proxy materials shall be calculated based on the number of directors in office as so reduced. Any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision of the By-Laws whom the Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the maximum number of Stockholder Nominees has been reached.

[4] The Required Information is the information provided to Nasdaq's Corporate Secretary about the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Company's proxy statement by the regulations promulgated under the Act, and if the Eligible Stockholder so elects, a written statement, not to exceed 500 words, in support of the Stockholder Nominee(s)' candidacy (the ''Statement'').

[5] As used throughout Nasdaq's By-Laws, the term ''Eligible Stockholder'' includes each member of a stockholder group that submits a proxy access nomination to the extent the context requires.

[6] When the Company includes proxy access nominees in the proxy materials, such individuals will be included in addition to any persons nominated for election to the Board or any committee thereof.

[7] *See* 15 U.S.C. 80a–12(d)(1)(G)(ii), which defines ''group of investment companies'' as any two or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.

[8] *See* 17 CFR 240.14a–9, which generally prohibits proxy solicitations that contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to the proxy access provision exceeds the maximum number of nominees allowed. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders exceeds the maximum number of nominees allowed, the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder will be selected for inclusion in the proxy materials until the maximum number is reached, going in order of the amount (largest to smallest) of shares of Nasdaq's outstanding common stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to Nasdaq. If the maximum number is not reached after the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder has been selected, this process will continue as many times as necessary, following the same order each time, until the maximum number is reached. Following such determination, if any Stockholder Nominee who satisfies the eligibility requirements thereafter is nominated by the Board, or is not included in the proxy materials or is not submitted for election as a director, in either case, as a result of the Eligible Stockholder becoming ineligible or withdrawing its nomination, the Stockholder Nominee becoming unwilling or unable to serve on the Board or the Eligible Stockholder or the Stockholder Nominee failing to comply with the proxy access provision of the By-Laws, no other nominee or nominees shall be included in the proxy materials or otherwise submitted for director election in substitution thereof.

The Company believes it is reasonable to limit the Board seats available to proxy access nominees, to establish procedures for selecting candidates if the nominee limit is exceeded and to exclude further proxy access nominees in the cases set forth above. The limitation on Board seats available to proxy access nominees ensures that proxy access cannot be used to take over the entire Board, which is not the stated purpose of proxy access campaigns. The procedures for selecting candidates if the nominee limit is exceeded establish clear and rational guidelines for an orderly nomination process to avoid the Company having to make arbitrary judgments among candidates. Finally, the exclusion of further proxy access nominees in certain cases will avoid further time and expense to the Company when the proxy access nominee has been nominated by the Board, in which case the goal of the proxy access nomination has been achieved, or in certain cases when the Eligible Stockholder or Stockholder Nominee is at fault.

Proposed Section 3.6(d) of the By-Laws

Proposed Section 3.6(d) clarifies, for the avoidance of doubt, how ''ownership'' will be defined for purposes of meeting the Required Ownership Percentage (discussed further below). Specifically, an Eligible Stockholder shall be deemed to ''own'' only those outstanding shares of Nasdaq's common stock as to which the stockholder possesses both: (i) The full voting and investment rights pertaining to the shares; and (ii) the full economic interest in (including the opportunity for profit from and risk of loss on) such shares; provided that the number of shares calculated in accordance with clauses (i) and (ii) shall not include any shares:

- Sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed, including any short sale;
- borrowed by such stockholder or any of its affiliates for any purposes or purchased by such stockholder or any of its affiliates pursuant to an agreement to resell; or
- subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar agreement entered into by such stockholder or any of its affiliates, whether any such instrument or agreement is to be settled with shares or with cash based on the notional amount or value of shares of Nasdaq's outstanding common stock, in any such case which instrument or agreement has, or is intended to have, or if exercised by either party would have, the purpose or effect of:
  - Reducing in any manner, to any extent or at any time in the future, such stockholder's or its affiliates' full right to vote or direct the voting of any such shares; and/or
  - hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or its affiliates.

Further, a stockholder shall ''own'' shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has delegated any voting power by means of a proxy, power of attorney or other instrument or arrangement which is revocable at any time by the stockholder. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has loaned such shares provided that the stockholder has the power to recall such loaned shares on three (3) business days' notice, has recalled such loaned shares as of the date of the Notice of Proxy Access Nomination and holds such shares through the date of the annual meeting. The terms ''owned,'' ''owning'' and other variations of the word ''own'' shall have correlative meanings. Whether outstanding shares of Nasdaq's common stock are ''owned'' for these purposes shall be determined by the Board or any committee thereof, in each case, in its sole discretion. For purposes of the proxy access provision of the By-Laws, the term ''affiliate'' or ''affiliates'' shall have the meaning ascribed thereto under the rules and regulations of the Act.[9] An Eligible Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to own for the purposes of the proxy access provision of the By-Laws.

Proposed Section 3.6(e) of the By-Laws

The first paragraph of proposed Section 3.6(e) establishes certain requirements for an Eligible Stockholder to make a proxy access nomination. Specifically, an Eligible Stockholder must have owned (defined as discussed above) 3% or more (the ''Required Ownership Percentage'') of Nasdaq's outstanding common stock (the ''Required Shares'') continuously for 3 years (the ''Minimum Holding Period'') as of both the date the Notice of Proxy Access Nomination is received by Nasdaq's Corporate Secretary and the

[9] Pursuant to Rule 12b–2 under the Act, ''[a]n 'affiliate' of, or a person 'affiliated' with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.'' 17 CFR 240.12b–2. Further, ''[t]he term 'control' (including the terms 'controlling,' 'controlled by' and 'under common control with') means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'' 17 CFR 240.12b–2.

record date for determining the stockholders entitled to vote at the annual meeting and must continue to own the Required Shares through the meeting date.

Proposed Section 3.6(e) also sets forth the information that an Eligible Stockholder must provide to Nasdaq's Corporate Secretary in writing within the deadline discussed above in order to make a proxy access nomination. This information includes:

- One or more written statements from the record holder of the shares (and from each intermediary through which the shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Notice of Proxy Access Nomination is delivered to, or mailed to and received by, Nasdaq's Corporate Secretary, the Eligible Stockholder owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder's agreement to provide, within five (5) business days after the record date for the annual meeting, written statements from the record holder and intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date; [10]
- a copy of the Schedule 14N that has been filed with the SEC as required by Rule 14a–18 under the Act; [11]
- the information, representations and agreements with respect to the Eligible Stockholder that are the same as those that would be required to be set forth in a stockholder's notice of nomination with respect to a ''Proposing Person'' pursuant to Section 3.1(b)(i) and Section 3.1(b)(iii) of the By-Laws; [12]
- the consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected; [13]
- a representation that the Eligible Stockholder:
  - Acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of Nasdaq, and does not presently have such intent; [14]
  - presently intends to maintain qualifying ownership of the Required Shares through the date of the annual meeting; [15]
  - has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s); [16]
  - has not engaged and will not engage in, and has not and will not be a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting, other than its Stockholder Nominee(s) or a nominee of the Board; [17]
  - agrees to comply with all applicable laws and regulations with respect to any solicitation in connection with the meeting or applicable to the filing and use, if any, of soliciting material; [18]
  - will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; [19] and
  - as to any two or more funds whose shares are aggregated to count as one stockholder for the purpose of constituting an Eligible Stockholder, within five business days after the date of the Notice of Proxy Access Nomination, will provide to Nasdaq documentation reasonably satisfactory to Nasdaq that demonstrates that the funds satisfy the requirements in the By-Laws, which were discussed above, for the funds to qualify as one Eligible Stockholder; [20]
- a representation as to the Eligible Stockholder's intentions with respect to maintaining qualifying ownership of the Required Shares for at least one year following the annual meeting; [21]
- an undertaking that the Eligible Stockholder agrees to:
  - Assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder's communications with Nasdaq's stockholders or out of the information that the Eligible Stockholder provided to Nasdaq; [22]
  - indemnify and hold harmless Nasdaq and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against Nasdaq or any of its directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to the proxy access provision; [23] and
  - file with the SEC any solicitation or other communication with Nasdaq's stockholders relating to the meeting at which the Stockholder Nominee will be nominated, regardless of whether any such filing is required under Regulation 14A of the Act or whether any exemption from filing is available thereunder; [24] and
- in the case of a nomination by a group of stockholders that together is an Eligible Stockholder, the designation by all group members of one group member that is authorized to act on behalf of all such members with respect to the nomination and matters related thereto, including withdrawal of the nomination.[25]

In proposing the Required Ownership Percentage and the Minimum Holding Period, Nasdaq seeks to ensure that the Eligible Stockholder has had a sufficient stake in the Company for a sufficient amount of time and is not pursuing a short-term agenda. In proposing the informational requirements for the Eligible Stockholder, Nasdaq's goal is to gather sufficient information about the Eligible Stockholder for both itself and its stockholders. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(f) of the By-Laws

Proposed Section 3.6(f) establishes the information the Stockholder Nominee must deliver to Nasdaq's Corporate

[10] *See* proposed Section 3.6(e)(i) of the By-Laws.

[11] *See* proposed Section 3.6(e)(ii) of the By-Laws; *see also* 17 CFR 240.14n–101 and 17 CFR 240.14a–18, which generally require a Nominating Stockholder to provide notice to the Company of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to the Company.

[12] *See* proposed Section 3.6(e)(iii) of the By-Laws; *see also* Sections 3.1(b)(i) and 3.1(b)(iii) of the By-Laws, which constitute part of Nasdaq's ''advance notice'' provision under which a ''Proposing Person'' may, among other things, nominate a person for election to the Board.

[13] *See* proposed Section 3.6(e)(iv) of the By-Laws.

[14] *See* proposed Section 3.6(e)(v)(A) of the By-Laws.

[15] *See* proposed Section 3.6(e)(v)(B) of the By-Laws.

[16] *See* proposed Section 3.6(e)(v)(C) of the By-Laws.

[17] *See* proposed Section 3.6(e)(v)(D) of the By-Laws; *see also* 17 CFR 240.14a-1(l), which defines the related terms ''solicit'' and ''solicitation.''

[18] *See* proposed Section 3.6(e)(v)(E) of the By-Laws.

[19] *See* proposed Section 3.6(e)(v)(F) of the By-Laws.

[20] *See* proposed Section 3.6(e)(v)(G) of the By-Laws.

[21] *See* proposed Section 3.6(e)(vi) of the By-Laws.

[22] *See* proposed Section 3.6(e)(vii)(A) of the By-Laws.

[23] *See* proposed Section 3.6(e)(vii)(B) of the By-Laws.

[24] *See* proposed Section 3.6(e)(vii)(C) of the By-Laws; *see also* 17 CFR 240.14a–1–14b–2, which governs solicitations of proxies.

[25] *See* proposed Section 3.6(e)(viii) of the By-Laws.

Secretary within the time period specified for delivering the Notice of Proxy Access Nomination. This information includes:

- The information required with respect to persons whom a stockholder proposes to nominate for election or reelection as a director by Section 3.1(b)(i) of the By-Laws [26] including, but not limited to, the signed questionnaire, representation and agreement required by Section 3.1(b)(i)(D) of the By-Laws; [27] and
- a written representation and agreement that such person:
  - Will act as a representative of all of Nasdaq's stockholders while serving as a director; and
  - will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects (and shall not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading).

In addition, at the request of Nasdaq, the Stockholder Nominee(s) must submit all completed and signed questionnaires required of Nasdaq's directors and officers. Nasdaq may request such additional information as necessary to (y) permit the Board to determine if each Stockholder Nominee satisfies the requirements of the proxy access provision of the By-Laws or if each Stockholder Nominee is independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing the independence of Nasdaq's directors [28] and/or (z) permit Nasdaq's Corporate Secretary to determine the classification of such nominee as an Industry, Non-Industry, Issuer or Public Director, if applicable, in order to make the certification referenced in Section 4.13(h)(iii) of the By-Laws.[29]

Like the informational requirements for an Eligible Stockholder, which are set forth above, the informational requirements for the Stockholder Nominee ensure that both Nasdaq and its stockholders will have sufficient information about the Stockholder Nominee. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(g) of the By-Laws

Pursuant to proposed Section 3.6(g), each Eligible Stockholder or Stockholder Nominee must promptly notify Nasdaq's Corporate Secretary of any information or communications provided by the Eligible Stockholder or Stockholder Nominee to Nasdaq or its stockholders that ceases to be true and correct in all material respects or omits a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading and of the information that is required to correct any such defect. This provision further states that providing any such notification shall not be deemed to cure any defect or, with respect to any defect that Nasdaq determines is material, limit Nasdaq's rights to omit a Stockholder Nominee from its proxy materials. This provision is intended to protect Nasdaq's stockholders by requiring an Eligible Stockholder or Stockholder Nominee to give Nasdaq notice of information previously provided that is materially untrue. Nasdaq may then decide what action to take with respect to such defect, which may include, with respect to a material defect, omitting the relevant Stockholder Nominee from its proxy materials.

Proposed Section 3.6(h) of the By-Laws

Proposed Section 3.6(h) provides that Nasdaq shall not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders under certain circumstances. In these situations, the proxy access nomination shall be disregarded and no vote on such Stockholder Nominee will occur, even if Nasdaq has received proxies in respect of the vote. These circumstances occur when the Stockholder Nominee:

- Has been nominated by an Eligible Stockholder who has engaged in or is currently engaged in, or has been or is a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board; [30]
- is not independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing independence of Nasdaq's directors, in each case as determined by the Board in its sole discretion; [31]
- would, if elected as a member of the Board, cause Nasdaq to be in violation of the By-Laws (including but not limited to the compositional requirements of the Board set forth in Section 4.3 of the By-Laws), its Amended and Restated Certificate of Incorporation, the rules and listing standards of The NASDAQ Stock Market, or any applicable state or federal law, rule or regulation; [32]

[26] Section 3.1(b)(i) of the By-Laws describes the information that a proposing stockholder must provide about an individual the stockholder proposes to nominate for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[27] Section 3.1(b)(i)(D) of the By-Laws requires a completed and signed questionnaire, representation and agreement, each containing certain information, from each individual proposed to be nominated for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[28] Currently, the independence of Nasdaq's directors is determined pursuant to the definition of ''Independent Director'' in Listing Rule 5605(a)(2) of The NASDAQ Stock Market, under which certain categories of individuals cannot be deemed independent and with respect to other individuals, the Board must make an affirmative determination that such individual has no relationship that, in the opinion of the Board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Other independence standards under the SEC rules and the Listing Rules of The NASDAQ Stock Market apply to members of certain of the Board's committees. As detailed below, the Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board.

[29] Section 4.13(h)(iii) of the By-Laws requires Nasdaq's Corporate Secretary to collect from each nominee for director such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, Issuer, or Public Director, if applicable, and to certify to the Committee each nominee's classification, if applicable. Detailed definitions of the terms ''Industry Director,'' ''Non-Industry Director,'' ''Issuer Director'' and ''Public Director'' are included in Article I of the By-Laws.

[30] *See* proposed Section 3.6(h)(i) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[31] *See* proposed Section 3.6(h)(ii) of the By-Laws; *see also* footnote 28, *supra.* The Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board. The Commission further notes that, according to Nasdaq, should the Board decide to adopt additional, more stringent standards than those required under Nasdaq listing standards and any requirements under Commission rules, all director nominees would be evaluated against these standards—not just those shareholder candidates nominated under the provisions of proposed Section 3.6.

[32] *See* proposed Section 3.6(h)(iii) of the By-Laws; *see also* Section 4.3 of the By-Laws, which provides that the number of Non-Industry Directors on the Board must equal or exceed the number of Industry Directors. In addition, the Board must include at least two Public Directors and may include at least one, but no more than two, Issuer Directors. Finally, the Board shall include no more than one Staff Director, unless the Board consists of ten or more directors, in which case, the Board shall include no more than two Staff Directors. Detailed definitions of the terms ''Non-Industry Director,'' ''Industry

Continued

• is or has been, within the past three (3) years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914; [33]

• is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past ten (10) years; [34]

• is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended; [35]

• is subject to ''statutory disqualification'' under Section 3(a)(39) of the Act; [36]

• has, or the applicable Eligible Stockholder has, provided information to Nasdaq in respect of the proxy access nomination that was untrue in any material respect or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, as determined by the Board or any committee thereof, in each case, in its sole discretion; [37] or

• breaches or fails, or the applicable Eligible Stockholder breaches or fails, to comply with its obligations pursuant to the By-Laws, including, but not limited to, the proxy access provisions and any agreement, representation or undertaking required by the proxy access provisions.[38]

Nasdaq believes these provisions will protect the Company and its stockholders by allowing it to exclude certain categories of objectionable Stockholder Nominees from the proxy statement.

Proposed Section 3.6(i) of the By-Laws

Under proposed Section 3.6(i), the Board or the chairman of the meeting of stockholders shall declare a proxy access nomination invalid, and such nomination shall be disregarded even if proxies in respect of such nomination have been received by the Company, if:

• The Stockholder Nominee(s) and/or the applicable Eligible Stockholder have breached its or their obligations under the proxy access provision of the By-Laws, as determined by the Board or the chairman of the meeting of stockholders, in each case, in its or his sole discretion; or

• the Eligible Stockholder (or a qualified representative thereof) does not appear at the meeting of stockholders to present the proxy access nomination.

Nasdaq believes this provision protects the Company and its stockholders by providing the Board or the chairman of the stockholder meeting limited authority to disqualify a proxy access nominee when that nominee or the sponsoring stockholder(s) have breached an obligation under the proxy access provision, including the obligation to appear at the stockholder meeting to present the proxy access nomination.

Proposed Section 3.6(j) of the By-Laws

Proposed Section 3.6(j) states that the following Stockholder Nominees who are included in the Company's proxy materials for a particular annual meeting of stockholders will be ineligible to be a Stockholder Nominee for the next two annual meetings:

• A Stockholder Nominee who withdraws from or becomes ineligible or unavailable for election at the annual meeting; or

• a Stockholder Nominee who does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election.

This provision will save the Company and its stockholders the time and expense of analyzing and addressing subsequent proxy access nominations regarding individuals who were included in the proxy materials for a particular annual meeting but ultimately did not stand for election or receive a substantial amount of votes. After the next two annual meetings, these Stockholder Nominees would again be eligible for nomination through the proxy access provisions of the By-Laws.

Proposed Section 3.6(k) of the By-Laws

In case there are matters involving a proxy access nomination that are open to interpretation, proposed Section 3.6(k) states that the Board (or any other person or body authorized by the Board) shall have exclusive power and authority to interpret the proxy access provisions of the By-Laws and make all determinations deemed necessary or advisable as to any person, facts or circumstances. In addition, all actions, interpretations and determinations of the Board (or any person or body authorized by the Board) with respect to the proxy access provisions shall be final, conclusive and binding on the Company, the stockholders and all other parties. While Nasdaq has attempted to implement a clear, detailed and thorough proxy access provision, there may be matters about future proxy access nominations that are open to interpretation. In these cases, Nasdaq believes it is reasonable and necessary to designate an arbiter to make final decisions on these points and that the Board is best-suited to act as that arbiter.

Proposed Section 3.6(l) of the By-Laws

Proposed Section 3.6(l) prohibits a stockholder from joining more than one group of stockholders to become an Eligible Stockholder for purposes of submitting a proxy access nomination for each annual meeting of stockholders. Nasdaq analogizes this provision to Article IV, Paragraph C(1) of its Amended and Restated Certificate of Incorporation, under which each holder of Nasdaq's common stock shall be entitled to one vote per share on all matters presented to the stockholders for a vote. Similar to that provision, Nasdaq believes it is reasonable for each share to count only once in submitting a proxy access nomination.

Proposed Section 3.6(m) of the By-Laws

For the avoidance of doubt, proposed Section 3.6(m) states that the proxy access provisions outlined in Section 3.6 of the By-Laws shall be the exclusive means for stockholders to include nominees in the Company's proxy materials. Stockholders may, of course, continue to propose nominees to the Committee and Board through other means, but the Committee and Board will have final authority to determine whether to include those nominees in the Company's proxy materials.

Revisions to Other Sections of the By-Laws

Nasdaq also proposes to make conforming changes to Sections 3.1(a), 3.3(a), 3.3(c) and 3.5 of the By-Laws to provide clarifications and prevent confusion. Specifically, current Section 3.1(a) enumerates the methods by which nominations of persons for election to the Board may be made at an annual

Director,'' ''Public Director,'' ''Issuer Director'' and ''Staff Director'' are included in Article I of the By-Laws.

[33] *See* proposed Section 3.6(h)(iv) of the By-Laws; *see also* 15 U.S.C. 19(a)(1), which generally provides that ''[n]o person shall, at the same time, serve as a director or officer in any two corporations'' that are ''competitors'' such that ''the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.''

[34] *See* proposed Section 3.6(h)(v) of the By-Laws.

[35] *See* proposed Section 3.6(h)(vi) of the By-Laws; *see also* 17 CFR 230.506(d), which generally disqualifies offerings involving certain felons and other bad actors from relying on the ''safe harbor'' in Rule 506 of Regulation D from registration under the Securities Act of 1933, as amended.

[36] *See* proposed Section 3.6(h)(vii) of the By-Laws; *see also* 15 U.S.C. 78c(a)(39), which disqualifies certain categories of individuals who generally have engaged in misconduct from membership or participation in, or association with a member of, a self-regulatory organization.

[37] *See* proposed Section 3.6(h)(viii) of the By-Laws.

[38] *See* proposed Section 3.6(h)(ix) of the By-Laws.

meeting of stockholders; Nasdaq proposes to add proxy access nominations to the list of methods. Current Section 3.3(a) specifies that, among other things, only such persons who are nominated in accordance with the procedures set forth in Article III of the By-Laws [39] shall be eligible to be elected at an annual or special meeting of Nasdaq's stockholders to serve as directors; for the avoidance of doubt, Nasdaq proposes to clarify that the reference to Article III includes the proxy access provision in Section 3.6 of the By-Laws with respect to director nominations in connection with annual meetings. Current Section 3.3(c) states, among other things, that compliance with Section 3.1(a)(iii) and (b) [40] shall be the exclusive means for a stockholder to make a director nomination; Nasdaq proposes to add proxy access as an additional means for a stockholder to make a director nomination. Finally, current Section 3.5 requires Nasdaq's director nominees to submit to Nasdaq's Corporate Secretary a questionnaire, representation and agreement within certain time periods; Nasdaq proposes to clarify that proxy access nominees must submit these materials within the time periods prescribed for delivery of a Notice of Proxy Access Nomination, as described above.

2. Statutory Basis

SCCP believes that its proposal is consistent with Section 17A(b)(3)(C) of the Act,[41] in that it assures a fair representation of shareholders and participants in the selection of directors and administration of its affairs. While the proposal relates to the organizational documents of the Company, rather than SCCP, SCCP is indirectly owned by the Company, and therefore, the Company's stockholders have an indirect stake in SCCP. In addition, the participants in SCCP, to the extent any exist, could purchase stock in the Company in the open market, just like any other stockholder.

In response to feedback from its investors, Nasdaq is proposing changes to its By-Laws to implement proxy access. SCCP believes that, by permitting an Eligible Stockholder of Nasdaq that meets the stated requirements to nominate directors and have its nominees included in Nasdaq's annual meeting proxy statement, the proposed rule change strengthens the corporate governance of SCCP's ultimate parent company, which assures a fair representation of shareholders and participants in the selection of directors and administration of its affairs.

In drafting its proxy access provision, Nasdaq has attempted to strike an appropriate balance between responding to investor feedback and including certain procedural and informational requirements to again assure a fair representation of shareholders and participants in the selection of directors and administration of its affairs. Specifically, the procedural requirements will achieve this objective by stating clearly and explicitly the procedures stockholders must follow in order to submit a proper proxy access nomination. The informational requirements will achieve this objective by ensuring, among other things, that the Company and its stockholders have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees comply with applicable laws, regulations and other requirements.

Finally, the remaining changes are clarifying in nature, and they assure fair representation by preventing confusion with respect to the operation of the By-Law provisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

Because the proposed rule change relates to the governance of the Company and not to the operations of SCCP, SCCP 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.

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

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 SCCP 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–SCCP–2016–01 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–SCCP–2016–01. 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 SCCP. 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–SCCP–2016–01 and should be submitted on or before October 26, 2016.

[39] Article III of the By-Laws relates to stockholder meetings.

[40] As part of Nasdaq's ''advance notice'' provision, Sections 3.1(a)(iii) and (b) of the By-Laws describe certain procedures that a stockholder must follow to, among other things, nominate a person for election to the Board.

[41] 15 U.S.C. 78q–1(b)(3)(C).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–24006 Filed 10–4–16; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78983; File No. SR–OCC–2016–010]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Amendments to and the Restatement of OCC's Certificate of Incorporation

September 29, 2016.

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 September 27, 2016, The Options Clearing Corporation (''OCC'') 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 primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii)[3] of the Act and Rule 19b–4(f)(6)[4] thereunder so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change by OCC concerns the amendment and restatement of OCC's Certificate of Incorporation to provide more clarity, transparency, and consistency regarding OCC's Management Director,[5] Exchange Director, Public Director, and Member Director requirements across OCC's governing documents. The proposed amendments and restatement would be filed with the Secretary of the State of Delaware in the form of an Amended and Restated Certificate of Incorporation, which is included in Exhibit 5 to the proposed rule change.[6] All capitalized terms not defined herein have the same meaning as set forth in the OCC By-Laws and Rules.[7]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

The purpose of this proposed rule change is to amend and restate OCC's Certificate of Incorporation to provide more clarity, transparency, and consistency regarding OCC's Management Director,[8] Exchange Director, Public Director, and Member Director requirements, which are being filed in the form of an Amended and Restated Certificate of Incorporation.[9] The proposed amendments to the Certificate of Incorporation are described in more detail below.

OCC proposes clarifying amendments to Article V of the Certificate of Incorporation to state that an individual who serves as an Exchange Director for more than one Equity Exchange pursuant to the By-Laws shall be entitled to such number of votes on each proposition submitted to the Board for a vote thereon or for written consent thereto as shall correspond to the number of Equity Exchanges represented by him or her. Article III, Section 6 of the By-Laws currently provides that an individual may be nominated by, elected by, and serve as an Exchange Director for more than one Equity Exchange and that each such individual shall be counted, for all purposes under the By-Laws (including, without limitation, for the purpose of determining whether a quorum is present or whether a resolution has been passed by the requisite number of directors), as a separate Exchange Director for each Equity Exchange that elected him or her. OCC believes it is appropriate under Delaware General Corporation Law to include these voting rights in its Certificate of Incorporation (in addition to the By-Laws) in order to clarify and reinforce the voting powers of its Exchange Directors.

OCC also proposes amendments to Article V of its Certificate of Incorporation to conform the language regarding Public Directors to existing language in the Certificate of Incorporation used for Member Directors. Specifically, the Certificate of Incorporation would be amended to state that the number of Public Directors shall be such number as shall be fixed by or pursuant to the By-Laws, divided into three classes, as provided therein. OCC believes that it is appropriate from a corporate governance perspective to specifically state in the Certificate of Incorporation that OCC's Public Directors are divided into three classes. OCC also proposes that the requirements for Public Director terms be clarified to state that each class of Public Directors shall be elected for a term which expires at the third annual meeting of stockholders following their election and upon the election and qualification of their successors, subject to their earlier death, disqualification, resignation, or removal. The proposed amendments would more closely align the language for Public Director requirements with that currently used to

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[42] 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)(iii).

[4] 17 CFR 240.19b–4(f)(6).

[5] On July 15, 2016, OCC filed a proposed rule change with the Commission concerning modifications and enhancements to OCC's governance arrangements. *See* Securities Exchange Act Release No. 78438 (July 28, 2016), 81 FR 51220 (August 3, 2016) (SR–OCC–2016–002). As part of the proposed rule change, OCC proposed amendments to its Certificate of Incorporation to remove an explicit requirement that OCC's Board of Directors (''Board'') have two Management Directors and instead provide that the number of Management Directors shall be such number as shall be fixed by or pursuant to the By-Laws (which the Board has authorized to be amended to state that the Board shall have one (1) Management Director). The Commission approved the proposed rule change on September 16, 2016. *See* Securities Exchange Act Release No. 78862 (September 16, 2016), 81 FR 65415 (September 22, 2016) (SR–OCC–2016–002).

[6] Pending all necessary regulatory filings and approvals for the proposed rule change, OCC will file the proposed amendments described herein along with the amendments to OCC's Certificate of Incorporation contained in SR–OCC–2016–002 in the form of an Amended and Restated Certificate of Incorporation. The Amended and Restated Certificate of Incorporation must also be filed with the Secretary of the State of Delaware before becoming effective.

[7] OCC's By-Laws and Rules can be found on OCC's public Web site: *http://optionsclearing.com/about/publications/bylaws.jsp.*

[8] *See supra* note 5.

[9] Under Section 245 of the General Corporation Law of the State of Delaware, a corporation may integrate into a single instrument all of the provisions of its certificate of incorporation which are then in effect and operative and may at the same time also further amend its certificate of incorporation by adopting a restated certificate of incorporation. *See* 8 Del. C. 1953, § 245. The proposed Amended and Restated Certificate of Incorporation would supersede OCC's current Restated Certificate of Incorporation (which was filed with the Secretary of the State of Delaware on November 3, 1987) and the subsequent amendments thereto.

describe Member Directors and is consistent with the current requirements for Public Directors in Article III, Section 6A of OCC's By-Laws. As a result, OCC believes the proposed amendments would provide more clarity and consistency in the description of OCC's Director requirements in the Certificate of Incorporation.

In addition, OCC proposes to amend Article V of the Certificate of Incorporation to eliminate an explicit statement that there be ''not less than nine'' Member Directors in order to provide more clarity and consistency in the description of OCC's Director requirements across OCC's governing documents. The proposed amendment is intended only to be a technical drafting change to the Certificate of Incorporation and would not substantively change OCC's current requirements regarding the number of Member Directors required to serve on OCC's Board. While the Certificate of Incorporation currently states that there be ''not less than nine'' Member Directors, the actual number of Member Directors serving on OCC's Board is fixed by Article III, Section 1 of the By-Laws (which is currently fixed at nine Member Directors). OCC believes it is appropriate from a corporate governance perspective that the number of various categories of Directors be fixed within one governing document of OCC. Currently, the Certificate of Incorporation only contains references to specific numbers for Management Directors and Member Directors; however, as discussed above, the Commission recently approved a proposed rule change by OCC to amend the Certificate of Incorporation to remove specific requirements regarding the number of Management Directors, with such number being fixed by the By-Laws.[10] OCC notes that it is not proposing any changes to the By-Laws in connection with its Member Director requirements. The number of Member Directors would continue to be fixed at nine pursuant to Article III, Section 1 of the By-Laws.[11]

Finally, OCC proposes that these amendments and restatement be filed in the form of an Amended and Restated Certificate of Incorporation, as reflected in Exhibit 5 to this proposed rule change. OCC's Certificate of Incorporation has not been restated since November 3, 1987. Since the 1987 restatement, the Certificate of Incorporation has been amended six times.[12] Given the scope and number of amendments to the Certificate of Incorporation since the last restatement, OCC believes it would be appropriate to integrate into a single instrument all of the provisions of OCC's Certificate of Incorporation that are currently in effect (pending regulatory approval of the proposed amendments described herein) in order to provide more clarity and transparency regarding OCC's governance arrangements. OCC notes that, in addition to the changes described above, the proposed amendments also include technical, non-substantive drafting changes to correct typographical errors in Articles IV and V of the Certificate of Incorporation.

(2) Statutory Basis

Section 17A(b)(3)(F) of the Act[13] requires that the rules of a clearing agency be designed, in general, to protect investors and the public interest. OCC believes that the proposed rule change is consistent with Section 17A(b)(3)(F) of the Act[14] and the rules thereunder applicable to OCC because the proposed rule change would provide more clarity and transparency regarding OCC's governance arrangements to Clearing Members, other users of OCC, and the general public. Specifically, the proposed rule change would enhance the clarity, consistency, and transparency of OCC's governance arrangements by: (i) Clarifying and reinforcing the voting powers of OCC's Exchange Directors in OCC's Certificate of Incorporation; (ii) providing more clarity and certainty regarding the number of Directors in each specific category of Directors required to serve on OCC's Board by consolidating those requirements into OCC's By-Laws; and (iii) specifying in the Certificate of Incorporation that OCC's Public Directors are divided into three classes and describing the length of the terms of OCC's Public Directors in a manner that more closely aligns with the language currently used to describe such requirements for Member Directors. Moreover, the proposed rule change would integrate into a single instrument all of the provisions of OCC's Certificate of Incorporation that are currently in effect as well as changes proposed herein. OCC believes that the proposed changes would provide more clarity and consistency in the descriptions of OCC's Director requirements and would enhance the readability of one of OCC's primary governing documents, its Certificate of Incorporation, for Clearing Members, other users of OCC, and the general public. As a result, OCC believes that the proposed rule change is designed, in general, to protect investors and the public interest in accordance with Section 17A(b)(3)(F) of the Act[15] and is reasonably designed to ensure that OCC has clear and transparent governance arrangements consistent with Rule 17Ad–22(d)(8)[16] thereunder. The proposed rule change is not inconsistent with the existing rules of OCC, including any other rules proposed to be amended.

(B) Clearing Agency's Statement on Burden on Competition

Section 17A(b)(3)(I) of the Act[17] requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. As discussed in more detail above, OCC believes that the proposed rule change would provide more clarity and transparency to users (and potential users) of OCC regarding OCC's Management Director, Exchange Director, Public Director, and Member Director requirements and does not alter the substantive requirements of OCC's governing documents. As such, OCC believes that the proposed changes would not have any impact or impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to Section 19(b)(3)(A) of the Act,[18] and Rule 19b–4(f)(6)[19] thereunder, the proposed rule change is

[10] *See supra* note 5.

[11] Furthermore, under Article XI of OCC's By-Laws, any change in the number of Member Directors required under Article III would require an amendment approved by two-thirds of the Directors then in office as well as the approval of the holders of all of the outstanding Common Stock of OCC entitled to vote thereon.

[12] The latest restatement of OCC's Certificate of Incorporation was dated November 3, 1987, and was subsequently amended on June 1, 1992, August 12, 1997, October 28, 1999, March 16, 2012, December 30, 2013, and March 6, 2015.

[13] 15 U.S.C. 78q–1(b)(3)(F).

[14] *Id.*

[15] *Id.*

[16] 17 CFR 240.17Ad–22(d)(8).

[17] 15 U.S.C. 78q–1(b)(3)(I).

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6).

filed for immediate effectiveness because it does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms would not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate.[20] Additionally, OCC provided the Commission with 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 Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow OCC to implement the proposed rule change immediately. As stated by OCC, OCC believes that the proposed rule change is not intended to substantively alter OCC's governance arrangements, but is designed to provide more clarity and transparency to Clearing Members, other users of OCC, and the general public. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing with the Commission.[21]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.[22]

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–OCC–2016–010 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–OCC–2016–010. 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 OCC and on OCC's Web site at *http://www.theocc.com/components/docs/legal/rules_and_bylaws/sr_occ_16_010.pdf.*

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–OCC–2016–010 and should be submitted on or before October 26, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated Authority.[23]

Robert W. Errett,

Deputy Secretary.

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BILLING CODE 8011–01–P

[20] OCC has requested that the Commission waive the 30-day operative delay contained in Rule 19b–4(f)(6)(iii) so that the proposal may become operative immediately upon filing. As noted herein, the proposed rule change is not intended to substantively alter OCC's governance arrangements but is designed to provide additional clarity regarding OCC's governance arrangements and improve the overall readability of OCC's Certificate of Incorporation. OCC believes that the prompt implementation of these changes would be consistent with the public interest and the protection of investors.

[21] For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[22] Notwithstanding its immediate effectiveness, implementation of this rule change will be delayed until this change is deemed certified or otherwise appropriately filed as a Weekly Notification of Rule Amendments under CFTC Regulation § 40.6.

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78985; File No. SR–ISE–2016–22]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change To Amend the By-Laws of Nasdaq, Inc. To Implement Proxy Access

September 29, 2016.

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 September 15, 2016, International Securities Exchange, LLC (''ISE'') 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 is filing this proposed rule change with respect to amendments of the By-Laws (the ''By-Laws'') of its parent corporation, Nasdaq, Inc. (''Nasdaq'' or the ''Company''), to implement proxy access. The proposed amendments will be implemented on a date designated by the Company following approval by the Commission. The text of the proposed rule change is available on the Exchange's Web site at *www.ise.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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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

Background

At Nasdaq's 2016 annual meeting held on May 5, 2016, Nasdaq's stockholders considered a stockholder proposal submitted under Rule 14a–8 under the Act.[3] The proposal, which passed with 73.52% of the votes cast, requested that Nasdaq's Board of Directors (the ''Board'') take steps to implement a ''proxy access'' by-law. Proxy access by-laws allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on a board and have those candidates included in a company's proxy materials. Such provisions allow stockholders to nominate candidates without undertaking the expense of a proxy solicitation.

Following the 2016 annual meeting, the Nominating & Governance Committee (the ''Committee'') of the Board and the Board reviewed the voting results on the stockholder proposal and discussed proxy access generally. The Committee ultimately recommended to the Board, and the Board approved, certain changes to Nasdaq's By-Laws to implement proxy access. Nasdaq now proposes to make these changes by adopting new Section 3.6 of the By-Laws and making certain conforming changes to current Sections 3.1, 3.3 and 3.5 of the By-Laws, all of which are described further below.

In developing its proposal, Nasdaq has generally tried to balance the relative weight of arguments for and against proxy access provisions. On the one hand, Nasdaq recognizes the significance of this issue to some investors, who see proxy access as an important accountability mechanism that allows them to participate in board elections through the nomination of stockholder candidates that are presented in a company's proxy statement. On the other hand, Nasdaq's proposed proxy access provision includes certain procedural requirements that ensure, among other things, that the Company and its stockholders will have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees will comply with applicable laws, regulations and other requirements.

Proposed Section 3.6(a) of the By-Laws

To respond to feedback from its stockholders, Nasdaq proposes to amend its By-Laws to, as set forth in the first sentence of proposed Section 3.6(a), require the Company to include in its proxy statement, its form proxy and any ballot distributed at the stockholder meeting, the name of, and certain Required Information [4] about, any person nominated for election (the ''Stockholder Nominee'') to the Board by a stockholder or group of stockholders (the ''Eligible Stockholder'') [5] that satisfies the requirements set forth in the proxy access provision of Nasdaq's By-Laws.[6] To utilize this provision, the Eligible Stockholder must expressly elect at the time of providing a required notice to the Company of the proxy access nomination (the ''Notice of Proxy Access Nomination'') to have its nominee included in the Company's proxy materials. Stockholders will be eligible to submit proxy access nominations only at annual meetings of stockholders when the Board solicits proxies with respect to the election of directors.

The next two sentences of Section 3.6(a) provide some additional clarification on the term ''Eligible Stockholder.'' First, in calculating the number of stockholders in a group seeking to qualify as an Eligible Stockholder, two or more of the following types of funds shall be counted as one stockholder: (i) funds under common management and investment control, (ii) funds under common management and funded primarily by the same employer, or (iii) funds that are a ''group of investment companies'' as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Company Act of 1940, as amended.[7] Nasdaq views this as a stockholder-friendly provision that will make it easier for such funds to participate in a proxy access nomination since they will not have to comply with the procedural requirements in the proxy access provision multiple times. Second, in the event that the Eligible Stockholder consists of a group of stockholders, any and all requirements and obligations for an individual Eligible Stockholder shall apply to each member of the group, except that the Required Ownership Percentage (discussed further below) shall apply to the ownership of the group in the aggregate. Generally, the applicable requirements and obligations relate to information that each member of the nominating group must provide to Nasdaq about itself, as discussed further below. Nasdaq believes it is reasonable to require each member of the nominating group to provide such information so that both the Company and its stockholders are fully informed about the entire group making the proxy access nomination.

The final sentence of proposed Section 3.6(a) allows Nasdaq to omit from its proxy materials any information or Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law or regulation. This provision allows Nasdaq to comply with Rule 14a–9 under the Act [8] and to protect its stockholders from information that is materially untrue or that violates any law or regulation. The final sentence of proposed Section 3.6(a) also explicitly allows Nasdaq to solicit against, and include in the proxy statement its own statement relating to, any Stockholder Nominee. This provision merely clarifies that just because Nasdaq must include a proxy access nominee in its proxy materials if the proxy access provisions are

[3] *See* 17 CFR 240.14a–8, which establishes procedures pursuant to which stockholders of a public company may have their proposals placed alongside management's proposals in the company's proxy materials for presentation to a vote at a meeting of stockholders.

[4] The Required Information is the information provided to Nasdaq's Corporate Secretary about the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Company's proxy statement by the regulations promulgated under the Act, and if the Eligible Stockholder so elects, a written statement, not to exceed 500 words, in support of the Stockholder Nominee(s)' candidacy (the ''Statement'').

[5] As used throughout Nasdaq's By-Laws, the term ''Eligible Stockholder'' includes each member of a stockholder group that submits a proxy access nomination to the extent the context requires.

[6] When the Company includes proxy access nominees in the proxy materials, such individuals will be included in addition to any persons nominated for election to the Board or any committee thereof.

[7] *See* 15 U.S.C. 80a–12(d)(1)(G)(ii), which defines ''group of investment companies'' as any two or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.

[8] *See* 17 CFR 240.14a–9, which generally prohibits proxy solicitations that contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

satisfied, Nasdaq does not necessarily have to support that nominee.

Proposed Section 3.6(b) of the By-Laws

Proposed Section 3.6(b) of the By-Laws establishes the deadline for a timely Notice of Proxy Access Nomination. Specifically, such a notice must be addressed to, and received by, Nasdaq's Corporate Secretary no earlier than one hundred fifty (150) days and no later than one hundred twenty (120) days before the anniversary of the date that Nasdaq issued its proxy statement for the previous year's annual meeting of stockholders. The Company believes this notice period will provide stockholders an adequate window to submit nominees via proxy access, while also providing the Company adequate time to diligence [sic] a proxy access nominee before including them in the proxy statement for the next annual meeting of stockholders.

Proposed Section 3.6(c) of the By-Laws

Proposed Section 3.6(c) specifies that the maximum number of Stockholder Nominees nominated by all Eligible Stockholders that will be included in Nasdaq's proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two and 25% of the total number of directors in office (rounded down to the nearest whole number) as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with the proxy access provision of the By-Laws (the ''Final Proxy Access Nomination Date''). In the event that one or more vacancies for any reason occurs after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board resolves to reduce the size of the Board in connection therewith, the maximum number of Stockholder Nominees included in Nasdaq's proxy materials shall be calculated based on the number of directors in office as so reduced. Any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision of the By-Laws whom the Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the maximum number of Stockholder Nominees has been reached.

Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to the proxy access provision exceeds the maximum number of nominees allowed. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders exceeds the maximum number of nominees allowed, the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder will be selected for inclusion in the proxy materials until the maximum number is reached, going in order of the amount (largest to smallest) of shares of Nasdaq's outstanding common stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to Nasdaq. If the maximum number is not reached after the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder has been selected, this process will continue as many times as necessary, following the same order each time, until the maximum number is reached. Following such determination, if any Stockholder Nominee who satisfies the eligibility requirements thereafter is nominated by the Board, or is not included in the proxy materials or is not submitted for election as a director, in either case, as a result of the Eligible Stockholder becoming ineligible or withdrawing its nomination, the Stockholder Nominee becoming unwilling or unable to serve on the Board or the Eligible Stockholder or the Stockholder Nominee failing to comply with the proxy access provision of the By-Laws, no other nominee or nominees shall be included in the proxy materials or otherwise submitted for director election in substitution thereof.

The Company believes it is reasonable to limit the Board seats available to proxy access nominees, to establish procedures for selecting candidates if the nominee limit is exceeded and to exclude further proxy access nominees in the cases set forth above. The limitation on Board seats available to proxy access nominees ensures that proxy access cannot be used to take over the entire Board, which is not the stated purpose of proxy access campaigns. The procedures for selecting candidates if the nominee limit is exceeded establish clear and rational guidelines for an orderly nomination process to avoid the Company having to make arbitrary judgments among candidates. Finally, the exclusion of further proxy access nominees in certain cases will avoid further time and expense to the Company when the proxy access nominee has been nominated by the Board, in which case the goal of the proxy access nomination has been achieved, or in certain cases when the Eligible Stockholder or Stockholder Nominee is at fault.

Proposed Section 3.6(d) of the By-Laws

Proposed Section 3.6(d) clarifies, for the avoidance of doubt, how ''ownership'' will be defined for purposes of meeting the Required Ownership Percentage (discussed further below). Specifically, an Eligible Stockholder shall be deemed to ''own'' only those outstanding shares of Nasdaq's common stock as to which the stockholder possesses both: (i) The full voting and investment rights pertaining to the shares; and (ii) the full economic interest in (including the opportunity for profit from and risk of loss on) such shares; provided that the number of shares calculated in accordance with clauses (i) and (ii) shall not include any shares:

- Sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed, including any short sale;
- borrowed by such stockholder or any of its affiliates for any purposes or purchased by such stockholder or any of its affiliates pursuant to an agreement to resell; or
- subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar agreement entered into by such stockholder or any of its affiliates, whether any such instrument or agreement is to be settled with shares or with cash based on the notional amount or value of shares of Nasdaq's outstanding common stock, in any such case which instrument or agreement has, or is intended to have, or if exercised by either party would have, the purpose or effect of:
  - Reducing in any manner, to any extent or at any time in the future, such stockholder's or its affiliates' full right to vote or direct the voting of any such shares; and/or
  - hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or its affiliates.

Further, a stockholder shall ''own'' shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct

how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has delegated any voting power by means of a proxy, power of attorney or other instrument or arrangement which is revocable at any time by the stockholder. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has loaned such shares provided that the stockholder has the power to recall such loaned shares on three (3) business days' notice, has recalled such loaned shares as of the date of the Notice of Proxy Access Nomination and holds such shares through the date of the annual meeting. The terms ''owned,'' ''owning'' and other variations of the word ''own'' shall have correlative meanings. Whether outstanding shares of Nasdaq's common stock are ''owned'' for these purposes shall be determined by the Board or any committee thereof, in each case, in its sole discretion. For purposes of the proxy access provision of the By-Laws, the term ''affiliate'' or ''affiliates'' shall have the meaning ascribed thereto under the rules and regulations of the Act.[9] An Eligible Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to own for the purposes of the proxy access provision of the By-Laws.

Proposed Section 3.6(e) of the By-Laws

The first paragraph of proposed Section 3.6(e) establishes certain requirements for an Eligible Stockholder to make a proxy access nomination. Specifically, an Eligible Stockholder must have owned (defined as discussed above) 3% or more (the ''Required Ownership Percentage'') of Nasdaq's outstanding common stock (the ''Required Shares'') continuously for 3 years (the ''Minimum Holding Period'') as of both the date the Notice of Proxy Access Nomination is received by Nasdaq's Corporate Secretary and the record date for determining the stockholders entitled to vote at the annual meeting and must continue to own the Required Shares through the meeting date.

Proposed Section 3.6(e) also sets forth the information that an Eligible Stockholder must provide to Nasdaq's Corporate Secretary in writing within the deadline discussed above in order to make a proxy access nomination. This information includes:

- One or more written statements from the record holder of the shares (and from each intermediary through which the shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Notice of Proxy Access Nomination is delivered to, or mailed to and received by, Nasdaq's Corporate Secretary, the Eligible Stockholder owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder's agreement to provide, within five (5) business days after the record date for the annual meeting, written statements from the record holder and intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date; [10]

- a copy of the Schedule 14N that has been filed with the SEC as required by Rule 14a–18 under the Act; [11]

- the information, representations and agreements with respect to the Eligible Stockholder that are the same as those that would be required to be set forth in a stockholder's notice of nomination with respect to a ''Proposing Person'' pursuant to Section 3.1(b)(i) and Section 3.1(b)(iii) of the By-Laws; [12]

- the consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected; [13]

- a representation that the Eligible Stockholder:

○ Acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of Nasdaq, and does not presently have such intent; [14]

○ presently intends to maintain qualifying ownership of the Required Shares through the date of the annual meeting; [15]

○ has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s); [16]

○ has not engaged and will not engage in, and has not and will not be a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting, other than its Stockholder Nominee(s) or a nominee of the Board; [17]

○ agrees to comply with all applicable laws and regulations with respect to any solicitation in connection with the meeting or applicable to the filing and use, if any, of soliciting material; [18]

○ will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; [19] and

○ as to any two or more funds whose shares are aggregated to count as one stockholder for the purpose of constituting an Eligible Stockholder, within five business days after the date of the Notice of Proxy Access Nomination, will provide to Nasdaq documentation reasonably satisfactory to Nasdaq that demonstrates that the funds satisfy the requirements in the By-Laws, which were discussed above, for the funds to qualify as one Eligible Stockholder; [20]

- a representation as to the Eligible Stockholder's intentions with respect to maintaining qualifying ownership of the Required Shares for at least one year following the annual meeting; [21]

[9] Pursuant to Rule 12b–2 under the Act, ''[a]n 'affiliate' of, or a person 'affiliated' with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.'' 17 CFR 240.12b–2. Further, ''[t]he term 'control' (including the terms 'controlling,' 'controlled by' and 'under common control with') means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'' 17 CFR 240.12b–2.

[10] *See* proposed Section 3.6(e)(i) of the By-Laws.

[11] *See* proposed Section 3.6(e)(ii) of the By-Laws; *see also* 17 CFR 240.14n–101 and 17 CFR 240.14a–18, which generally require a Nominating Stockholder to provide notice to the Company of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to the Company.

[12] *See* proposed Section 3.6(e)(iii) of the By-Laws; *see also* Sections 3.1(b)(i) and 3.1(b)(iii) of the By-Laws, which constitute part of Nasdaq's ''advance notice'' provision under which a ''Proposing Person'' may, among other things, nominate a person for election to the Board.

[13] *See* proposed Section 3.6(e)(iv) of the By-Laws.

[14] *See* proposed Section 3.6(e)(v)(A) of the By-Laws.

[15] *See* proposed Section 3.6(e)(v)(B) of the By-Laws.

[16] *See* proposed Section 3.6(e)(v)(C) of the By-Laws.

[17] *See* proposed Section 3.6(e)(v)(D) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[18] *See* proposed Section 3.6(e)(v)(E) of the By-Laws.

[19] *See* proposed Section 3.6(e)(v)(F) of the By-Laws.

[20] *See* proposed Section 3.6(e)(v)(G) of the By-Laws.

[21] *See* proposed Section 3.6(e)(vi) of the By-Laws.

• an undertaking that the Eligible Stockholder agrees to:

○ Assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder's communications with Nasdaq's stockholders or out of the information that the Eligible Stockholder provided to Nasdaq; [22]

○ indemnify and hold harmless Nasdaq and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against Nasdaq or any of its directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to the proxy access provision; [23] and

○ file with the SEC any solicitation or other communication with Nasdaq's stockholders relating to the meeting at which the Stockholder Nominee will be nominated, regardless of whether any such filing is required under Regulation 14A of the Act or whether any exemption from filing is available thereunder; [24] and

• in the case of a nomination by a group of stockholders that together is an Eligible Stockholder, the designation by all group members of one group member that is authorized to act on behalf of all such members with respect to the nomination and matters related thereto, including withdrawal of the nomination.[25]

In proposing the Required Ownership Percentage and the Minimum Holding Period, Nasdaq seeks to ensure that the Eligible Stockholder has had a sufficient stake in the Company for a sufficient amount of time and is not pursuing a short-term agenda. In proposing the informational requirements for the Eligible Stockholder, Nasdaq's goal is to gather sufficient information about the Eligible Stockholder for both itself and its stockholders. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

[22] *See* proposed Section 3.6(e)(vii)(A) of the By-Laws.

[23] *See* proposed Section 3.6(e)(vii)(B) of the By-Laws.

[24] *See* proposed Section 3.6(e)(vii)(C) of the By-Laws; *see also* 17 CFR 240.14a–1—14b–2, which governs solicitations of proxies.

[25] *See* proposed Section 3.6(e)(viii) of the By-Laws.

Proposed Section 3.6(f) of the By-Laws

Proposed Section 3.6(f) establishes the information the Stockholder Nominee must deliver to Nasdaq's Corporate Secretary within the time period specified for delivering the Notice of Proxy Access Nomination. This information includes:

• The information required with respect to persons whom a stockholder proposes to nominate for election or reelection as a director by Section 3.1(b)(i) of the By-Laws [26] including, but not limited to, the signed questionnaire, representation and agreement required by Section 3.1(b)(i)(D) of the By-Laws; [27] and

• a written representation and agreement that such person:

○ Will act as a representative of all of Nasdaq's stockholders while serving as a director; and

○ will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects (and shall not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading).

In addition, at the request of Nasdaq, the Stockholder Nominee(s) must submit all completed and signed questionnaires required of Nasdaq's directors and officers. Nasdaq may request such additional information as necessary to (y) permit the Board to determine if each Stockholder Nominee satisfies the requirements of the proxy access provision of the By-Laws or if each Stockholder Nominee is independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing the independence of Nasdaq's directors [28] and/or (z) permit Nasdaq's Corporate Secretary to determine the classification of such nominee as an Industry, Non-Industry, Issuer or Public Director, if applicable, in order to make the certification referenced in Section 4.13(h)(iii) of the By-Laws.[29]

Like the informational requirements for an Eligible Stockholder, which are set forth above, the informational requirements for the Stockholder Nominee ensure that both Nasdaq and its stockholders will have sufficient information about the Stockholder Nominee. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(g) of the By-Laws

Pursuant to proposed Section 3.6(g), each Eligible Stockholder or Stockholder Nominee must promptly notify Nasdaq's Corporate Secretary of any information or communications provided by the Eligible Stockholder or Stockholder Nominee to Nasdaq or its stockholders that ceases to be true and correct in all material respects or omits a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading and of the information that is required to correct any such defect. This provision further states that providing any such notification shall not be deemed to cure any defect or, with respect to any defect that Nasdaq determines is material, limit Nasdaq's rights to omit a Stockholder Nominee from its proxy materials. This provision is intended to protect Nasdaq's stockholders by requiring an Eligible Stockholder or Stockholder Nominee to give Nasdaq notice of information previously provided that is materially untrue. Nasdaq may then decide what action to

[26] Section 3.1(b)(i) of the By-Laws describes the information that a proposing stockholder must provide about an individual the stockholder proposes to nominate for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[27] Section 3.1(b)(i)(D) of the By-Laws requires a completed and signed questionnaire, representation and agreement, each containing certain information, from each individual proposed to be nominated for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[28] Currently, the independence of Nasdaq's directors is determined pursuant to the definition of ''Independent Director'' in Listing Rule 5605(a)(2) of The NASDAQ Stock Market, under which certain categories of individuals cannot be deemed independent and with respect to other individuals, the Board must make an affirmative determination that such individual has no relationship that, in the opinion of the Board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Other independence standards under the SEC rules and the Listing Rules of The NASDAQ Stock Market apply to members of certain of the Board's committees. As detailed below, the Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board.

[29] Section 4.13(h)(iii) of the By-Laws requires Nasdaq's Corporate Secretary to collect from each nominee for director such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, Issuer, or Public Director, if applicable, and to certify to the Committee each nominee's classification, if applicable. Detailed definitions of the terms ''Industry Director,'' ''Non-Industry Director,'' ''Issuer Director'' and ''Public Director'' are included in Article I of the By-Laws.

take with respect to such defect, which may include, with respect to a material defect, omitting the relevant Stockholder Nominee from its proxy materials.

Proposed Section 3.6(h) of the By-Laws

Proposed Section 3.6(h) provides that Nasdaq shall not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders under certain circumstances. In these situations, the proxy access nomination shall be disregarded and no vote on such Stockholder Nominee will occur, even if Nasdaq has received proxies in respect of the vote. These circumstances occur when the Stockholder Nominee:

- Has been nominated by an Eligible Stockholder who has engaged in or is currently engaged in, or has been or is a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board; [30]
- is not independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing independence of Nasdaq's directors, in each case as determined by the Board in its sole discretion; [31]
- would, if elected as a member of the Board, cause Nasdaq to be in violation of the By-Laws (including but not limited to the compositional requirements of the Board set forth in Section 4.3 of the By-Laws), its Amended and Restated Certificate of Incorporation, the rules and listing standards of The NASDAQ Stock Market, or any applicable state or federal law, rule or regulation; [32]
- is or has been, within the past three (3) years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914; [33]
- is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past ten (10) years; [34]
- is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended; [35]
- is subject to ''statutory disqualification'' under Section 3(a)(39) of the Act; [36]
- has, or the applicable Eligible Stockholder has, provided information to Nasdaq in respect of the proxy access nomination that was untrue in any material respect or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, as determined by the Board or any committee thereof, in each case, in its sole discretion; [37] or
- breaches or fails, or the applicable Eligible Stockholder breaches or fails, to comply with its obligations pursuant to the By-Laws, including, but not limited to, the proxy access provisions and any agreement, representation or undertaking required by the proxy access provisions.[38]

Nasdaq believes these provisions will protect the Company and its stockholders by allowing it to exclude certain categories of objectionable Stockholder Nominees from the proxy statement.

Proposed Section 3.6(i) of the By-Laws

Under proposed Section 3.6(i), the Board or the chairman of the meeting of stockholders shall declare a proxy access nomination invalid, and such nomination shall be disregarded even if proxies in respect of such nomination have been received by the Company, if:

- The Stockholder Nominee(s) and/or the applicable Eligible Stockholder have breached its or their obligations under the proxy access provision of the By-Laws, as determined by the Board or the chairman of the meeting of stockholders, in each case, in its or his sole discretion; or
- the Eligible Stockholder (or a qualified representative thereof) does not appear at the meeting of stockholders to present the proxy access nomination.

Nasdaq believes this provision protects the Company and its stockholders by providing the Board or the chairman of the stockholder meeting limited authority to disqualify a proxy access nominee when that nominee or the sponsoring stockholder(s) have breached an obligation under the proxy access provision, including the obligation to appear at the stockholder meeting to present the proxy access nomination.

Proposed Section 3.6(j) of the By-Laws

Proposed Section 3.6(j) states that the following Stockholder Nominees who are included in the Company's proxy materials for a particular annual meeting of stockholders will be ineligible to be a Stockholder Nominee for the next two annual meetings:

- A Stockholder Nominee who withdraws from or becomes ineligible or unavailable for election at the annual meeting; or
- a Stockholder Nominee who does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election.

This provision will save the Company and its stockholders the time and expense of analyzing and addressing subsequent proxy access nominations regarding individuals who were included in the proxy materials for a particular annual meeting but ultimately did not stand for election or receive a substantial amount of votes. After the next two annual meetings, these Stockholder Nominees would again be eligible for nomination through the proxy access provisions of the By-Laws.

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[30] *See* proposed Section 3.6(h)(i) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[31] *See* proposed Section 3.6(h)(ii) of the By-Laws; *see also* footnote 28, *supra*. The Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board. The Commission further notes that, according to Nasdaq, should the Board decide to adopt additional, more stringent standards than those required under Nasdaq listing standards and any requirements under Commission rules, all director nominees would be evaluated against these standards—not just those shareholder candidates nominated under the provisions of proposed Section 3.6.

[32] *See* proposed Section 3.6(h)(iii) of the By-Laws; *see also* Section 4.3 of the By-Laws, which provides that the number of Non-Industry Directors on the Board must equal or exceed the number of Industry Directors. In addition, the Board must include at least two Public Directors and may include at least one, but no more than two, Issuer Directors. Finally, the Board shall include no more than one Staff Director, unless the Board consists of ten or more directors, in which case, the Board shall include no more than two Staff Directors. Detailed definitions of the terms ''Non-Industry Director,'' ''Industry Director,'' ''Public Director,'' ''Issuer Director'' and ''Staff Director'' are included in Article I of the By-Laws.

[33] *See* proposed Section 3.6(h)(iv) of the By-Laws; *see also* 15 U.S.C. 19(a)(1), which generally provides that ''[n]o person shall, at the same time, serve as a director or officer in any two corporations'' that are ''competitors'' such that ''the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.''

[34] *See* proposed Section 3.6(h)(v) of the By-Laws.

[35] *See* proposed Section 3.6(h)(vi) of the By-Laws; *see also* 17 CFR 230.506(d), which generally disqualifies offerings involving certain felons and other bad actors from relying on the ''safe harbor'' in Rule 506 of Regulation D from registration under the Securities Act of 1933, as amended.

[36] *See* proposed Section 3.6(h)(vii) of the By-Laws; *see also* 15 U.S.C. 78c(a)(39), which disqualifies certain categories of individuals who generally have engaged in misconduct from membership or participation in, or association with a member of, a self-regulatory organization.

[37] *See* proposed Section 3.6(h)(viii) of the By-Laws.

[38] *See* proposed Section 3.6(h)(ix) of the By-Laws.

Proposed Section 3.6(k) of the By-Laws

In case there are matters involving a proxy access nomination that are open to interpretation, proposed Section 3.6(k) states that the Board (or any other person or body authorized by the Board) shall have exclusive power and authority to interpret the proxy access provisions of the By-Laws and make all determinations deemed necessary or advisable as to any person, facts or circumstances. In addition, all actions, interpretations and determinations of the Board (or any person or body authorized by the Board) with respect to the proxy access provisions shall be final, conclusive and binding on the Company, the stockholders and all other parties. While Nasdaq has attempted to implement a clear, detailed and thorough proxy access provision, there may be matters about future proxy access nominations that are open to interpretation. In these cases, Nasdaq believes it is reasonable and necessary to designate an arbiter to make final decisions on these points and that the Board is best-suited to act as that arbiter.

Proposed Section 3.6(l) of the By-Laws

Proposed Section 3.6(l) prohibits a stockholder from joining more than one group of stockholders to become an Eligible Stockholder for purposes of submitting a proxy access nomination for each annual meeting of stockholders. Nasdaq analogizes this provision to Article IV, Paragraph C(1) of its Amended and Restated Certificate of Incorporation, under which each holder of Nasdaq's common stock shall be entitled to one vote per share on all matters presented to the stockholders for a vote. Similar to that provision, Nasdaq believes it is reasonable for each share to count only once in submitting a proxy access nomination.

Proposed Section 3.6(m) of the By-Laws

For the avoidance of doubt, proposed Section 3.6(m) states that the proxy access provisions outlined in Section 3.6 of the By-Laws shall be the exclusive means for stockholders to include nominees in the Company's proxy materials. Stockholders may, of course, continue to propose nominees to the Committee and Board through other means, but the Committee and Board will have final authority to determine whether to include those nominees in the Company's proxy materials.

Revisions to Other Sections of the By-Laws

Nasdaq also proposes to make conforming changes to Sections 3.1(a), 3.3(a), 3.3(c) and 3.5 of the By-Laws to provide clarifications and prevent confusion. Specifically, current Section 3.1(a) enumerates the methods by which nominations of persons for election to the Board may be made at an annual meeting of stockholders; Nasdaq proposes to add proxy access nominations to the list of methods. Current Section 3.3(a) specifies that, among other things, only such persons who are nominated in accordance with the procedures set forth in Article III of the By-Laws [39] shall be eligible to be elected at an annual or special meeting of Nasdaq's stockholders to serve as directors; for the avoidance of doubt, Nasdaq proposes to clarify that the reference to Article III includes the proxy access provision in Section 3.6 of the By-Laws with respect to director nominations in connection with annual meetings. Current Section 3.3(c) states, among other things, that compliance with Section 3.1(a)(iii) and (b) [40] shall be the exclusive means for a stockholder to make a director nomination; Nasdaq proposes to add proxy access as an additional means for a stockholder to make a director nomination. Finally, current Section 3.5 requires Nasdaq's director nominees to submit to Nasdaq's Corporate Secretary a questionnaire, representation and agreement within certain time periods; Nasdaq proposes to clarify that proxy access nominees must submit these materials within the time periods prescribed for delivery of a Notice of Proxy Access Nomination, as described above.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[41] in general, and furthers the objectives of Section 6(b)(5) of the Act,[42] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

In response to feedback from its investors, Nasdaq is proposing changes to its By-Laws to implement proxy access. The Exchange believes that, by permitting an Eligible Stockholder of Nasdaq that meets the stated requirements to nominate directors and have its nominees included in Nasdaq's annual meeting proxy statement, the proposed rule change strengthens the corporate governance of the Exchange's ultimate parent company, which is beneficial to both investors and the public interest.

In drafting its proxy access provision, Nasdaq has attempted to strike an appropriate balance between responding to investor feedback and including certain procedural and informational requirements for the protection of the Company and its investors. Specifically, the procedural requirements will protect investors by stating clearly and explicitly the procedures stockholders must follow in order to submit a proper proxy access nomination. The informational requirements will enhance investor protection by ensuring, among other things, that the Company and its stockholders have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees comply with applicable laws, regulations and other requirements.

Finally, the remaining changes are clarifying in nature, and they enhance investor protection and the public interest by preventing confusion with respect to the operation of the By-Law provisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

Because the proposed rule change relates to the governance of the Company and not to the operations of the Exchange, 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.

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

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.

[39] Article III of the By-Laws relates to stockholder meetings.

[40] As part of Nasdaq's ''advance notice'' provision, Sections 3.1(a)(iii) and (b) of the By-Laws describe certain procedures that a stockholder must follow to, among other things, nominate a person for election to the Board.

[41] 15 U.S.C. 78f(b).

[42] 15 U.S.C. 78f(b)(5).

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–ISE–2016–22 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–ISE–2016–22.* 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–ISE–2016–22* and should be submitted on or before October 26, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–24007 Filed 10–4–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78913; File No. SR–Nasdaq–2016–002]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Amendment No. 3, and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 3, to List and Trade Shares of the First Trust Municipal High Income ETF of First Trust Exchange-Traded Fund III

September 23, 2016.

I. Introduction

On January 6, 2016, The NASDAQ Stock Market LLC (''Nasdaq'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the First Trust Municipal High Income ETF (''Fund'') under Nasdaq Rule 5735. The proposed rule change was published for comment in the **Federal Register** on January 27, 2016.[3] On February 16, 2016, the Exchange filed Amendment No. 1.[4] On March 8, 2016, pursuant to Section 19(b)(2) of the Act,[5] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[6]

On April 26, 2016, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act[7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[8] In the Order Instituting Proceedings, the Commission solicited comments on specified matters related to the proposal.[9]

On June 24, 2016, the Exchange filed Amendment No. 2, which replaced the originally filed proposed rule change in its entirety.[10]

On July 21, 2016, the Commission designated a longer period for Commission action on the proposed rule change.[11] On August 30, 2016, the Exchange filed Amendment No. 3, which replaced the originally filed proposed rule change (as previously modified by Amendments No. 1 and No. 2) in its entirety.[12]

The Commission has not received any comments on the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment No. 3 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

II. The Exchange's Description of 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. Nasdaq has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[43] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 76944 (Jan. 21, 2016), 81 FR 4712.

[4] Amendment No. 1 is available on the Commission's Web site at: *http://www.sec.gov/comments/sr-bats-2015-100/bats2015100.shtml.*

[5] 15 U.S.C. 78s(b)(2).

[6] *See* Securities Exchange Act Release No. 34–77320, 81 FR 13429 (Mar. 14, 2016). The Commission designated April 26, 2016, as the date by which the Commission would either approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[7] 15 U.S.C. 78s(b)(2)(B).

[8] *See* Securities Exchange Act Release No. 77871, 81 FR 26265 (May 2, 2016) (''Order Instituting Proceedings'').

[9] Specifically, the Commission instituted proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade,'' and ''to protect investors and the public interest.'' *See id.,* 81 FR at 26268.

[10] Amendment No. 2 is available on the Commission's Web site at: *https://www.sec.gov/comments/sr-nasdaq-2016-002/nasdaq2016002-2.pdf.*

[11] *See* Securities Exchange Act Release No. 78384, 81 FR 49286 (July 27, 2016) (designating September 23, 2016, as the date by which the Commission must either approve or disapprove the proposed rule change).

[12] Amendment No. 3 is available on the Commission's Web site at: *https://www.sec.gov/comments/sr-nasdaq-2016-002/nasdaq2016002-3.pdf.*

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 the Shares of the Fund under Nasdaq Rule 5735, which governs the listing and trading of Managed Fund Shares [13] on the Exchange. The Fund will be an actively-managed exchange-traded fund (''ETF''). The Shares will be offered by the Trust, which was established as a Massachusetts business trust on January 9, 2008.[14] The Trust is registered with the Commission as an investment company and has filed a registration statement on Form N–1A (''Registration Statement'') with the Commission.[15] The Fund will be a series of the Trust. The Fund intends to qualify each year as a regulated investment company (''RIC'') under Subchapter M of the Internal Revenue Code of 1986, as amended.

First Trust Advisors L.P. will be the investment adviser (''Adviser'') to the Fund. First Trust Portfolios L.P. (the ''Distributor'') will be the principal underwriter and distributor of the Fund's Shares. Brown Brothers Harriman & Co. (''BBH'') will act as the administrator, accounting agent, custodian, and transfer agent to the Fund.

Paragraph (g) of Rule 5735 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.[16] In addition, paragraph (g) 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, non-public information regarding the open-end fund's portfolio.

Rule 5735(g) is similar to Nasdaq Rule 5705(b)(5)(A)(i); however, paragraph (g) 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. The Adviser is not a broker-dealer, but it is affiliated with the Distributor, a broker-dealer, and has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition and/or changes to the portfolio.

In addition, personnel who make decisions on the Fund's portfolio composition will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund's portfolio. In the event (a) the Adviser or any sub-adviser registers as a 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 another broker-dealer, it will implement a fire wall with respect to its relevant personnel and/or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition and/or changes to the portfolio and will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding such portfolio. The Fund currently does not intend to use a sub-adviser.

First Trust Municipal High Income ETF

Principal Investments

The primary investment objective of the Fund will be to generate current income that is exempt from regular federal income taxes and its secondary objective will be long-term capital appreciation. Under normal market conditions,[17] the Fund will seek to achieve its investment objectives by investing at least 80% of its net assets (including investment borrowings) in municipal debt securities that pay interest that is exempt from regular federal income taxes which are ''exempted securities'' under Section 3(a)(12) of the Act (collectively, ''Municipal Securities'').[18] Municipal Securities are generally issued by or on behalf of states, territories or possessions of the U.S. and the District

[13] 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 Index Fund Shares, listed and traded on the Exchange under Nasdaq Rule 5705, 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.

[14] The Commission has issued an order, upon which the Trust may rely, granting certain exemptive relief under the 1940 Act. *See* Investment Company Act Release No. 30029 (April 10, 2012) (File No. 812–13795) (the ''Exemptive Relief''). In addition, on December 6, 2012, the staff of the Commission's Division of Investment Management (''Division'') issued a no-action letter (''No-Action Letter'') relating to the use of derivatives by actively-managed ETFs. *See* No-Action Letter dated December 6, 2012 from Elizabeth G. Osterman, Associate Director, Office of Exemptive Applications, Division of Investment Management. The No-Action Letter stated that the Division would not recommend enforcement action to the Commission under applicable provisions of and rules under the 1940 Act if actively-managed ETFs operating in reliance on specified orders (which include the Exemptive Relief) invest in options contracts, futures contracts or swap agreements provided that they comply with certain representations stated in the No-Action Letter.

[15] *See* Post-Effective Amendment No. 27 to Registration Statement on Form N–1A for the Trust, dated August 31, 2015 (File Nos. 333–176976 and 811–22245). The descriptions of the Fund and the Shares contained herein are based, in part, on information in the Registration Statement.

[16] 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 its related personnel are 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 implemented written policies and procedures reasonably designed to prevent violation, 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.

[17] The term ''under normal market conditions'' as used herein includes, but is not limited to, the absence of adverse market, economic, political or other conditions, including extreme volatility or trading halts in the fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or *force majeure* type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. On a temporary basis, including for defensive purposes, during the initial invest-up period (*i.e.,* the six-week period following the commencement of trading of Shares on the Exchange) and during periods of high cash inflows or outflows (*i.e.,* rolling periods of seven calendar days during which inflows or outflows of cash, in the aggregate, exceed 10% of the Fund's net assets as of the opening of business on the first day of such periods), the Fund may depart from its principal investment strategies; for example, it may hold a higher than normal proportion of its assets in cash. During such periods, the Fund may not be able to achieve its investment objectives. The Fund may adopt a defensive strategy when the Adviser believes securities in which the Fund normally invests have elevated risks due to political or economic factors and in other extraordinary circumstances.

[18] Assuming compliance with the investment requirements and limitations described herein, the Fund may invest up to 100% of its net assets in Municipal Securities that pay interest that generates income subject to the federal alternative minimum tax.

of Columbia and their political subdivisions, agencies, authorities and other instrumentalities. The types of Municipal Securities in which the Fund may invest include municipal lease obligations (and certificates of participation in such obligations), municipal general obligation bonds, municipal revenue bonds, municipal notes, municipal cash equivalents, private activity bonds (including without limitation industrial development bonds), and pre-refunded [19] and escrowed to maturity bonds. In addition, Municipal Securities include securities issued by entities whose underlying assets are municipal bonds (*i.e.,* tender option bond (TOB) trusts and custodial receipts trusts).

The Fund may invest in Municipal Securities of any maturity. However, under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows,[20] the weighted average maturity of the Fund will be less than or equal to 14 years.

Under normal market conditions, the Fund will invest at least 65% of its net assets in Municipal Securities that are, at the time of investment, rated below investment grade (*i.e.,* not rated Baa3/BBB− or above) by at least one nationally recognized statistical rating organization (''NRSRO'') rating such securities (or Municipal Securities that are unrated and determined by the Adviser to be of comparable quality) [21] (commonly referred to as ''high yield'' or ''junk'' bonds); [22] however, the Fund will consider pre-refunded or escrowed to maturity bonds, regardless of rating, to be investment grade securities.

The Fund may invest up to 35% of its net assets in ''investment grade'' Municipal Securities, which are Municipal Securities that are, at the time of investment, rated investment grade (*i.e.,* rated Baa3/BBB− or above) by each NRSRO rating such securities (or Municipal Securities that are unrated and determined by the Adviser to be of comparable quality). If, subsequent to purchase by the Fund, a Municipal Security held by the Fund experiences an improvement in credit quality and becomes investment grade, the Fund may continue to hold the Municipal Security and it will not cause the Fund to violate the 35% investment limitation; however, the Municipal Security will be taken into account for purposes of determining whether purchases of additional Municipal Securities will cause the Fund to violate such limitation.

The Fund will be actively managed and will not be tied to an index. However, under normal market conditions, on a continuous basis determined at the time of purchase, its portfolio of Municipal Securities [23] will generally meet, as applicable, all except for two of the criteria for non-actively managed, index-based, fixed income ETFs contained in Nasdaq Rule 5705(b)(4)(A), as described below.

Nasdaq Rule 5705(b)(4)(A)(i) requires that the index or portfolio consist of ''Fixed Income Securities.'' Fixed Income Securities include, among other things, Municipal Securities.[24] Therefore, the Fund's portfolio of Municipal Securities will satisfy this requirement under normal market conditions.

Nasdaq Rule 5705(b)(4)(A)(iii) applies to convertible securities and, therefore, since Municipal Securities do not include convertible securities, this requirement is not applicable.

Nasdaq Rule 5705(b)(4)(A)(iv) requires that no component fixed income security (excluding Treasury securities) will represent more than 30% of the weight of the index or portfolio, and that the five highest weighted component fixed income securities will not in the aggregate account for more than 65% of the weight of the index or portfolio. The Fund's portfolio of Municipal Securities [25] will satisfy this requirement under normal market conditions.

Nasdaq Rule 5705(b)(4)(A)(v) requires that an underlying index or portfolio (excluding one consisting entirely of exempted securities) include securities from a minimum of 13 non-affiliated issuers. Under normal market conditions, the Fund's portfolio of Municipal Securities [26] will include securities from a minimum of 13 non-affiliated issuers.[27] Therefore, the Fund's portfolio of Municipal Securities will satisfy this requirement under normal market conditions.

The Fund's portfolio of Municipal Securities may not satisfy Rule 5705(b)(4)(A)(vi), which requires that component securities that in the aggregate account for at least 90% of the weight of the index or portfolio be either exempted securities or from a specified type of issuer. However, as noted above, under normal market conditions, at least 80% of the Fund's net assets (including investment borrowings) will be invested in Municipal Securities, which are ''exempted securities'' as defined in Section 3(a)(12) of the Act.[28]

The Fund's portfolio of Municipal Securities will not generally satisfy Rule 5705(b)(4)(A)(ii), which requires that components that in the aggregate account for at least 75% of the weight

[19] A pre-refunded municipal bond is a municipal bond that has been refunded to a call date on or before the final maturity of principal and remains outstanding in the municipal market. The payment of principal and interest of the pre-refunded municipal bonds held by the Fund will be funded from securities in a designated escrow account that holds U.S. Treasury securities or other obligations of the U.S. government (including its agencies and instrumentalities). As the payment of principal and interest is generated from securities held in a designated escrow account, the pledge of the municipality has been fulfilled and the original pledge of revenue by the municipality is no longer in place. The escrow account securities pledged to pay the principal and interest of the pre-refunded municipal bond do not guarantee the price movement of the bond before maturity. Investment in pre-refunded municipal bonds held by the Fund may subject the Fund to interest rate risk, market risk and credit risk. In addition, while a secondary market exists for pre-refunded municipal bonds, if the Fund sells pre-refunded municipal bonds prior to maturity, the price received may be more or less than the original cost, depending on market conditions at the time of sale.

[20] *See supra* note 17 regarding the meaning of the terms ''initial invest-up period'' and ''periods of high cash inflows or outflows.''

[21] Comparable quality of unrated Municipal Securities will be determined by the Adviser based on fundamental credit analysis of the unrated security and comparable rated securities. On a best efforts basis, the Adviser will attempt to make a rating determination based on publicly available data. In making a ''comparable quality'' determination, the Adviser may consider, for example, whether the issuer of the security has issued other rated securities, the nature and provisions of the relevant security, whether the obligations under the relevant security are guaranteed by another entity and the rating of such guarantor (if any), relevant cash flows, macroeconomic analysis, and/or sector or industry analysis.

[22] The Municipal Securities in which the Fund will invest to satisfy this 65% investment requirement may include Municipal Securities that are currently in default and not expected to pay the current coupon (''Distressed Municipal Securities''). The Fund may invest up to 10% of its net assets in Distressed Municipal Securities. If, subsequent to purchase by the Fund, a Municipal Security held by the Fund becomes a Distressed Municipal Security, the Fund may continue to hold the Distressed Municipal Security and it will not cause the Fund to violate the 10% limitation; however, the Distressed Municipal Security will be taken into account for purposes of determining whether purchases of additional Municipal Securities will cause the Fund to violate such limitation.

[23] For purposes of this statement and the discussion of the requirements of Nasdaq Rule 5705(b)(4)(A) below, with respect to Municipal Securities that are issued by entities whose underlying assets are municipal bonds, the underlying municipal bonds, rather than the securities issued by such entities, will be taken into account.

[24] *See supra* note 23.

[25] *Id.*

[26] *Id.*

[27] For purposes of this restriction, ''non-affiliated issuers'' are issuers that are not ''affiliated persons'' within the meaning of Section 2(a)(3) of the 1940 Act. Additionally, for purposes of this restriction, each state and each separate political subdivision, agency, authority, or instrumentality of such state, each multi-state agency or authority, and each guarantor, if any, will be treated as separate issuers of Municipal Securities.

[28] *See supra* note 23.

of the index or portfolio have a minimum original principal amount outstanding of $100 million or more. However, under normal market conditions, at least 40% (based on dollar amount invested) of the Municipal Securities in which the Fund invests [29] will be issued by issuers with total outstanding debt issuances that, in the aggregate, have a minimum amount of municipal debt outstanding at the time of purchase of $75 million or more. The Commission has previously issued orders approving proposed rule changes relating to the listing and trading under NYSE Arca Equities Rule 5.2(j)(3), Commentary .02 (which governs the listing and trading of fixed-income index ETFs on NYSE Arca, Inc.), to various ETFs that track indexes comprised of municipal securities (including high-yield municipal index ETFs) that did not meet the analogous requirement included in Commentary .02(a)(2) to NYSE Arca Equities Rule 5.2(j)(3),[30] but demonstrated that the portfolio of municipal securities in which the ETFs would invest would be sufficiently liquid. Similarly, under normal market conditions, the Fund's portfolio of Municipal Securities (although not necessarily the Fund's entire portfolio as a whole) will satisfy all except for two of the applicable requirements of Nasdaq Rule 5705(b)(4)(A), and a significant portion (at least 40% (based on dollar amount invested)) of the Municipal Securities in which the Fund invests [31] will be issued by issuers with total outstanding debt issuances that, in the aggregate, have a minimum amount of municipal debt outstanding at the time of purchase of $75 million or more, which should provide support regarding the anticipated liquidity of the Fund's Municipal Securities portfolio.

Other Investments

With respect to up to 20% (in the aggregate) of its net assets, the Fund may invest in and hold the securities and other instruments (including cash) described below.

The Fund may invest up to 20% of its net assets in short-term debt instruments (described below), money market funds and other cash equivalents, taxable municipal securities or tax-exempt municipal securities that are not exempted securities under Section 3(a)(12) under the Act, or it may hold cash. The percentage of the Fund invested in such holdings or held in cash will vary and will depend on several factors, including market conditions.

Short-term debt instruments, which do not include Municipal Securities, are issued by issuers having a long-term debt rating of at least A−/A3 (as applicable) by Standard & Poor's Ratings Services (''S&P Ratings''), Moody's Investors Service, Inc. (''Moody's'') or Fitch Ratings (''Fitch'') and have a maturity of one year or less.

The Fund may invest in the following short-term debt instruments: (1) Fixed rate and floating rate 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; (2) certificates of deposit issued against funds deposited in a bank or savings and loan association; (3) bankers' acceptances, which are short-term credit instruments used to finance commercial transactions; (4) repurchase agreements,[32] which involve purchases of debt securities; (5) 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; and (6) commercial paper, which is short-term unsecured promissory notes.[33]

With respect to up to 20% of its net assets, the Fund may (i) invest in the securities of other investment companies registered under the 1940 Act, including money market funds, other ETFs, [34] open-end funds (other than money market funds and other ETFs), and closed-end funds and (ii) acquire short positions in the securities of the foregoing investment companies.

With respect to up to 20% of its net assets, the Fund may (i) invest in exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures contracts, and exchange-listed U.S. Treasury futures contracts and (ii) acquire short positions in the foregoing derivatives. Transactions in the foregoing derivatives may allow the Fund to obtain net long or short exposures to selected interest rates. These derivatives may also be used to hedge risks, including interest rate risks and credit risks, associated with the Fund's portfolio investments. The Fund's investments in derivative instruments will be consistent with the Fund's investment objectives and the 1940 Act and will not be used to seek to achieve a multiple or inverse multiple of an index.

Investment Restrictions

The Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser.[35] The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available

[29] *Id.*

[30] *See, e.g.,* Securities Exchange Act Release Nos. 75376 (July 7, 2015), 80 FR 40113 (July 13, 2015) (SR–NYSEArca–2015–18) (order approving listing and trading of Vanguard Tax-Exempt Bond Index Fund); 71232 (January 3, 2014), 79 FR 1662 (January 9, 2014) (SR–NYSEArca–2013–118) (order approving listing and trading of Market Vectors Short High-Yield Municipal Index ETF); and 63881 (February 9, 2011), 76 FR 9065 (February 16, 2011) (SR–NYSEArca–2010–120) (order approving listing and trading of SPDR Nuveen S&P High Yield Municipal Bond ETF).

[31] *See supra* note 23.

[32] The Fund intends to enter into repurchase agreements only with financial institutions and dealers believed by the Adviser to present minimal credit risks in accordance with criteria approved by the Board of Trustees of the Trust (''Trust Board''). The Adviser will review and monitor the creditworthiness of such institutions. The Adviser will monitor the value of the collateral at the time the transaction is entered into and at all times during the term of the repurchase agreement.

[33] The Fund may only invest in commercial paper rated A–3 or higher by S&P Ratings, Prime–3 or higher by Moody's or F3 or higher by Fitch.

[34] An ETF is an investment company registered under the 1940 Act that holds a portfolio of securities. Many ETFs are designed to track the performance of a securities index, including industry, sector, country and region indexes. ETFs included in the Fund will be listed and traded in the U.S. on registered exchanges. The Fund may invest in the securities of ETFs in excess of the limits imposed under the 1940 Act pursuant to exemptive orders obtained by other ETFs and their sponsors from the Commission. In addition, the Fund may invest in the securities of certain other investment companies in excess of the limits imposed under the 1940 Act pursuant to an exemptive order that the Trust has obtained from the Commission. *See* Investment Company Act Release No. 30377 (February 5, 2013) (File No. 812–13895). The ETFs in which the Fund may invest include Index Fund Shares (as described in Nasdaq Rule 5705), Portfolio Depository Receipts (as described in Nasdaq Rule 5705), and Managed Fund Shares (as described in Nasdaq Rule 5735). While the Fund may invest in inverse ETFs, the Fund will not invest in leveraged or inverse leveraged (*e.g.,* 2X or –3X) ETFs.

[35] 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).

markets as determined in accordance with Commission staff guidance.[36]

The Fund may not invest 25% or more of the value of its total assets in securities of issuers in any one industry. This restriction does not apply to (a) Municipal Securities issued by governments or political subdivisions of governments, (b) obligations issued or guaranteed by the U.S. government, its agencies or instrumentalities, or (c) securities of other investment companies.[37] In addition, under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows,[38] the Fund's investments in Municipal Securities will provide exposure (based on dollar amount invested) to (a) at least 10 different industries [39] (with no more than 25% of the value of the Fund's net assets comprised of Municipal Securities that provide exposure to any single industry) and (b) at least 15 different states (with no more than 30% of the value of the Fund's net assets comprised of Municipal Securities that provide exposure to any single state).[40]

Under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows,[41] (a) with respect to 75% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 3% of the value of the Fund's net assets and (b) with respect to 15% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 5% of the value of the Fund's net assets.[42]

Under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows,[43] (a) with respect to the Municipal Securities in which the Fund invests that are rated investment grade by each NRSRO rating such securities, at the time of purchase, the applicable borrower will be obligated to pay debt service on issues of municipal obligations that have an aggregate principal amount outstanding of $100 million or more and (b) with respect to all other Municipal Securities in which the Fund invests (''Clause B Munis''),[44] at the time of purchase of a Clause B Muni, the borrowers of all Clause B Munis held by the Fund, in the aggregate, will have a weighted average of principal municipal debt outstanding of $50 million or more.[45] In complying with this requirement, the Fund will calculate the weighted average of all principal municipal debt outstanding of all Clause B Muni borrowers at the time of purchase of a new Clause B Muni based on (i) the most recent information available on debt outstanding of the new Clause B Muni purchase and (ii) the debt outstanding information available at the previous time of original purchase of all other existing Clause B Muni borrowers already held in the Fund.[46] Purchases that add to an existing borrower position will result in updated debt calculations for that borrower using the most recent information available. Notwithstanding the foregoing, in the case of a Municipal Security that is a pre-refunded or escrowed to maturity bond, such Municipal Security will be included in clause (a) of the first sentence of this paragraph only if it was rated investment grade by each NRSRO rating such security immediately prior to being pre-refunded or escrowed to maturity, as applicable, and will otherwise be a Clause B Muni.

Creation and Redemption of Shares

The Fund will issue and redeem Shares on a continuous basis at net asset value (''NAV'') [47] only in large blocks of Shares (''Creation Units'') in transactions with authorized participants, generally including broker-dealers and large institutional investors (''Authorized Participants''). Creation Units generally will consist of 50,000 Shares, although this may change from time to time. Creation Units, however, are not expected to consist of less than 50,000 Shares. As described in the Registration Statement and consistent with the Exemptive Relief, the Fund will issue and redeem Creation Units in exchange for an in-kind portfolio of instruments and/or cash in lieu of such instruments (the ''Creation Basket'').[48] In addition, if there is a difference between the NAV attributable to a Creation Unit and the market value of the Creation Basket exchanged for the Creation Unit, the party conveying instruments (which may include cash-in-lieu amounts) with the lower value will pay to the other an amount in cash equal to the difference (referred to as the ''Cash Component'').

Creations and redemptions must be made by or through an Authorized Participant that has executed an agreement that has been agreed to by the Distributor and BBH with respect to

[36] 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).

[37] *See* Form N–1A, Item 9. 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).

[38] *See supra* note 17 regarding the meaning of the terms ''initial invest-up period'' and ''periods of high cash inflows or outflows.''

[39] The municipal industry classification system used by the Fund will divide the municipal securities universe into distinct categories that are intended to reflect either the use of proceeds generated by particular subsets of municipal securities or the collateral/sources of repayment securing/backing such municipal securities. For example, municipal bonds associated with the airport industry are issued to construct or expand an airport and/or related facilities and are secured by revenues generated from the use of the airport.

[40] For the avoidance of doubt, in the case of Municipal Securities that are issued by entities whose underlying assets are municipal bonds, the underlying municipal bonds will be taken into account.

[41] *See supra* note 17 regarding the meaning of the terms ''initial invest-up period'' and ''periods of high cash inflows or outflows.''

[42] For this purpose, (a) in the case of a municipal conduit financing (in general terms, the issuance of municipal securities by an issuer to finance a project to be used primarily by a third party (the ''conduit borrower'')), the term ''borrower'' will refer to the conduit borrower (*i.e.,* the party on which a bondholder must rely for repayment) and (b) in the case of other municipal financings, the term ''borrower'' will refer to the issuer of the municipal securities. In addition, for the avoidance of doubt, in the case of Municipal Securities that are issued by entities whose underlying assets are municipal bonds, the underlying municipal bonds will be taken into account.

[43] *See* note 17 regarding the meaning of the terms ''initial invest-up period'' and ''periods of high cash inflows or outflows.''

[44] For the avoidance of doubt, unrated Municipal Securities, regardless of credit quality, will be Clause B Munis.

[45] For purposes of this paragraph, *see supra* note 42 for the meaning of the term ''borrower''. In addition, for the avoidance of doubt, in the case of Municipal Securities that are issued by entities whose underlying assets are municipal bonds, the underlying municipal bonds will be taken into account.

[46] The Fund will not be required to update information regarding debt outstanding for borrowers of Clause B Munis already held in the Fund.

[47] The NAV of the Fund's Shares generally will be calculated once daily Monday through Friday as of the close of regular trading on the New York Stock Exchange (''NYSE''), generally 4:00 p.m., Eastern Time (the ''NAV Calculation Time''). NAV per Share will be calculated by dividing the Fund's net assets by the number of Fund Shares outstanding.

[48] Subject to, and in accordance with, the provisions of the Exemptive Relief, it is expected that the Fund will typically issue and redeem Creation Units on a cash basis; however, at times, it may issue and redeem Creation Units on an in-kind (or partially in-kind) basis.

creations and redemptions of Creation Units. All standard orders to create Creation Units must be received by the transfer agent no later than the closing time of the regular trading session on the NYSE (ordinarily 4:00 p.m., Eastern Time) (the ''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 as next determined on such date after receipt of the order in proper form. Shares may be redeemed only in Creation Units at their NAV next determined after receipt, not later than the Closing Time, of a redemption request in proper form by the Fund through the transfer agent and only on a business day.

The Fund's custodian, through the National Securities Clearing Corporation, will make available on each business day, prior to the opening of business of the Exchange, the list of the names and quantities of the instruments comprising the Creation Basket, as well as the estimated Cash Component (if any), for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following business day prior to commencement of trading in the Shares.

Net Asset Value

The Fund's NAV will be determined as of the close of regular trading on the NYSE on each day the NYSE is open for trading. If the NYSE closes early on a valuation day, the NAV will be determined as of that time. NAV per Share will be calculated for the Fund by taking the value of the Fund's total assets, including interest or dividends accrued but not yet collected, less all liabilities, including accrued expenses and dividends declared but unpaid, and dividing such amount by the total number of Shares outstanding. The result, rounded to the nearest cent, will be the NAV per Share. All valuations will be subject to review by the Trust Board or its delegate.

The Fund's investments will be valued daily. As described more specifically below, investments traded on an exchange (*i.e.,* a regulated market), will generally be valued at market value prices that represent last sale or official closing prices. In addition, as described more specifically below, non-exchange traded investments (including Municipal Securities) will generally be valued using prices obtained from third-party pricing services (each, a ''Pricing Service'').[49] If, however, valuations for any of the Fund's investments cannot be readily obtained as provided in the preceding manner, or the Pricing Committee of the Adviser (the ''Pricing Committee'') [50] questions the accuracy or reliability of valuations that are so obtained, such investments will be valued at fair value, as determined by the Pricing Committee, in accordance with valuation procedures (which may be revised from time to time) adopted by the Trust Board (the ''Valuation Procedures''), and in accordance with provisions of the 1940 Act. The Pricing Committee's fair value determinations may require subjective judgments about the value of an asset. The fair valuations attempt to estimate the value at which an asset could be sold at the time of pricing, although actual sales could result in price differences, which could be material.

Certain securities, including in particular Municipal Securities, in which the Fund may invest will not be listed on any securities exchange or board of trade. Such securities will typically be bought and sold by institutional investors in individually negotiated private transactions that function in many respects like an over-the-counter secondary market, although typically no formal market makers will exist. Certain securities, particularly debt securities, will have few or no trades, or trade infrequently, and information regarding a specific security may not be widely available or may be incomplete. Accordingly, determinations of the value of debt securities may be based on infrequent and dated information. Because there is less reliable, objective data available, elements of judgment may play a greater role in valuation of debt securities than for other types of securities.

The information summarized below is based on the Valuation Procedures as currently in effect; however, as noted above, the Valuation Procedures are amended from time to time and, therefore, such information is subject to change.

The following investments will typically be valued using information provided by a Pricing Service: (a) Except as provided below, Municipal Securities; (b) except as provided below, short-term U.S. government securities, commercial paper, and bankers' acceptances, all as set forth under ''Other Investments'' (collectively, ''Short-Term Debt Instruments''); and (c) except as provided below, taxable and other municipal securities that are not Municipal Securities. Debt instruments may be valued at evaluated mean prices, as provided by Pricing Services. Pricing Services typically value non-exchange-traded instruments utilizing a range of market-based inputs and assumptions, including readily available market quotations obtained from broker-dealers making markets in such instruments, cash flows, and transactions for comparable instruments. In pricing certain instruments, the Pricing Services may consider information about an instrument's issuer or market activity provided by the Adviser.

Municipal Securities, Short-Term Debt Instruments and taxable and other municipal securities having a remaining maturity of 60 days or less when purchased will typically be valued at cost adjusted for amortization of premiums and accretion of discounts, provided the Pricing Committee has determined that the use of amortized cost is an appropriate reflection of value given market and issuer-specific conditions existing at the time of the determination.

Repurchase agreements will typically be valued as follows:

Overnight repurchase agreements will be valued at amortized cost when it represents the best estimate of value. Term repurchase agreements (*i.e.,* those whose maturity exceeds seven days) will be valued at the average of the bid quotations obtained daily from at least two recognized dealers.

Equity securities (including ETFs and closed-end funds) listed on any exchange other than the Exchange will typically be valued at the last sale price on the exchange on which they are principally traded on the business day as of which such value is being determined. Such equity securities (including ETFs and closed-end funds) listed on the Exchange will typically be valued at the official closing price on the business day as of which such value is being determined. If there has been no sale on such day, or no official closing price in the case of securities traded on the Exchange, such equity securities will typically be valued using fair value pricing. Such equity securities traded on more than one securities exchange will be valued at the last sale price or official closing price, as applicable, on the business day as of which such value is being determined at the close of the exchange representing the principal market for such securities.

Money market funds and other registered open-end management

[49] The Adviser may use various Pricing Services or discontinue the use of any Pricing Services, as approved by the Trust Board from time to time.

[50] The Pricing Committee will be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the Fund's portfolio.

investment companies (other than ETFs, which will be valued as described above) will typically be valued at their net asset values as reported by such registered open-end management investment companies to Pricing Services.

Exchange-listed derivatives (including options on U.S. Treasury securities, options on U.S. Treasury futures contracts, and U.S. Treasury futures contracts) will typically be valued at the closing price in the market where such instruments are principally traded.

Availability of Information

The Fund's Web site (*www.ftportfolios.com*), which will be publicly available prior to the public offering of Shares, will include a form of the prospectus for the Fund that may be downloaded. The Web site will include the Shares' ticker, CUSIP and exchange information along with additional quantitative information updated on a daily basis, including, for the Fund: (1) Daily trading volume, the prior business day's reported NAV and closing price, mid-point of the bid/ask spread at the time of calculation of such NAV (the ''Bid/Ask Price''),[51] and a calculation of the premium and 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 Regular Market Session [52] on the Exchange, the Fund will disclose on its Web site the identities and quantities of the portfolio of securities and other assets (the ''Disclosed Portfolio'' as defined in Nasdaq Rule 5735(c)(2)) held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the business day.[53] The Fund's disclosure of derivative positions in the Disclosed Portfolio will include sufficient information for market participants to use to value these positions intraday. On a daily basis, the Fund will disclose on the Fund's Web site the following information regarding each portfolio holding, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding), the identity of the security 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 percentage weighting of the holding in the Fund's portfolio. The Web site information will be publicly available at no charge.

In addition, for the Fund, an estimated value, defined in Rule 5735(c)(3) as the ''Intraday Indicative Value,'' that reflects an estimated intraday value of the Fund's Disclosed Portfolio, will be disseminated. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service,[54] will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Regular Market Session. The Intraday Indicative Value will be based on quotes and closing prices provided by a dealer who makes a market in those instruments. Premiums and discounts between the Intraday Indicative Value and the market price may occur. This should not be viewed as a ''real time'' update of the NAV per Share of the Fund, which is calculated only once a day.

The dissemination of the Intraday Indicative Value, together with the Disclosed Portfolio, will allow investors to determine the value of the underlying portfolio of the Fund on a daily basis and will provide a close estimate of that value throughout the trading day.

Investors will also be able to obtain the Fund's Statement of Additional Information (''SAI''), the Fund's annual and semi-annual reports (together, ''Shareholder Reports''), and its Form N–CSR and Form N–SAR, filed twice a year. The Fund's SAI and Shareholder Reports will be available free upon request from the Fund, 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 will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the Consolidated Tape Association (''CTA'') plans for the Shares. Quotation and last sale information for exchange-listed equity securities (including other ETFs and closed-end funds) will be available from the exchanges on which they are traded as well as in accordance with any applicable CTA plans. Quotation and last sale information for U.S. exchange-listed options will be available via the Options Price Reporting Authority.

One source of price information for Municipal Securities and taxable and other municipal securities will be the Electronic Municipal Market Access (''EMMA'') of the Municipal Securities Rulemaking Board (''MSRB'').[55] Additionally, the MSRB offers trade data subscription services that permit subscribers to obtain same-day pricing information about municipal securities transactions. Moreover, pricing information for Municipal Securities, as well as for taxable and other municipal securities, Short-Term Debt Instruments (including short-term U.S. government securities, commercial paper, and bankers' acceptances), and repurchase agreements will be available from major broker-dealer firms and/or major market data vendors and/or Pricing Services.

Pricing information for exchange-listed derivatives (including options on U.S. Treasury securities, options on U.S. Treasury futures contracts, and U.S. Treasury futures contracts), ETFs and closed-end funds will be available from

[51] The Bid/Ask Price of the Fund will be determined using the midpoint of the highest bid and the lowest offer on the Exchange as of the time of calculation of the Fund's NAV. The records relating to Bid/Ask Prices will be retained by the Fund and its service providers.

[52] *See* Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4 a.m. to 9:30 a.m., Eastern Time; (2) Regular Market Session from 9:30 a.m. to 4 p.m. or 4:15 p.m., Eastern Time; and (3) Post-Market Session from 4 p.m. or 4:15 p.m. to 8 p.m., Eastern Time).

[53] Under accounting procedures to be followed by the Fund, trades made on the prior business day (''T'') will be booked and reflected in NAV on the current business day (''T+1''). Accordingly, the Fund 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.

[54] Currently, the NASDAQ OMX Global Index Data Service (''GIDS'') is the Nasdaq global index data feed service, offering real-time updates, daily summary messages, and access to widely followed indexes and Intraday Indicative Values for ETFs. GIDS provides investment professionals with the daily information needed to track or trade Nasdaq indexes, listed ETFs, or third party partner indexes and ETFs.

[55] Information available on EMMA includes next-day information regarding municipal securities transactions and par amounts traded. In addition, a source of price information for certain taxable municipal securities is the Trade Reporting and Compliance Engine (''TRACE'') of the Financial Industry Regulatory Authority (''FINRA'').

the applicable listing exchange and from major market data vendors.

Money market funds and other open-end funds (excluding ETFs) are typically priced once each business day and their prices will be available through the applicable fund's Web site or from major market data vendors.

Additional information regarding the Fund and the Shares, including investment strategies, risks, creation and redemption procedures, fees, Fund holdings disclosure policies, distributions and taxes will be included in the Registration Statement.

Initial and Continued Listing

The Shares will be subject to Rule 5735, which sets forth the initial and continued listing criteria applicable to Managed Fund Shares. The Exchange represents that, for initial and continued listing, the Fund must be in compliance with Rule 10A–3 [56] under the Act. A minimum of 100,000 Shares will be outstanding at the commencement of trading on the Exchange. 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.

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 Fund. Nasdaq will halt trading in the Shares under the conditions specified in Nasdaq Rules 4120 and 4121, including the trading pauses under Nasdaq Rules 4120(a)(11) and (12). Trading 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 other assets constituting the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Trading in the Shares also will be subject to Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

Trading Rules

Nasdaq deems the Shares to be equity securities, thus rendering trading in the Shares subject to Nasdaq's existing rules governing the trading of equity securities. Nasdaq will allow trading in the Shares from 4:00 a.m. until 8:00 p.m., Eastern Time. The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions. As provided in Nasdaq Rule 5735(b)(3), the minimum price variation for quoting and entry of orders in Managed Fund Shares traded on the Exchange is $0.01.

Surveillance

The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[57] 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.

FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund (including closed-end funds, ETFs, exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures, and exchange-listed U.S. Treasury futures contracts) with other markets and other entities that are members of the Intermarket Surveillance Group (''ISG''),[58] and FINRA may obtain trading information regarding trading in the Shares and such exchange-listed securities and instruments held by the Fund from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund from markets and other entities that are members of ISG, which includes securities and futures exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. Moreover, FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's TRACE.[59]

At least 90% of the Fund's net assets that are invested in exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures contracts, and exchange-listed U.S. Treasury futures contracts (in the aggregate) will be invested in instruments that trade in markets that are members of ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange. All of the Fund's net assets that are invested in exchange-listed equity securities (including closed-end funds and ETFs) will be invested in securities that trade in markets that are members of ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Information Circular

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (1) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (2) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (3) how information regarding the Intraday Indicative Value and the Disclosed Portfolio is disseminated; (4) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (5) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (6) trading information. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.

[56] *See* 17 CFR 240.10A–3.

[57] FINRA surveils trading on the Exchange pursuant to a regulatory services agreement. The Exchange is responsible for FINRA's performance under this regulatory services agreement.

[58] For a list of the current members of ISG, *see www.isgportal.org.* The Exchange notes that not all components of the Disclosed Portfolio may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[59] For Municipal Securities, trade information can generally be found on the MSRB's EMMA.

Additionally, the Information Circular will reference that the Fund is subject to various fees and expenses described in the Registration Statement. The Information Circular will also disclose the trading hours of the Shares of the Fund and the applicable NAV Calculation Time for the Shares. The Information Circular will disclose that information about the Shares of the Fund will be publicly available on the Fund's Web site.

Continued Listing Representations

All statements and representations made in this filing regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures shall constitute continued listing requirements for listing the Shares on the Exchange. In addition, the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series.

2. Statutory Basis

Nasdaq believes that the proposal is consistent with Section 6(b) of the Act in general and Section 6(b)(5) of the Act in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and 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 Nasdaq Rule 5735. The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.

The Adviser is not a broker-dealer, but it is affiliated with a broker-dealer and is required to implement a ''fire wall'' with respect to such broker-dealer affiliate regarding access to information concerning the composition and/or changes to the Fund's portfolio. In addition, paragraph (g) of Nasdaq Rule 5735 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 non-public information regarding the open-end fund's portfolio.

FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund (including closed-end funds, ETFs, exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures contracts, and exchange-listed U.S. Treasury futures contracts) with other markets and other entities that are members of ISG, and FINRA may obtain trading information regarding trading in the Shares and such exchange-listed securities and instruments held by the Fund from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund from markets and other entities that are members of ISG, which includes securities and futures exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. Moreover, FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's TRACE. At least 90% of the Fund's net assets that are invested in exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures contracts, and exchange-listed U.S. Treasury futures contracts (in the aggregate) will be invested in instruments that trade in markets that are members of ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange. All of the Fund's net assets that are invested in exchange-listed equity securities (including closed-end funds and ETFs) will be invested in securities that trade in markets that are members of ISG or are parties to a comprehensive surveillance sharing agreement with the Exchange.

The primary investment objective of the Fund will be to generate current income that is exempt from regular federal income taxes and its secondary objective will be long-term capital appreciation. Under normal market conditions, the Fund will seek to achieve its investment objectives by investing at least 80% of its net assets (including investment borrowings) in Municipal Securities. The Fund may invest up to 20% of its net assets in taxable municipal securities and in tax-exempt municipal securities that are not Municipal Securities. In addition, the Fund may invest up to 10% of its net assets in Distressed Municipal Securities. With respect to up to 20% of its net assets, the Fund may (i) invest in exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures contracts, and exchange-listed U.S. Treasury futures contracts and (ii) acquire short positions in the foregoing derivatives. The Fund's investments in derivative instruments will be consistent with the Fund's investment objectives and the 1940 Act and will not be used to seek to achieve a multiple or inverse multiple of an index. Also, the Fund may hold up to an aggregate amount of 15% of its net assets in illiquid assets (calculated at the time of investment), including Rule 144A securities deemed illiquid by the Adviser. The Fund will monitor its portfolio liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and will consider taking appropriate steps in order to maintain adequate liquidity if, through a change in values, net assets, or other circumstances, more than 15% of the Fund's net assets are held in illiquid assets. Illiquid assets include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance.

Under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows,[60] the Fund's investments in Municipal Securities will provide exposure (based on dollar amount invested) to (a) at least 10 different industries (with no more than 25% of the value of the Fund's net assets comprised of Municipal Securities that provide exposure to any single industry) and (b) at least 15 different states (with no more than 30% of the value of the Fund's net assets comprised of Municipal Securities that provide exposure to any single state). In addition, under normal market conditions, except for the initial invest-up period and periods of high cash

[60] *See* note 17 regarding the meaning of the terms ''initial invest-up period'' and ''periods of high cash inflows or outflows.''

inflows or outflows,[61] (a) with respect to 75% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 3% of the value of the Fund's net assets and (b) with respect to 15% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 5% of the value of the Fund's net assets. The Exchange believes that the foregoing restrictions should mitigate the risks associated with manipulation in that they limit exposure to specific industries, states and borrowers.

Further, under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows,[62] (a) with respect to the Municipal Securities in which the Fund invests that are rated investment grade by each NRSRO rating such securities, at the time of purchase, the applicable borrower will be obligated to pay debt service on issues of municipal obligations that have an aggregate principal amount outstanding of $100 million or more and (b) with respect to Clause B Munis, at the time of purchase of a Clause B Muni, the borrowers of all Clause B Munis held by the Fund, in the aggregate, will have a weighted average of principal municipal debt outstanding of $50 million or more. In complying with this requirement, the Fund will calculate the weighted average of all principal municipal debt outstanding of all Clause B Muni borrowers at the time of purchase of a new Clause B Muni based on (i) the most recent information available on debt outstanding of the new Clause B Muni purchase and (ii) the debt outstanding information available at the previous time of original purchase of all other existing Clause B Muni borrowers already held in the Fund.[63] Purchases that add to an existing borrower position will result in updated debt calculations for that borrower using the most recent information available. Notwithstanding the foregoing, in the case of a Municipal Security that is a pre-refunded or escrowed to maturity bond, such Municipal Security will be included in clause (a) of the first sentence of this paragraph only if it was rated investment grade by each NRSRO rating such security immediately prior to being pre-refunded or escrowed to maturity, as applicable, and will otherwise be a Clause B Muni. The Exchange believes that the foregoing restrictions should mitigate the risks associated with manipulation in that they impose requirements relating to the outstanding municipal debt of borrowers of Municipal Securities.

The Fund's investments will be valued daily. Investments traded on an exchange (*i.e.,* a regulated market), will generally be valued at market value prices that represent last sale or official closing prices. Non-exchange traded investments (including Municipal Securities) will generally be valued using prices obtained from a Pricing Service. If, however, valuations for any of the Fund's investments cannot be readily obtained as provided in the preceding two sentences, or the Pricing Committee questions the accuracy or reliability of valuations that are so obtained, such investments will be valued at fair value, as determined by the Pricing Committee, in accordance with the Valuation Procedures and in accordance with provisions of the 1940 Act.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the 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 Fund and the Shares, thereby promoting market transparency. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service, will be widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Regular Market Session. On each business day, before commencement of trading in Shares in the Regular Market Session on the Exchange, the Fund will disclose on its Web site the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day. 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, and quotation and last sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and the CTA plans for the Shares. One source of price information for Municipal Securities and taxable and other municipal securities will be the MSRB's EMMA. Additionally, the MSRB offers trade data subscription services that permit subscribers to obtain same-day pricing information about municipal securities transactions. Moreover, pricing information for Municipal Securities, as well as for taxable and other municipal securities, Short-Term Debt Instruments (including short-term U.S. government securities, commercial paper, and bankers' acceptances), and repurchase agreements will be available from major broker-dealer firms and/or major market data vendors and/or Pricing Services.

Pricing information for exchange-listed derivatives (including options on U.S. Treasury securities, options on U.S. Treasury futures contracts, and U.S. Treasury futures contracts), ETFs and closed-end funds will be available from the applicable listing exchange and from major market data vendors.

Money market funds and other open-end funds (excluding ETFs) are typically priced once each business day and their prices will be available through the applicable fund's Web site or from major market data vendors.

The Fund's Web site will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. Trading in Shares of the Fund will be halted under the conditions specified in Nasdaq Rules 4120 and 4121 or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. In addition, as noted above, investors will have ready access to information regarding the Fund's holdings, the Intraday 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 an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund (including closed-end funds, ETFs, exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures contracts, and exchange-listed U.S.

[61] *Id.*

[62] *Id.*

[63] The Fund will not be required to update information regarding debt outstanding for borrowers of Clause B Munis already held in the Fund.

Treasury futures contracts) with other markets and other entities that are members of ISG, and FINRA may obtain trading information regarding trading in the Shares and such exchange-listed securities and instruments held by the Fund from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund from markets and other entities that are members of ISG, which includes securities and futures exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. Furthermore, as noted above, investors will have ready access to information regarding the Fund's holdings, the Intraday Indicative Value, the Disclosed Portfolio, and quotation and last sale information for the Shares.

For the above reasons, Nasdaq believes the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change will facilitate the listing and trading of an additional type of actively-managed exchange-traded fund 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

Written comments were neither solicited nor received.

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to list and trade the Shares is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.[64] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,[65] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission also finds that the proposal to list and trade the Shares on the Exchange is consistent with Section 11A(a)(1)(C)(iii) of the Exchange Act,[66] which sets forth Congress' finding that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Quotation and last sale information for the Shares will be available via Nasdaq proprietary quote and trade services, as well as in accordance with the Unlisted Trading Privileges and CTA plans for the Shares.

In addition, for the Fund, an estimated value, defined in Rule 5735(c)(3) as the ''Intraday Indicative Value,'' that reflects an estimated intraday value of the Fund's Disclosed Portfolio, will be disseminated. Moreover, the Intraday Indicative Value, available on the NASDAQ OMX Information LLC proprietary index data service,[67] will be based upon the current value for the components of the Disclosed Portfolio and will be updated and widely disseminated by one or more major market data vendors and broadly displayed at least every 15 seconds during the Regular Market Session.[68]

On each business day, before commencement of trading in Shares in the Regular Market Session [69] on the Exchange, the Fund will disclose on its Web site the identities and quantities of the portfolio of securities and other assets (the ''Disclosed Portfolio'' as defined in Nasdaq Rule 5735(c)(2)) held by the Fund that will form the basis for the Fund's calculation of NAV at the end of the business day.[70] The Fund's custodian, through the National Securities Clearing Corporation, will make available on each business day, prior to the opening of business of the Exchange, the list of the names and quantities of the instruments comprising the Creation Basket, as well as the estimated Cash Component (if any), for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following business day prior to commencement of trading in the Shares.

The NAV of the Fund's Shares will normally be determined as of the close of the regular trading session on the Exchange (ordinarily 4:00 p.m. Eastern time) on each business day. 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.

One source of price information for Municipal Securities and taxable municipal securities will be the EMMA of the MSRB.[71] Additionally, the MSRB offers trade data subscription services that permit subscribers to obtain same-day pricing information about municipal securities transactions. Moreover, pricing information for Municipal Securities, as well as for taxable and other municipal securities, Short-Term Debt Instruments (including short-term U.S. government securities, commercial paper, and bankers' acceptances), and repurchase agreements will be available from major broker-dealer firms or from major market data vendors or Pricing Services.

Pricing information for exchange-listed derivatives (including options on U.S. Treasury securities, options on U.S. Treasury futures contracts, and U.S. Treasury futures contracts), ETFs, and closed-end funds will be available from the applicable listing exchange and from major market data vendors. Money market funds and other open-end funds (excluding ETFs) are typically priced

[64] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[65] 15 U.S.C. 78f(b)(5).

[66] 15 U.S.C. 78k–1(a)(1)(C)(iii).

[67] *See supra* note 54.

[68] The Exchange states that several major market data vendors display or make widely available Portfolio Indicative Values taken from the CTA or other data feeds.

[69] *See* Nasdaq Rule 4120(b)(4) (describing the three trading sessions on the Exchange: (1) Pre-Market Session from 4 a.m. to 9:30 a.m., Eastern Time; (2) Regular Market Session from 9:30 a.m. to 4 p.m. or 4:15 p.m., Eastern Time; and (3) Post-Market Session from 4 p.m. or 4:15 p.m. to 8 p.m., Eastern Time).

[70] The Fund's disclosure of derivative positions in the Disclosed Portfolio will include information designed to allow market participants to use to value these positions intraday. On a daily basis, the Fund will disclose on the Fund's Web site the following information regarding each portfolio holding, as applicable to the type of holding: Ticker symbol, CUSIP number or other identifier, if any; a description of the holding (including the type of holding), the identity of the security 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 percentage weighting of the holding in the Fund's portfolio. The Web site information will be publicly available at no charge.

[71] *See supra* note 55.

once each business day, and their prices will be available through the applicable fund's Web site or from major market data vendors. Quotation and last sale information for exchange-listed equity securities (including other ETFs and closed-end funds) will be available from the exchanges on which they are traded as well as in accordance with any applicable CTA plans. Quotation and last sale information for U.S. exchange-listed options will be available via the Options Price Reporting Authority. The Fund's Web site will include a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information.

The Commission further believes that the proposal to list and trade the Shares is reasonably designed to promote fair disclosure of information that may be necessary to price the Shares appropriately and to prevent trading when a reasonable degree of transparency cannot be assured. 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. Trading in Shares of the Fund will be halted under the conditions specified in Nasdaq Rules 4120 and 4121 [72] or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable, and trading in the Shares will be subject to Nasdaq Rule 5735(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted.

The Exchange represents that it has a general policy prohibiting the distribution of material, non-public information by its employees. In addition, paragraph (g) of Nasdaq Rule 5735 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 non-public information regarding the open-end fund's portfolio. The Exchange represents that the Adviser is not a broker-dealer, but it is affiliated with the Distributor, a broker-dealer, and has implemented a fire wall with respect to its broker-dealer affiliate regarding access to information concerning the composition of and/or changes to the portfolio.[73]

Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. The Exchange represents that trading in the Shares will be subject to the existing trading surveillances, administered by both Nasdaq and also FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws.[74] The Commission believes that the Exchange's procedures, combined with the Fund's general adherence to the generic fixed income listing requirements in Nasdaq Rule 5705(b)(4)(A) on a continuous basis measured at the time of purchase are designed to mitigate the potential for price manipulation of the shares. Furthermore, the Commission believes that the investment restrictions discussed above appear reasonably designed to minimize the Fund's susceptibility to manipulation.

The Exchange represents that it deems the Shares to be equity securities, thus rendering the trading of the Shares subject to the Exchange's existing rules governing the trading of equity securities.

In support of this proposal, the Exchange has made the following additional representations:

(1) The Shares will conform to the initial and continued listing criteria under Nasdaq Rule 5735.[75]

(2) The Exchange has appropriate rules to facilitate transactions in the Shares during all trading sessions.[76]

(3) Trading in the Shares will be subject to the existing trading surveillances, administered by FINRA on behalf of the Exchange, which are designed to detect violations of Exchange rules and applicable federal securities laws, and 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 federal securities laws applicable to trading on the Exchange.[77]

(4) FINRA, on behalf of the Exchange, will communicate as needed regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund (including closed-end funds, ETFs, exchange-listed options on U.S. Treasury securities, exchange-listed options on U.S. Treasury futures, and exchange-listed U.S. Treasury futures contracts) with other markets and other entities that are members of the ISG, and FINRA may obtain trading information regarding trading in the Shares and in the exchange-listed securities and instruments held by the Fund from these markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares and the exchange-listed securities and instruments held by the Fund from markets and other entities that are members of ISG, which includes securities and futures exchanges, or with which the Exchange has in place a comprehensive surveillance sharing agreement. Moreover, FINRA, on behalf of the Exchange, will be able to access, as needed, trade information for certain fixed income securities held by the Fund reported to FINRA's TRACE.[78]

(5) Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) Nasdaq Rule 2111A, which imposes suitability obligations on Nasdaq members with respect to recommending transactions in the Shares to customers; (c) how information regarding the Intraday Indicative Value and the Disclosed Portfolio is disseminated; (d) the risks involved in trading the Shares during the Pre-Market and Post-Market Sessions when an updated Intraday Indicative Value will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information. The Information Circular will also discuss any exemptive, no-action and interpretive relief granted by the Commission from any rules under the Act.[79]

(6) For initial and continued listing, the Fund must be in compliance with Rule 10A–3 [80] under the Act.[81]

[72] These reasons may include: (1) The extent to which trading is not occurring in the securities and financial instruments comprising the Disclosed Portfolio of the Fund; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. 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 Fund.

[73] *See supra* notes 16 and 23.

[74] The Exchange states that FINRA surveils trading on the Exchange pursuant to a regulatory services agreement and that the Exchange is responsible for FINRA's performance under this regulatory services agreement. *See supra* note 57.

[75] *See* Amendment No. 3, *supra* note 12, at 33.

[76] *See id.* at 29.

[77] *See id.* at 30.

[78] *See id.* at 30–31.

[79] *See id.* at 31–32.

[80] *See* 17 CFR 240.10A–3.

[81] *See* Amendment No. 3, *supra* note 12, at 28.

(7) The Fund may invest up to 10% of its net assets in Distressed Municipal Securities.[82]

(8) Under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows, (1) with respect to 75% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 3% of the value of the Fund's net assets; and (2) with respect to 15% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 5% of the value of the Fund's net assets.[83]

(9) Except for the initial invest-up period and periods of high cash inflows or outflows, the Fund's investments in Municipal Securities will provide exposure to at least 15 different states, with no more than 30% of the value of the Fund's net assets comprising Municipal Securities that provide exposure to any single state.[84]

(10) Except for the initial invest-up period and periods of high cash inflows or outflows, the Fund's investments in Municipal Securities will provide exposure to at least 10 different industries with no more than 25% of the value of the Fund's net assets comprising Municipal Securities that provide exposure to any single industry.[85]

The Exchange also represents that all statements and representations made in the proposed rule change, as modified by Amendment No. 3 regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange rules and surveillance procedures constitute continued listing requirements for listing the Shares on the Exchange. In addition, the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will monitor for compliance with the continued listing requirements. If the Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under the Nasdaq 5800 Series.

This approval order is based on all of the Exchange's representations, including those set forth above and in the Notice, and the Exchange's description of the Fund. The Commission notes that the Fund and the Shares must comply with the requirements of Nasdaq Rule 5735 to be listed and traded on the Exchange.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act[86] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Solicitation of Comments on Amendment No. 3

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 3 is consistent with the Exchange 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–2016–002 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–2016–002. 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–2016–002 and should be submitted on or before October 26, 2016.

V. Accelerated Approval of Proposed Rule Change as Modified by Amendment No. 3

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 3, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 3 in the **Federal Register**. Amendment No. 3 supplements the proposed rule change by clarifying the Fund's general adherence to the quantitative standards set forth in NASDAQ 5705(b)(4)(A).[87] In addition, the Exchange represents that it would adhere to certain investment restrictions, including but not limited to, the following:

(1) With respect to 75% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 3% of the value of the Fund's net assets;

(2) with respect to 15% of the Fund's net assets, the Fund's exposure to any single borrower (based on dollar amount invested) will not exceed 5% of the value of the Fund's net assets;

(3) the Fund's investments in Municipal Securities will provide exposure to at least 15 different states, with no more than 30% of the value of the Fund's net assets comprising Municipal Securities that provide exposure to any single state; and

(4) the Fund's investments in Municipal Securities will provide exposure to at least 10 different industries with no more than 25% of the value of the Fund's net assets comprising Municipal Securities that provide exposure to any single industry.[88]

The addition of these investment restrictions helped the Commission find that the proposed listing and trading of the Shares is consistent with the portion of Section 6(b)(5) of the Exchange Act,[89] which requires that the rules of a national securities exchange must be designed to, among other things, prevent fraudulent and manipulative acts and practices and, in general, to protect investors and the public interest.

[82] *See id.* at 35.

[83] *See id.* at 17.

[84] *See id.* at 16–17.

[85] *See id.*

[86] 15 U.S.C. 78f(b)(5).

[87] *See* Amendment No. 3, *supra* note 12, at 10–13.

[88] The Fund represents that it would adhere to these investment restrictions under normal market conditions, except for the initial invest-up period and periods of high cash inflows or outflows. *See id.* at 16–17.

[89] 15 U.S.C. 78f(b)(5).

Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,[90] to approve the proposed rule change, as modified by Amendment No. 3, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[91] that the proposed rule change (SR–Nasdaq–2016–002), as modified by Amendment No. 3 be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[92]

Brent J. Fields,

Secretary.

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[90] 15 U.S.C. 78s(b)(2).

[91] *Id.*

[92] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78975]

Order Extending a Temporary Exemption From Compliance With Rules 13n–1 to 13n–12 Under the Securities Exchange Act of 1934

September 29, 2016.

I. Introduction

The Securities and Exchange Commission (''Commission'') is extending certain exemptions previously granted in connection with requirements applicable to security-based swap data repositories.

On March 18, 2016, pursuant to its authority in Section 36 of the Securities Exchange Act of 1934 (''Exchange Act''), the Commission granted a temporary exemption from compliance with Exchange Act Rules 13n–1 to 13n–12 until June 30, 2016, and at the same time extended exemptions from Exchange Act Sections 13(n)(5)(D)(i), 13(n)(5)(F), 13(n)(5)(G), 13(n)(5)(H), 13(n)(7)(A), 13(n)(7)(B), 13(n)(7)(C) and 29(b) that had been provided in the DFA Effective Date Order [1] (''SDR Relief''). The Commission's March 18, 2016 order provides that the SDR Relief will expire on the earlier of (1) the date the Commission grants registration to an SDR or (2) June 30, 2016.[2] The Commission granted those exemptions to help facilitate the potential submission of SDR applications.

On June 30, 2016, the Commission extended the SDR Relief until October 5, 2016 to allow it additional time to review and consider issues related to the applications to register with the Commission as SDRs submitted by DTCC Data Repository (U.S.) LLC (''DDR'') and ICE Trade Vault, LLC (''ICE Trade Vault'').[3]

To allow the Commission additional time to review these applications prior to the compliance date for Rules 13n–1 to 13n–12, as currently amended, (''SDR Rules'') and the expiration of the SDR Relief, the Commission is extending the exemptions granted in the June 2016 order.[4]

II. Discussion

The SDR Rules Release [5] states that SDRs were required to be in compliance with the SDR Rules by March 18, 2016. The SDR Rules Release also notes that, absent an exemption, any SDR must be registered with the Commission and in compliance with the federal securities laws and the rules and regulations thereunder (including the applicable Dodd-Frank Act provisions and all of the SDR Rules).[6] Rule 13n–1(c) provides that, within 90 days of the date of the publication of notice of the filing of an application for registration (or within such longer period as to which the applicant consents), the Commission will either grant the registration by order or institute proceedings to determine whether registration should be granted or denied.

Two entities have filed applications to register with the Commission as SDRs. ICE Trade Vault filed with the Commission a Form SDR seeking registration as an SDR on March 29, 2016 and amended that form on April 18, 2016. The Commission's notice of ICE Trade Vault's application for registration as an SDR was published in the **Federal Register** on April 28, 2016.[7] The comment period closed on May 31, 2016. To date, the Commission has received six comment letters on the ICE Trade Vault application.

DDR filed with the Commission a Form SDR seeking registration as an SDR on April 6, 2016 and amended that form on April 25, 2016. The Commission's notice of DDR's application for registration as an SDR was published in the **Federal Register** on July 7, 2016.[8] The comment period closed on August 8, 2016. To date, the Commission has received four comment letters on the DDR application.

Subject to certain exceptions, Section 36 of the Exchange Act [9] authorizes the Commission, by rule, regulation, or order, to exempt, either conditionally or unconditionally, any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of the Exchange Act or any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors. The Commission finds that it is necessary and appropriate in the public interest, and consistent with the protection of investors, to grant a temporary exemption from compliance with the SDR Rules and extend the SDR Relief. The commenters on the DDR and ICE Trade Vault SDR applications have raised issues that require further review and consideration. The Commission does not believe that the October 5, 2016, compliance date provides sufficient time for adequate consideration of the comments and any possible amendments to the respective applications.

Therefore, to allow the Commission additional time prior to the compliance date for the SDR Rules and the expiration of the SDR Relief to review the first applications for registration of SDRs and consider issues related to those applications, the Commission hereby grants, pursuant to Section 36 of the Exchange Act, a temporary exemption from compliance with the SDR Rules and an extension of the SDR Relief until April 1, 2017.

By the Commission.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–23998 Filed 10–4–16; 8:45 am]

BILLING CODE 8011–01–P

[1] *See* Temporary Exemptions and Other Temporary Relief, Together with Information on Compliance Dates for New Provisions of the Exchange Act Applicable to Security-Based Swaps, Exchange Act Release No. 64678 (June 15, 2011), 76 FR 36287 (June 22, 2011) (the ''DFA Effective Date Order'').

[2] *See* Exchange Act Release No. 77400 (Mar. 18, 2016), 81 FR 15599 (Mar. 23, 2016) (''March 2016 SDR Section 36 Order'').

[3] *See* Exchange Act Release No. 77699 (Apr. 22, 2016), 81 FR 25475 (Apr. 28, 2016) (''ICE Trade Vault Notice'') and Exchange Act Release No. 34–78216 (June 30, 2016), 81 FR 44379 (July 7, 2016) (''DDR Notice'').

[4] This relief applies to Rules 13n–1 to 13n–12 as amended, including amendments to Rule 13n-4 adopted by the Commission on August 29, 2016. *See* Exchange Act Release No. 78716 (Aug. 29, 2016), 81 FR 60585 (Sept. 2, 2016).

[5] *See* Exchange Act Release No. 74246 (Feb. 11, 2015), 80 FR 14438 (Mar. 19, 2015) (''SDR Rules Release'').

[6] *See id.,* 80 FR at 14456.

[7] *See* ICE Trade Vault Notice.

[8] *See* DDR Notice.

[9] 15 U.S.C. 78mm.

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78987; File No. SR–NSX–2016–13]

Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rules 11.11 and 11.26 To Describe Changes to System Functionality Necessary To Implement the Regulation NMS Plan To Implement a Tick Size Pilot Program

September 29, 2016.

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 September 26, 2016, National Stock Exchange, Inc. (''NSX'' or the ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change, as described in Items I and II, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comment on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to: (1) Amend Exchange Rule 11.11(c), Other Types of Orders and Order Modifiers, to specify that certain order types will not be supported upon the effective date of the Regulation NMS Plan to Implement a Tick Size Pilot (the ''Plan'') [3] and (2) amend Exchange Rule 11.26 to specify that the Exchange will not to support the Block Size Order Exemption to the Trade-at rule for Test Group Three securities. The Exchange is proposing this rule change after carefully considering the scope of the changes to the Exchange's trading system (''System'') [4] to support the functionality requirements for Test Group Three securities and the potential for introducing additional systemic risk.

The Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act [5] and provided the Commission with the notice required by Rule 19b–4(f)(6)(iii) under the Act.[6]

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nsx.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

On August 25, 2014, NYSE Group, Inc., on behalf of BZX, Chicago Stock Exchange, Inc., Bats EDGA Exchange, Inc., Bats EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc. (''FINRA''), NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, the Nasdaq Stock Market LLC, New York Stock Exchange LLC (''NYSE''), NYSE MKT LLC, and NYSE Arca, Inc. (collectively ''Participants''), filed with the Commission, pursuant to Section 11A of the Act [7] and Rule 608 of Regulation NMS thereunder,[8] the Plan to Implement a Tick Size Pilot Program (''Pilot'').[9] The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.[10] The Plan [11] was published for comment in the **Federal Register** on November 7, 2014 and was thereafter approved by the Commission, as modified, on May 6, 2015.[12] On November 6, 2015, the Commission granted the Participants an exemption from implementing the Plan until October 3, 2016.[13] On March 3, 2016, the Commission noticed an amendment to the Plan adding NSX as a Participant.[14]

The Plan is designed to allow the Commission, market participants, and the public to study and assess the impact of increment conventions on the liquidity and trading of the common stocks of small-capitalization companies. Each Participant is required to comply, and to enforce compliance by its member organizations, as applicable, with the provisions of the Plan. As is described more fully below, the proposed rules would require ETP Holders [15] to comply with the applicable data collection requirements of the Plan.[16]

The Pilot will include stocks of companies with $3 billion or less in market capitalization, an average daily trading volume of one million shares or less, and a volume weighted average price of at least $2.00 for every trading day. The Pilot will consist of a control group of approximately 1,400 Pilot Securities and three test groups with 400 Pilot Securities in each (selected by a stratified random sampling process).[17] During the pilot, Pilot Securities in the control group will be quoted at the current tick size increment of $0.01 per share and will trade at the currently permitted increments. Pilot Securities in the first test group (''Test Group One'') will be quoted in $0.05 minimum increments but will continue to trade at any price increment that is currently permitted.[18] Pilot Securities in the second test group (''Test Group Two'') will be quoted in $0.05 minimum increments and will trade at $0.05 minimum increments subject to a midpoint exception, a retail investor order exception, and a negotiated trade

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

[4] Under Exchange Rule 1.5S.(4) [sic], the term ''System'' is defined as the electronic securities communications and trading facility designated by the Board of Directors of the Exchange through which the orders of Users are consolidated for ranking and execution.

[5] 15 U.S.C. 78s(b)(3)(A).

[6] 17 CFR 240.19b–4(f)(6)(iii).

[7] 15 U.S.C. 78k–1.

[8] 17 CFR 242.608.

[9] *See* Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

[10] *See* note 3, *supra.*

[11] Unless otherwise specified, capitalized terms used in this rule filing are based on the defined terms of the Plan.

[12] *See* Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (File No. 4–657) (''Approval Order'').

[13] *See* Securities Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015) (File No. 4–657) (Order Granting Exemption From Compliance With the National Market System Plan To Implement a Tick Size Pilot Program).

[14] *See* Securities Exchange Act Release No. 77277 (March 3, 2016), 81 FR 12162 (March 8, 2016).

[15] An ''ETP Holder'' is a registrant of NSX to which NSX has issued an ETP. An ''ETP'' is defined as ''. . . an Equity Trading Permit issued by the Exchange for effecting approved securities transactions on the Exchange's trading facilities. . . .'' *See* Exchange Rule 1.5.E(1).

[16] Rule 11.26, Interpretations and Policies .11, which is being renumbered to .12, provides that the Rule shall be in effect during a pilot period to coincide with the pilot period for the Plan (including any extensions to the pilot period for the Plan).

[17] *See* Section V of the Plan for identification of Pilot Securities, including criteria for selection and grouping.

[18] *See* Section VI(B) of the Plan.

exception.[19] Pilot Securities in the third test group (''Test Group Three'') will be subject to the same quoting and trading increments as Test Group Two and also will be subject to the ''Trade-at'' requirement to prevent price matching by a market participant that is not displaying at a Trading Center's ''Best Protected Bid'' or ''Best Protected Offer,'' unless an enumerated exception applies.[20] In addition to the exceptions provided under Test Group Two, an exception for Block Size orders and exceptions that mirror those under Rule 611 of Regulation NMS [21] will apply to the Trade-at requirement.

In approving the Plan, the Commission noted that the Trading Center data reporting requirements would facilitate an analysis of the effects of the Pilot on liquidity (*e.g.,* transaction costs by order size), execution quality (*e.g.,* speed of order executions), market maker activity, competition between trading venues (*e.g.,* routing frequency of market orders), transparency (*e.g.,* choice between displayed and hidden orders), and market dynamics (*e.g.,* rates and speed of order cancellations).[22]

Proposed Amendments to Rule 11.11, Order Types and Modifiers

The Exchange proposes to amend NSX Rule 11.11(c) to specify that, upon the Plan's effective date, certain order types will not be supported for trading across all symbols and will be rejected upon entry into the System. The Exchange is making this proposal to avoid creating unnecessary System complexity and introducing unnecessary systemic risk to the System, as well as to avoid expending resources unnecessarily in order to support order types that are of limited current usage. Pursuant to Rule 1001(a) of Regulation Systems Compliance and Integrity (''Regulation SCI''),[23] the Exchange is required to ''. . . establish, maintain and enforce written policies and procedures reasonably designed to ensure that its SCI systems, and for the purposes of security standards, indirect SCI systems, have levels of capacity, integrity, resiliency and security adequate to maintain [its] operational capability and promote the maintenance of fair and orderly markets.'' The Exchange is proposing the instant rule change in order to assure that it will maintain the operational capability of the System and assure that the System will be ready to operate under Plan requirements as of its effective date, October 3, 2016.

The Exchange has determined to reject all incoming Sweep Orders and Destination Specific Orders in all symbols. The Exchange is proposing this approach, instead of one in which it would only reject any such orders entered in the Plan securities, in order to avoid data anomalies that could result if the Exchange were to reject only Sweep Orders and Destination Specific Orders in the Pilot securities, but continue to allow them in non-Pilot symbols.

Sweep Orders

The Exchange proposes to amend Rule 11.11(c)(7) to state that upon the effective date of the Plan, described in Rule 11.26,[24] the Exchange will reject all Sweep Orders entered into the System. A Sweep Order is a limit order that instructs the System to ''sweep'' the market. Sweep Orders may be designated as ''Protected Sweep,'' ''Full Sweep,'' or ''Destination Sweep.'' An order designated as a Protected Sweep Order is converted into one or more limit orders with sizes equal to the order sizes in the NSX Book and the order sizes of protected quotations at away trading centers to be executed in accordance with Exchange Rule 11.15(b).[25] An order designated as a Full Sweep Order is converted into one or more limit orders with sizes equal to the sizes of the best available quotations (including manual quotations) in the NSX Book and at away trading centers in accordance with Exchange Rule 11.15(b). An order designated as a Destination Sweep Order is routed to an away trading center specified by the User, after the order is exposed to the NSX Book.

The System changes and testing necessary for handling a Sweep Order to comply with the Trade-at requirements for Test Group Three securities under the Plan are complex and will create unnecessary risk to the System relative to ETP Holders' current usage of the order type. The Exchange would be required to dedicate significant resources to changing the System to ensure that Sweep Orders are handled in compliance with the Trade-at prohibition of Test Group Three, even though the Exchange has received only one Sweep Order since it resumed trading operations in December 2015.[26] The Exchange believes that this extremely limited usage of Sweep Orders does not justify creating additional System complexity and introducing the inherent risk to the System in creating such complexity by supporting these order types. The Exchange has determined that the scope of programming and testing to assure that Sweep Orders would execute and route consistent with the requirements of the Plan does not justify the level of potential risk involved, especially in view of the October 3, 2016 Plan implementation date. As a result of these factors, the Exchange proposes to reject all Sweep Orders entered into the System for all securities traded on the Exchange.

Destination Specific Orders

The Exchange proposes to amend Rule 11.26(c)(7) [sic] to specify that upon the effective date of the Plan, described in NSX Rule 11.26, the Exchange will reject all Destination Specific Orders entered into the System. A Destination Specific Order is a market or limit order that instructs the System to route the order to a specified away trading center, after exposing the order to the NSX Book. Users can access markets offering bids and offers other than protected quotations (*i.e.,* manual quotations) by entering a Destination Specific Order. The System changes necessary for handling of a Destination Specific Order to comply with the Trade-at provision of the Plan become increasingly complex and introduce unnecessary risk relative to ETP Holders' usage of the order type. For example, in a Test Group Three security, which is subject to the Trade-at Prohibition, the Exchange would not be able to follow the customer's instruction to route the order to a specific destination if another trading center was displaying a protected quotation at the Trade-at price, and the order would have to be canceled. The Exchange would be required to dedicate significant resources to programming the System to ensure that Destination Specific Orders are handled in compliance with the Trade-at prohibition of Test Group Three, even though the Exchange has not received a single Destination Specific Order since resuming trading operations in

[19] *See* Section VI(C) of the Plan.

[20] *See* Section VI(D) of the Plan.

[21] 17 CFR 242.611.

[22] *See* Approval Order, 80 FR at 27543.

[23] 17 CFR 242.1001(a).

[24] NSX Rule 11.26 governs the Exchange's data collection and quoting and trading requirements under the Plan.

[25] Exchange Rule 11.15(b) pertains to order handling and execution of Sweep Orders.

[26] *See* Exchange Act Release No. 76640 (December 14, 2015), 80 FR 79122 (December 18, 2015), Order Approving a Proposed Rule Change to Modify and Eliminate Certain Rules and to Enable Trading Activity to Resume on the Exchange. Trading operations resumed on December 22, 2015 and since that time, the Exchange has received one Sweep Order.

December 2015. The Exchange believes that current non-usage of Destination Specific Orders does not justify using extensive resources to create additional System complexity by supporting the Destination Specific Order type for Pilot securities. As a result of these factors, the Exchange proposes to not accept all Destination Specific Orders entered into the System.

Block Size Order Exemption

The Exchange is further proposing to renumber Exchange Rule 11.26, Interpretations and Policies .11 to Interpretations and Policies .12 and to adopt new Interpretations and Policies .11 to specify that the Exchange will not to support the Block Size Order Exemption to the Trade-at rule for Test Group Three securities. Pursuant to the Plan, the Exchange adopted Rule 11.26(c)(3)(d)(iii)c. [sic] to provide for the Block Size Order Exemption, which allows an ETP Holder to execute a block size order (*i.e.,* an order of 5,000 shares or for a quantity of stock having a market value of at least $100,000) against undisplayed liquidity in Test Group Three securities at the Trade-at price. The Exemption was included in the Plan to allow customers to completely fill their large orders at a single venue, thereby avoiding the time and cost associated with filling a block size order through many smaller orders routed to other execution venues. The Exchange has determined that, because of the programming required to implement the exemption, it will not support the exemption and will handle a block size order in a Test Group Three security as the Exchange would handle any other order not subject to exemption. Thus, block size orders in Test Group Three securities entered on NSX will be subject to the Trade-at prohibition, unless the order qualifies for one of the other exemptions under the rule.

The Exchange will not support the Block Size Order Exemption because block size orders are generally not applicable to the order types that the Exchange supports and, as such, the Exchange has rarely received block size orders. The Exchange has determined that the System changes necessary to exempt a block size order from complying with the Trade-at provision of the Plan are complex and will introduce unnecessary risk relative to ETP Holders' usage of block size orders on the Exchange.

The Exchange does not believe that market participants will be harmed in any way as a result of this determination because they can enter block-size orders in Test Group 3 securities on another exchanges for execution. The Exchange will provide notice to all of its ETP Holders that it will not support the Block Size Order Exemption for Test Group Three securities. Further, since the Exchange receives rarely receives block-size orders at present, there is minimal risk that the data it produces under the Plan will be affected by the absence of information relating to the Block Size Order Exemption.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [27] in general, and furthers the objectives of Section 6(b)(5) of the Act [28] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Plan requires the Exchange to establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with applicable quoting and trading requirements specified in the Plan. The proposed rule change is designed to comply with the Plan, reduce complexity, and enhance System resiliency while not adversely affecting the data collected under the Plan. Therefore, the Exchange believes that the proposed rule changes are reasonably designed to comply with applicable quoting and trading requirements specified in the Plan and, as discussed further below, other applicable regulations.

The Exchange believes that this proposal is consistent with the Act because it is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan by allowing the Exchange to dedicate its resources to adjusting System functionalities that are consistently used by the Exchange and are impacted under the Plan. In approving the Plan, the Commission noted that the Pilot was an appropriate, data-driven test that was designed to evaluate the impact of a wider tick size on trading, liquidity, and the market quality of securities of smaller capitalization companies, and was therefore in furtherance of the purposes of the Act. The Exchange believes that this proposal is in furtherance of the objectives of the Plan, as identified by the Commission, and is therefore consistent with the Act because the proposal allows the Exchange to further dedicate its resources to System changes that are in furtherance of compliance with the Plan.

The Exchange also believes that its proposed amendments are consistent with the Act because they are intended to eliminate unnecessary System complexity and risk based on the de minimis current usage of such order types and sizes in Pilot Securities under the Plan's minimum trading and quoting increments or the Trade-at Prohibition. The Commission adopted Regulation SCI in November 2014 to strengthen the technology infrastructure of the U.S. securities markets.[29] Regulation SCI is designed to reduce the occurrence of system issues, improve resiliency when system problems do occur, and enhance the Commission's oversight and enforcement of securities market technology infrastructure.

Regulation SCI requires the Exchange to establish written policies and procedures reasonably designed to ensure that their systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets, and that they operate in a manner that complies with the Exchange Act. Each of these proposed changes are intended to reduce complexity and risk in the System to ensure the Exchange's technology remains resilient. In determining the scope of the proposed changes, the Exchange carefully weighed the impact on the Pilot, System complexity, and the usage of such order types and block size orders in Pilot Securities.[30] The potential complexity results from code changes for a majority of the Exchange's order types, which requires the implementation and testing of a separate branch of code for each Test Group. Development work for the Tick Pilot results in the creation of four additional branches of code that are to be developed and tested (*e.g.,* Control Group and three Test Groups). Given these complexities, the Exchange determined that the changes proposed herein are necessary to ensure continued System resiliency in accordance with the requirements of Regulation SCI. Therefore, the Exchange believes the proposed rule change

[27] 15 U.S.C. 78f(b).

[28] 15 U.S.C. 78f(b)(5).

[29] See Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72251 (December 5, 2014) (''Regulation SCI Approval Order'').

[30] But for the Plan, the Exchange notes that it would not have proposed to amend the operation of Sweep Orders and Destination Specific Orders, as well as not support the Block Size Order Exemption, as described herein.

promotes just and equitable principles of trade, removes impediments to and perfects the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

In addition, each of these proposed changes would have no impact on the data reported pursuant to the Plan. As evidenced above, Sweep Orders and Destination Specific Orders, and block size orders have rarely been used since the Exchange resumed trading operations. The limited usage and execution scenarios do not justify the additional system complexity which would be created by modifying the System to support such order types and support the Block Size Order Exemption in order to comply with the Plan. Therefore, the Exchange believes each proposed change is a reasonable means to assure the System's integrity, resiliency, and availability are such that they will continue to promote the maintenance of fair and orderly markets. Due to the additional complexity and limited usage, the Exchange believes it is not unfairly discriminatory to apply the changes proposed herein as such changes are necessary to reduce complexity and ensure continued System resiliency in accordance with the requirements of Regulation SCI. Moreover, since the Exchange is proposing to reject all Sweep Orders and Destination Specific Orders, and not just those in Pilot securities or on a test group-specific basis, there is no potential that the data compiled and submitted by the Exchange pursuant to the Plan will be affected by disparate standards applied to Plan securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that the proposed rule change is designed to assist the Exchange in meeting its regulatory obligations pursuant to the Plan, reduce System complexity, and enhance resiliency. The Exchange also notes that the proposed rule change will apply equally to all such ETP Holders, as will the data collection requirements for Market Makers.

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 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) [31] of the Act and Rule 19b–4(f)(6) [32] thereunder because the proposal does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) 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 if consistent with the protection of investors and the public interest.

A proposed rule change filed under Rule 19b–4(f)(6) [33] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[34] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that so that the proposed rule change can become operative on September 26, 2016.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to implement the proposed rules immediately thereby preventing delays in the implementation of the Plan. The Commission notes that the Plan is scheduled to start on October 3, 2016. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative upon filing with the Commission.[35]

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–NSX–2016–13 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 No. SR–NSX–2016–13. This file number should be included in the subject line if email is used. To help the Commission process and review 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 a.m. and 3 p.m. eastern time. Copies of such filings will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to file number SR–NSX–2016–13 and should be submitted on or before October 26, 2016.

For the Commission by the Division of Trading and Markets, pursuant to the delegated authority.[36]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–24009 Filed 10–4–16; 8:45 am]

BILLING CODE 8011–01–P

[31] 15 U.S.C. 78s(b)(3)(A).

[32] 17 CFR 240.19b–4(f)(6).

[33] 17 CFR 240.19b–4(f)(6).

[34] 17 CFR 240.19b–4(f)(6)(iii).

[35] For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[36] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78980; File No. SR–ISEMercury–2016–16]

Self-Regulatory Organizations; ISE Mercury, LLC; Notice of Filing of Proposed Rule Change To Amend the By-Laws of Nasdaq, Inc. To Implement Proxy Access

September 29, 2016.

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 September 15, 2016, ISE Mercury, LLC (''ISE Mercury'') 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 is filing this proposed rule change with respect to amendments of the By-Laws (the ''By-Laws'') of its parent corporation, Nasdaq, Inc. (''Nasdaq'' or the ''Company''), to implement proxy access. The proposed amendments will be implemented on a date designated by the Company following approval by the Commission. The text of the proposed rule change is available on the Exchange's Web site at *www.ise.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.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

At Nasdaq's 2016 annual meeting held on May 5, 2016, Nasdaq's stockholders considered a stockholder proposal submitted under Rule 14a-8 under the Act.[3] The proposal, which passed with 73.52% of the votes cast, requested that Nasdaq's Board of Directors (the ''Board'') take steps to implement a ''proxy access'' by-law. Proxy access by-laws allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on a board and have those candidates included in a company's proxy materials. Such provisions allow stockholders to nominate candidates without undertaking the expense of a proxy solicitation.

Following the 2016 annual meeting, the Nominating & Governance Committee (the ''Committee'') of the Board and the Board reviewed the voting results on the stockholder proposal and discussed proxy access generally. The Committee ultimately recommended to the Board, and the Board approved, certain changes to Nasdaq's By-Laws to implement proxy access. Nasdaq now proposes to make these changes by adopting new Section 3.6 of the By-Laws and making certain conforming changes to current Sections 3.1, 3.3 and 3.5 of the By-Laws, all of which are described further below.

In developing its proposal, Nasdaq has generally tried to balance the relative weight of arguments for and against proxy access provisions. On the one hand, Nasdaq recognizes the significance of this issue to some investors, who see proxy access as an important accountability mechanism that allows them to participate in board elections through the nomination of stockholder candidates that are presented in a company's proxy statement. On the other hand, Nasdaq's proposed proxy access provision includes certain procedural requirements that ensure, among other things, that the Company and its stockholders will have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees will comply with applicable laws, regulations and other requirements.

[3] *See* 17 CFR 240.14a–8, which establishes procedures pursuant to which stockholders of a public company may have their proposals placed alongside management's proposals in the company's proxy materials for presentation to a vote at a meeting of stockholders.

Proposed Section 3.6(a) of the By-Laws

To respond to feedback from its stockholders, Nasdaq proposes to amend its By-Laws to, as set forth in the first sentence of proposed Section 3.6(a), require the Company to include in its proxy statement, its form proxy and any ballot distributed at the stockholder meeting, the name of, and certain Required Information [4] about, any person nominated for election (the ''Stockholder Nominee'') to the Board by a stockholder or group of stockholders (the ''Eligible Stockholder'') [5] that satisfies the requirements set forth in the proxy access provision of Nasdaq's By-Laws.[6] To utilize this provision, the Eligible Stockholder must expressly elect at the time of providing a required notice to the Company of the proxy access nomination (the ''Notice of Proxy Access Nomination'') to have its nominee included in the Company's proxy materials. Stockholders will be eligible to submit proxy access nominations only at annual meetings of stockholders when the Board solicits proxies with respect to the election of directors.

The next two sentences of Section 3.6(a) provide some additional clarification on the term ''Eligible Stockholder.'' First, in calculating the number of stockholders in a group seeking to qualify as an Eligible Stockholder, two or more of the following types of funds shall be counted as one stockholder: (i) Funds under common management and investment control, (ii) funds under common management and funded primarily by the same employer, or (iii) funds that are a ''group of investment companies'' as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Company Act of 1940, as amended.[7]

[4] The Required Information is the information provided to Nasdaq's Corporate Secretary about the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Company's proxy statement by the regulations promulgated under the Act, and if the Eligible Stockholder so elects, a written statement, not to exceed 500 words, in support of the Stockholder Nominee(s)' candidacy (the ''Statement'').

[5] As used throughout Nasdaq's By-Laws, the term ''Eligible Stockholder'' includes each member of a stockholder group that submits a proxy access nomination to the extent the context requires.

[6] When the Company includes proxy access nominees in the proxy materials, such individuals will be included in addition to any persons nominated for election to the Board or any committee thereof.

[7] *See* 15 U.S.C. 80a–12(d)(1)(G)(ii), which defines ''group of investment companies'' as any two or

Continued

Nasdaq views this as a stockholder-friendly provision that will make it easier for such funds to participate in a proxy access nomination since they will not have to comply with the procedural requirements in the proxy access provision multiple times. Second, in the event that the Eligible Stockholder consists of a group of stockholders, any and all requirements and obligations for an individual Eligible Stockholder shall apply to each member of the group, except that the Required Ownership Percentage (discussed further below) shall apply to the ownership of the group in the aggregate. Generally, the applicable requirements and obligations relate to information that each member of the nominating group must provide to Nasdaq about itself, as discussed further below. Nasdaq believes it is reasonable to require each member of the nominating group to provide such information so that both the Company and its stockholders are fully informed about the entire group making the proxy access nomination.

The final sentence of proposed Section 3.6(a) allows Nasdaq to omit from its proxy materials any information or Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law or regulation. This provision allows Nasdaq to comply with Rule 14a–9 under the Act [8] and to protect its stockholders from information that is materially untrue or that violates any law or regulation. The final sentence of proposed Section 3.6(a) also explicitly allows Nasdaq to solicit against, and include in the proxy statement its own statement relating to, any Stockholder Nominee. This provision merely clarifies that just because Nasdaq must include a proxy access nominee in its proxy materials if the proxy access provisions are satisfied, Nasdaq does not necessarily have to support that nominee.

Proposed Section 3.6(b) of the By-Laws

Proposed Section 3.6(b) of the By-Laws establishes the deadline for a timely Notice of Proxy Access Nomination. Specifically, such a notice must be addressed to, and received by, Nasdaq's Corporate Secretary no earlier than one hundred fifty (150) days and no later than one hundred twenty (120) days before the anniversary of the date that Nasdaq issued its proxy statement for the previous year's annual meeting of stockholders. The Company believes this notice period will provide stockholders an adequate window to submit nominees via proxy access, while also providing the Company adequate time to diligence [sic] a proxy access nominee before including them in the proxy statement for the next annual meeting of stockholders.

Proposed Section 3.6(c) of the By-Laws

Proposed Section 3.6(c) specifies that the maximum number of Stockholder Nominees nominated by all Eligible Stockholders that will be included in Nasdaq's proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two and 25% of the total number of directors in office (rounded down to the nearest whole number) as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with the proxy access provision of the By-Laws (the ''Final Proxy Access Nomination Date''). In the event that one or more vacancies for any reason occurs after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board resolves to reduce the size of the Board in connection therewith, the maximum number of Stockholder Nominees included in Nasdaq's proxy materials shall be calculated based on the number of directors in office as so reduced. Any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision of the By-Laws whom the Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the maximum number of Stockholder Nominees has been reached.

Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to the proxy access provision exceeds the maximum number of nominees allowed. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders exceeds the maximum number of nominees allowed, the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder will be selected for inclusion in the proxy materials until the maximum number is reached, going in order of the amount (largest to smallest) of shares of Nasdaq's outstanding common stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to Nasdaq. If the maximum number is not reached after the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder has been selected, this process will continue as many times as necessary, following the same order each time, until the maximum number is reached. Following such determination, if any Stockholder Nominee who satisfies the eligibility requirements thereafter is nominated by the Board, or is not included in the proxy materials or is not submitted for election as a director, in either case, as a result of the Eligible Stockholder becoming ineligible or withdrawing its nomination, the Stockholder Nominee becoming unwilling or unable to serve on the Board or the Eligible Stockholder or the Stockholder Nominee failing to comply with the proxy access provision of the By-Laws, no other nominee or nominees shall be included in the proxy materials or otherwise submitted for director election in substitution thereof.

The Company believes it is reasonable to limit the Board seats available to proxy access nominees, to establish procedures for selecting candidates if the nominee limit is exceeded and to exclude further proxy access nominees in the cases set forth above. The limitation on Board seats available to proxy access nominees ensures that proxy access cannot be used to take over the entire Board, which is not the stated purpose of proxy access campaigns. The procedures for selecting candidates if the nominee limit is exceeded establish clear and rational guidelines for an orderly nomination process to avoid the Company having to make arbitrary judgments among candidates. Finally, the exclusion of further proxy access nominees in certain cases will avoid further time and expense to the Company when the proxy access

more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.

[8] *See* 17 CFR 240.14a–9, which generally prohibits proxy solicitations that contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

nominee has been nominated by the Board, in which case the goal of the proxy access nomination has been achieved, or in certain cases when the Eligible Stockholder or Stockholder Nominee is at fault.

Proposed Section 3.6(d) of the By-Laws

Proposed Section 3.6(d) clarifies, for the avoidance of doubt, how ''ownership'' will be defined for purposes of meeting the Required Ownership Percentage (discussed further below). Specifically, an Eligible Stockholder shall be deemed to ''own'' only those outstanding shares of Nasdaq's common stock as to which the stockholder possesses both: (i) The full voting and investment rights pertaining to the shares; and (ii) the full economic interest in (including the opportunity for profit from and risk of loss on) such shares; provided that the number of shares calculated in accordance with clauses (i) and (ii) shall not include any shares:

- Sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed, including any short sale;
- borrowed by such stockholder or any of its affiliates for any purposes or purchased by such stockholder or any of its affiliates pursuant to an agreement to resell; or
- subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar agreement entered into by such stockholder or any of its affiliates, whether any such instrument or agreement is to be settled with shares or with cash based on the notional amount or value of shares of Nasdaq's outstanding common stock, in any such case which instrument or agreement has, or is intended to have, or if exercised by either party would have, the purpose or effect of:
  - Reducing in any manner, to any extent or at any time in the future, such stockholder's or its affiliates' full right to vote or direct the voting of any such shares; and/or
  - hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or its affiliates.

Further, a stockholder shall ''own'' shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has delegated any voting power by means of a proxy, power of attorney or other instrument or arrangement which is revocable at any time by the stockholder. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has loaned such shares provided that the stockholder has the power to recall such loaned shares on three (3) business days' notice, has recalled such loaned shares as of the date of the Notice of Proxy Access Nomination and holds such shares through the date of the annual meeting. The terms ''owned,'' ''owning'' and other variations of the word ''own'' shall have correlative meanings. Whether outstanding shares of Nasdaq's common stock are ''owned'' for these purposes shall be determined by the Board or any committee thereof, in each case, in its sole discretion. For purposes of the proxy access provision of the By-Laws, the term ''affiliate'' or ''affiliates'' shall have the meaning ascribed thereto under the rules and regulations of the Act.[9] An Eligible Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to own for the purposes of the proxy access provision of the By-Laws.

Proposed Section 3.6(e) of the By-Laws

The first paragraph of proposed Section 3.6(e) establishes certain requirements for an Eligible Stockholder to make a proxy access nomination. Specifically, an Eligible Stockholder must have owned (defined as discussed above) 3% or more (the ''Required Ownership Percentage'') of Nasdaq's outstanding common stock (the ''Required Shares'') continuously for 3 years (the ''Minimum Holding Period'') as of both the date the Notice of Proxy Access Nomination is received by Nasdaq's Corporate Secretary and the record date for determining the stockholders entitled to vote at the annual meeting and must continue to own the Required Shares through the meeting date.

Proposed Section 3.6(e) also sets forth the information that an Eligible Stockholder must provide to Nasdaq's Corporate Secretary in writing within the deadline discussed above in order to make a proxy access nomination. This information includes:

- One or more written statements from the record holder of the shares (and from each intermediary through which the shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Notice of Proxy Access Nomination is delivered to, or mailed to and received by, Nasdaq's Corporate Secretary, the Eligible Stockholder owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder's agreement to provide, within five (5) business days after the record date for the annual meeting, written statements from the record holder and intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date; [10]
- a copy of the Schedule 14N that has been filed with the SEC as required by Rule 14a–18 under the Act; [11]
- the information, representations and agreements with respect to the Eligible Stockholder that are the same as those that would be required to be set forth in a stockholder's notice of nomination with respect to a ''Proposing Person'' pursuant to Section 3.1(b)(i) and Section 3.1(b)(iii) of the By-Laws; [12]
- the consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected; [13]
- a representation that the Eligible Stockholder:
  - Acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of Nasdaq, and does not presently have such intent; [14]
  - presently intends to maintain qualifying ownership of the Required Shares through the date of the annual meeting; [15]

[9] Pursuant to Rule 12b–2 under the Act, ''[a]n 'affiliate' of, or a person 'affiliated' with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.'' 17 CFR 240.12b–2. Further, ''[t]he term 'control' (including the terms 'controlling,' 'controlled by' and 'under common control with') means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'' 17 CFR 240.12b–2.

[10] *See* proposed Section 3.6(e)(i) of the By-Laws.

[11] *See* proposed Section 3.6(e)(ii) of the By-Laws; *see also* 17 CFR 240.14n–101 and 17 CFR 240.14a–18, which generally require a Nominating Stockholder to provide notice to the Company of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to the Company.

[12] *See* proposed Section 3.6(e)(iii) of the By-Laws; *see also* Sections 3.1(b)(i) and 3.1(b)(iii) of the By-Laws, which constitute part of Nasdaq's ''advance notice'' provision under which a ''Proposing Person'' may, among other things, nominate a person for election to the Board.

[13] *See* proposed Section 3.6(e)(iv) of the By-Laws.

[14] *See* proposed Section 3.6(e)(v)(A) of the By-Laws.

[15] *See* proposed Section 3.6(e)(v)(B) of the By-Laws.

○ has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s); [16]

○ has not engaged and will not engage in, and has not and will not be a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1 (l) under the Act in support of the election of any individual as a director at the annual meeting, other than its Stockholder Nominee(s) or a nominee of the Board; [17]

○ agrees to comply with all applicable laws and regulations with respect to any solicitation in connection with the meeting or applicable to the filing and use, if any, of soliciting material; [18]

○ will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; [19] and

○ as to any two or more funds whose shares are aggregated to count as one stockholder for the purpose of constituting an Eligible Stockholder, within five business days after the date of the Notice of Proxy Access Nomination, will provide to Nasdaq documentation reasonably satisfactory to Nasdaq that demonstrates that the funds satisfy the requirements in the By-Laws, which were discussed above, for the funds to qualify as one Eligible Stockholder; [20]

• a representation as to the Eligible Stockholder's intentions with respect to maintaining qualifying ownership of the Required Shares for at least one year following the annual meeting; [21]

• an undertaking that the Eligible Stockholder agrees to:

○ assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder's communications with Nasdaq's stockholders or out of the information that the Eligible Stockholder provided to Nasdaq; [22]

○ indemnify and hold harmless Nasdaq and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against Nasdaq or any of its directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to the proxy access provision; [23] and

○ file with the SEC any solicitation or other communication with Nasdaq's stockholders relating to the meeting at which the Stockholder Nominee will be nominated, regardless of whether any such filing is required under Regulation 14A of the Act or whether any exemption from filing is available thereunder; [24] and

• in the case of a nomination by a group of stockholders that together is an Eligible Stockholder, the designation by all group members of one group member that is authorized to act on behalf of all such members with respect to the nomination and matters related thereto, including withdrawal of the nomination.[25]

In proposing the Required Ownership Percentage and the Minimum Holding Period, Nasdaq seeks to ensure that the Eligible Stockholder has had a sufficient stake in the Company for a sufficient amount of time and is not pursuing a short-term agenda. In proposing the informational requirements for the Eligible Stockholder, Nasdaq's goal is to gather sufficient information about the Eligible Stockholder for both itself and its stockholders. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(f) of the By-Laws

Proposed Section 3.6(f) establishes the information the Stockholder Nominee must deliver to Nasdaq's Corporate Secretary within the time period specified for delivering the Notice of Proxy Access Nomination. This information includes:

• The information required with respect to persons whom a stockholder proposes to nominate for election or reelection as a director by Section 3.1(b)(i) of the By-Laws [26] including, but not limited to, the signed questionnaire, representation and agreement required by Section 3.1(b)(i)(D) of the By-Laws; [27] and

• a written representation and agreement that such person:

○ Will act as a representative of all of Nasdaq's stockholders while serving as a director; and

○ will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects (and shall not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading).

In addition, at the request of Nasdaq, the Stockholder Nominee(s) must submit all completed and signed questionnaires required of Nasdaq's directors and officers. Nasdaq may request such additional information as necessary to (y) permit the Board to determine if each Stockholder Nominee satisfies the requirements of the proxy access provision of the By-Laws or if each Stockholder Nominee is independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing the independence of Nasdaq's directors [28] and/or (z) permit Nasdaq's Corporate Secretary to determine the classification of such nominee as an Industry, Non-Industry, Issuer or Public Director, if applicable, in order to make

[16] *See* proposed Section 3.6(e)(v)(C) of the By-Laws.

[17] *See* proposed Section 3.6(e)(v)(D) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[18] *See* proposed Section 3.6(e)(v)(E) of the By-Laws.

[19] *See* proposed Section 3.6(e)(v)(F) of the By-Laws.

[20] *See* proposed Section 3.6(e)(v)(G) of the By-Laws.

[21] *See* proposed Section 3.6(e)(vi) of the By-Laws.

[22] *See* proposed Section 3.6(e)(vii)(A) of the By-Laws.

[23] *See* proposed Section 3.6(e)(vii)(B) of the By-Laws.

[24] *See* proposed Section 3.6(e)(vii)(C) of the By-Laws; *see also* 17 CFR 240.14a–1–14b–2, which governs solicitations of proxies.

[25] *See* proposed Section 3.6(e)(viii) of the By-Laws.

[26] Section 3.1(b)(i) of the By-Laws describes the information that a proposing stockholder must provide about an individual the stockholder proposes to nominate for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[27] Section 3.1(b)(i)(D) of the By-Laws requires a completed and signed questionnaire, representation and agreement, each containing certain information, from each individual proposed to be nominated for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[28] Currently, the independence of Nasdaq's directors is determined pursuant to the definition of ''Independent Director'' in Listing Rule 5605(a)(2) of The NASDAQ Stock Market, under which certain categories of individuals cannot be deemed independent and with respect to other individuals, the Board must make an affirmative determination that such individual has no relationship that, in the opinion of the Board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Other independence standards under the SEC rules and the Listing Rules of The NASDAQ Stock Market apply to members of certain of the Board's committees. As detailed below, the Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board.

the certification referenced in Section 4.13(h)(iii) of the By-Laws.[29]

Like the informational requirements for an Eligible Stockholder, which are set forth above, the informational requirements for the Stockholder Nominee ensure that both Nasdaq and its stockholders will have sufficient information about the Stockholder Nominee. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(g) of the By-Laws

Pursuant to proposed Section 3.6(g), each Eligible Stockholder or Stockholder Nominee must promptly notify Nasdaq's Corporate Secretary of any information or communications provided by the Eligible Stockholder or Stockholder Nominee to Nasdaq or its stockholders that ceases to be true and correct in all material respects or omits a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading and of the information that is required to correct any such defect. This provision further states that providing any such notification shall not be deemed to cure any defect or, with respect to any defect that Nasdaq determines is material, limit Nasdaq's rights to omit a Stockholder Nominee from its proxy materials. This provision is intended to protect Nasdaq's stockholders by requiring an Eligible Stockholder or Stockholder Nominee to give Nasdaq notice of information previously provided that is materially untrue. Nasdaq may then decide what action to take with respect to such defect, which may include, with respect to a material defect, omitting the relevant Stockholder Nominee from its proxy materials.

Proposed Section 3.6(h) of the By-Laws

Proposed Section 3.6(h) provides that Nasdaq shall not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders under certain circumstances. In these situations, the proxy access nomination shall be disregarded and no vote on such Stockholder Nominee will occur, even if Nasdaq has received proxies in respect of the vote. These circumstances occur when the Stockholder Nominee:

- Has been nominated by an Eligible Stockholder who has engaged in or is currently engaged in, or has been or is a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board; [30]
- is not independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing independence of Nasdaq's directors, in each case as determined by the Board in its sole discretion; [31]
- would, if elected as a member of the Board, cause Nasdaq to be in violation of the By-Laws (including but not limited to the compositional requirements of the Board set forth in Section 4.3 of the By-Laws), its Amended and Restated Certificate of Incorporation, the rules and listing standards of The NASDAQ Stock Market, or any applicable state or federal law, rule or regulation; [32]
- is or has been, within the past three (3) years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914; [33]
- is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past ten (10) years; [34]
- is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended; [35]
- is subject to ''statutory disqualification'' under Section 3(a)(39) of the Act; [36]
- has, or the applicable Eligible Stockholder has, provided information to Nasdaq in respect of the proxy access nomination that was untrue in any material respect or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, as determined by the Board or any committee thereof, in each case, in its sole discretion; [37] or
- breaches or fails, or the applicable Eligible Stockholder breaches or fails, to comply with its obligations pursuant to the By-Laws, including, but not limited to, the proxy access provisions and any agreement, representation or undertaking required by the proxy access provisions.[38]

Nasdaq believes these provisions will protect the Company and its stockholders by allowing it to exclude certain categories of objectionable Stockholder Nominees from the proxy statement.

Proposed Section 3.6(i) of the By-Laws

Under proposed Section 3.6(i), the Board or the chairman of the meeting of stockholders shall declare a proxy access nomination invalid, and such nomination shall be disregarded even if proxies in respect of such nomination have been received by the Company, if:

- The Stockholder Nominee(s) and/or the applicable Eligible Stockholder have breached its or their obligations under

[29] Section 4.13(h)(iii) of the By-Laws requires Nasdaq's Corporate Secretary to collect from each nominee for director such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, Issuer, or Public Director, if applicable, and to certify to the Committee each nominee's classification, if applicable. Detailed definitions of the terms ''Industry Director,'' ''Non-Industry Director,'' ''Issuer Director'' and ''Public Director'' are included in Article I of the By-Laws.

[30] *See* proposed Section 3.6(h)(i) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[31] *See* proposed Section 3.6(h)(ii) of the By-Laws; *see also* footnote 28, *supra.* The Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board. The Commission further notes that, according to Nasdaq, should the Board decide to adopt additional, more stringent standards than those required under Nasdaq listing standards and any requirements under Commission rules, all director nominees would be evaluated against these standards—not just those shareholder candidates nominated under the provisions of proposed Section 3.6.

[32] *See* proposed Section 3.6(h)(iii) of the By-Laws; *see also* Section 4.3 of the By-Laws, which provides that the number of Non-Industry Directors on the Board must equal or exceed the number of Industry Directors. In addition, the Board must include at least two Public Directors and may include at least one, but no more than two, Issuer Directors. Finally, the Board shall include no more than one Staff Director, unless the Board consists of ten or more directors, in which case, the Board shall include no more than two Staff Directors. Detailed definitions of the terms ''Non-Industry Director,'' ''Industry Director,'' ''Public Director,'' ''Issuer Director'' and ''Staff Director'' are included in Article I of the By-Laws.

[33] *See* proposed Section 3.6(h)(iv) of the By-Laws; *see also* 15 U.S.C. 19(a)(1), which generally provides that ''[n]o person shall, at the same time, serve as a director or officer in any two corporations'' that are ''competitors'' such that ''the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.''

[34] *See* proposed Section 3.6(h)(v) of the By-Laws.

[35] *See* proposed Section 3.6(h)(vi) of the By-Laws; *see also* 17 CFR 230.506(d), which generally disqualifies offerings involving certain felons and other bad actors from relying on the ''safe harbor'' in Rule 506 of Regulation D from registration under the Securities Act of 1933, as amended.

[36] *See* proposed Section 3.6(h)(vii) of the By-Laws; *see also* 15 U.S.C. 78c(a)(39), which disqualifies certain categories of individuals who generally have engaged in misconduct from membership or participation in, or association with a member of, a self-regulatory organization.

[37] *See* proposed Section 3.6(h)(viii) of the By-Laws.

[38] *See* proposed Section 3.6(h)(ix) of the By-Laws.

the proxy access provision of the By-Laws, as determined by the Board or the chairman of the meeting of stockholders, in each case, in its or his sole discretion; or

• the Eligible Stockholder (or a qualified representative thereof) does not appear at the meeting of stockholders to present the proxy access nomination.

Nasdaq believes this provision protects the Company and its stockholders by providing the Board or the chairman of the stockholder meeting limited authority to disqualify a proxy access nominee when that nominee or the sponsoring stockholder(s) have breached an obligation under the proxy access provision, including the obligation to appear at the stockholder meeting to present the proxy access nomination.

Proposed Section 3.6(j) of the By-Laws

Proposed Section 3.6(j) states that the following Stockholder Nominees who are included in the Company's proxy materials for a particular annual meeting of stockholders will be ineligible to be a Stockholder Nominee for the next two annual meetings:

• A Stockholder Nominee who withdraws from or becomes ineligible or unavailable for election at the annual meeting; or

• a Stockholder Nominee who does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election.

This provision will save the Company and its stockholders the time and expense of analyzing and addressing subsequent proxy access nominations regarding individuals who were included in the proxy materials for a particular annual meeting but ultimately did not stand for election or receive a substantial amount of votes. After the next two annual meetings, these Stockholder Nominees would again be eligible for nomination through the proxy access provisions of the By-Laws.

Proposed Section 3.6(k) of the By-Laws

In case there are matters involving a proxy access nomination that are open to interpretation, proposed Section 3.6(k) states that the Board (or any other person or body authorized by the Board) shall have exclusive power and authority to interpret the proxy access provisions of the By-Laws and make all determinations deemed necessary or advisable as to any person, facts or circumstances. In addition, all actions, interpretations and determinations of the Board (or any person or body authorized by the Board) with respect to the proxy access provisions shall be final, conclusive and binding on the Company, the stockholders and all other parties. While Nasdaq has attempted to implement a clear, detailed and thorough proxy access provision, there may be matters about future proxy access nominations that are open to interpretation. In these cases, Nasdaq believes it is reasonable and necessary to designate an arbiter to make final decisions on these points and that the Board is best-suited to act as that arbiter.

Proposed Section 3.6(l) of the By-Laws

Proposed Section 3.6(l) prohibits a stockholder from joining more than one group of stockholders to become an Eligible Stockholder for purposes of submitting a proxy access nomination for each annual meeting of stockholders. Nasdaq analogizes this provision to Article IV, Paragraph C(1) of its Amended and Restated Certificate of Incorporation, under which each holder of Nasdaq's common stock shall be entitled to one vote per share on all matters presented to the stockholders for a vote. Similar to that provision, Nasdaq believes it is reasonable for each share to count only once in submitting a proxy access nomination.

Proposed Section 3.6(m) of the By-Laws

For the avoidance of doubt, proposed Section 3.6(m) states that the proxy access provisions outlined in Section 3.6 of the By-Laws shall be the exclusive means for stockholders to include nominees in the Company's proxy materials. Stockholders may, of course, continue to propose nominees to the Committee and Board through other means, but the Committee and Board will have final authority to determine whether to include those nominees in the Company's proxy materials.

Revisions to Other Sections of the By-Laws

Nasdaq also proposes to make conforming changes to Sections 3.1(a), 3.3(a), 3.3(c) and 3.5 of the By-Laws to provide clarifications and prevent confusion. Specifically, current Section 3.1(a) enumerates the methods by which nominations of persons for election to the Board may be made at an annual meeting of stockholders; Nasdaq proposes to add proxy access nominations to the list of methods. Current Section 3.3(a) specifies that, among other things, only such persons who are nominated in accordance with the procedures set forth in Article III of the By-Laws [39] shall be eligible to be elected at an annual or special meeting of Nasdaq's stockholders to serve as directors; for the avoidance of doubt, Nasdaq proposes to clarify that the reference to Article III includes the proxy access provision in Section 3.6 of the By-Laws with respect to director nominations in connection with annual meetings. Current Section 3.3(c) states, among other things, that compliance with Section 3.1(a)(iii) and (b) [40] shall be the exclusive means for a stockholder to make a director nomination; Nasdaq proposes to add proxy access as an additional means for a stockholder to make a director nomination. Finally, current Section 3.5 requires Nasdaq's director nominees to submit to Nasdaq's Corporate Secretary a questionnaire, representation and agreement within certain time periods; Nasdaq proposes to clarify that proxy access nominees must submit these materials within the time periods prescribed for delivery of a Notice of Proxy Access Nomination, as described above.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[41] in general, and furthers the objectives of Section 6(b)(5) of the Act,[42] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

In response to feedback from its investors, Nasdaq is proposing changes to its By-Laws to implement proxy access. The Exchange believes that, by permitting an Eligible Stockholder of Nasdaq that meets the stated requirements to nominate directors and have its nominees included in Nasdaq's annual meeting proxy statement, the proposed rule change strengthens the corporate governance of the Exchange's ultimate parent company, which is beneficial to both investors and the public interest.

In drafting its proxy access provision, Nasdaq has attempted to strike an appropriate balance between responding to investor feedback and including certain procedural and informational requirements for the protection of the Company and its investors. Specifically, the procedural requirements will protect investors by stating clearly and explicitly the procedures stockholders

[39] Article III of the By-Laws relates to stockholder meetings.

[40] As part of Nasdaq's ''advance notice'' provision, Sections 3.1(a)(iii) and (b) of the By-Laws describe certain procedures that a stockholder must follow to, among other things, nominate a person for election to the Board.

[41] 15 U.S.C. 78f(b).

[42] 15 U.S.C. 78f(b)(5).

must follow in order to submit a proper proxy access nomination. The informational requirements will enhance investor protection by ensuring, among other things, that the Company and its stockholders have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees comply with applicable laws, regulations and other requirements.

Finally, the remaining changes are clarifying in nature, and they enhance investor protection and the public interest by preventing confusion with respect to the operation of the By-Law provisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

Because the proposed rule change relates to the governance of the Company and not to the operations of the Exchange, 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.

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

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–ISEMercury–2016–16 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–ISEMercury–2016–16. 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–ISEMercury–2016–16 and should be submitted on or before October 26, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–24002 Filed 10–4–16; 8:45 am]

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[43] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78978; File No. SR–PHLX–2016–93]

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing of Proposed Rule Change To Amend the By-Laws of Nasdaq, Inc. To Implement Proxy Access

September 29, 2016.

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 September 15, 2016, NASDAQ PHLX LLC (''Phlx'') or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing this proposed rule change with respect to amendments of the By-Laws (the ''By-Laws'') of its parent corporation, Nasdaq, Inc. (''Nasdaq'' or the ''Company''), to implement proxy access. The proposed amendments will be implemented on a date designated by the Company following approval by the Commission. The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqphlx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

At Nasdaq's 2016 annual meeting held on May 5, 2016, Nasdaq's stockholders considered a stockholder proposal submitted under Rule 14a–8 under the Act.[3] The proposal, which passed with 73.52% of the votes cast, requested that Nasdaq's Board of Directors (the ''Board'') take steps to implement a ''proxy access'' by-law. Proxy access by-laws allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on a board and have those candidates included in a company's proxy materials. Such provisions allow stockholders to nominate candidates without undertaking the expense of a proxy solicitation.

Following the 2016 annual meeting, the Nominating & Governance Committee (the ''Committee'') of the Board and the Board reviewed the voting results on the stockholder proposal and discussed proxy access generally. The Committee ultimately recommended to the Board, and the Board approved, certain changes to Nasdaq's By-Laws to implement proxy access. Nasdaq now proposes to make these changes by adopting new Section 3.6 of the By-Laws and making certain conforming changes to current Sections 3.1, 3.3 and 3.5 of the By-Laws, all of which are described further below.

In developing its proposal, Nasdaq has generally tried to balance the relative weight of arguments for and against proxy access provisions. On the one hand, Nasdaq recognizes the significance of this issue to some investors, who see proxy access as an important accountability mechanism that allows them to participate in board elections through the nomination of stockholder candidates that are presented in a company's proxy statement. On the other hand, Nasdaq's proposed proxy access provision includes certain procedural requirements that ensure, among other things, that the Company and its stockholders will have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees will comply with applicable laws, regulations and other requirements.

Proposed Section 3.6(a) of the By-Laws

To respond to feedback from its stockholders, Nasdaq proposes to amend its By-Laws to, as set forth in the first sentence of proposed Section 3.6(a), require the Company to include in its proxy statement, its form proxy and any ballot distributed at the stockholder meeting, the name of, and certain Required Information[4] about, any person nominated for election (the ''Stockholder Nominee'') to the Board by a stockholder or group of stockholders (the ''Eligible Stockholder'')[5] that satisfies the requirements set forth in the proxy access provision of Nasdaq's By-Laws.[6] To utilize this provision, the Eligible Stockholder must expressly elect at the time of providing a required notice to the Company of the proxy access nomination (the ''Notice of Proxy Access Nomination'') to have its nominee included in the Company's proxy materials. Stockholders will be eligible to submit proxy access nominations only at annual meetings of stockholders when the Board solicits proxies with respect to the election of directors.

The next two sentences of Section 3.6(a) provide some additional clarification on the term ''Eligible Stockholder.'' First, in calculating the number of stockholders in a group seeking to qualify as an Eligible Stockholder, two or more of the following types of funds shall be counted as one stockholder: (i) Funds under common management and investment control, (ii) funds under common management and funded primarily by the same employer, or (iii) funds that are a ''group of investment companies'' as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Company Act of 1940, as amended.[7] Nasdaq views this as a stockholder-friendly provision that will make it easier for such funds to participate in a proxy access nomination since they will not have to comply with the procedural requirements in the proxy access provision multiple times. Second, in the event that the Eligible Stockholder consists of a group of stockholders, any and all requirements and obligations for an individual Eligible Stockholder shall apply to each member of the group, except that the Required Ownership Percentage (discussed further below) shall apply to the ownership of the group in the aggregate. Generally, the applicable requirements and obligations relate to information that each member of the nominating group must provide to Nasdaq about itself, as discussed further below. Nasdaq believes it is reasonable to require each member of the nominating group to provide such information so that both the Company and its stockholders are fully informed about the entire group making the proxy access nomination.

The final sentence of proposed Section 3.6(a) allows Nasdaq to omit from its proxy materials any information or Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law or regulation. This provision allows Nasdaq to comply with Rule 14a–9 under the Act[8] and to protect its stockholders from information that is materially untrue or that violates any law or regulation. The final sentence of proposed Section 3.6(a) also explicitly allows Nasdaq to solicit against, and include in the proxy statement its own statement relating to, any Stockholder Nominee. This provision merely clarifies that just because Nasdaq must include a proxy access nominee in its proxy materials if the proxy access provisions are satisfied, Nasdaq does not necessarily have to support that nominee.

Proposed Section 3.6(b) of the By-Laws

Proposed Section 3.6(b) of the By-Laws establishes the deadline for a timely Notice of Proxy Access

[3] *See* 17 CFR 240.14a–8, which establishes procedures pursuant to which stockholders of a public company may have their proposals placed alongside management's proposals in the company's proxy materials for presentation to a vote at a meeting of stockholders.

[4] The Required Information is the information provided to Nasdaq's Corporate Secretary about the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Company's proxy statement by the regulations promulgated under the Act, and if the Eligible Stockholder so elects, a written statement, not to exceed 500 words, in support of the Stockholder Nominee(s)' candidacy (the ''Statement'').

[5] As used throughout Nasdaq's By-Laws, the term ''Eligible Stockholder'' includes each member of a stockholder group that submits a proxy access nomination to the extent the context requires.

[6] When the Company includes proxy access nominees in the proxy materials, such individuals will be included in addition to any persons nominated for election to the Board or any committee thereof.

[7] *See* 15 U.S.C. 80a–12(d)(1)(G)(ii), which defines ''group of investment companies'' as any two or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.

[8] *See* 17 CFR 240.14a–9, which generally prohibits proxy solicitations that contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

Nomination. Specifically, such a notice must be addressed to, and received by, Nasdaq's Corporate Secretary no earlier than one hundred fifty (150) days and no later than one hundred twenty (120) days before the anniversary of the date that Nasdaq issued its proxy statement for the previous year's annual meeting of stockholders. The Company believes this notice period will provide stockholders an adequate window to submit nominees via proxy access, while also providing the Company adequate time to diligence [sic] a proxy access nominee before including them in the proxy statement for the next annual meeting of stockholders.

Proposed Section 3.6(c) of the By-Laws

Proposed Section 3.6(c) specifies that the maximum number of Stockholder Nominees nominated by all Eligible Stockholders that will be included in Nasdaq's proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two and 25% of the total number of directors in office (rounded down to the nearest whole number) as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with the proxy access provision of the By-Laws (the ''Final Proxy Access Nomination Date''). In the event that one or more vacancies for any reason occurs after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board resolves to reduce the size of the Board in connection therewith, the maximum number of Stockholder Nominees included in Nasdaq's proxy materials shall be calculated based on the number of directors in office as so reduced. Any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision of the By-Laws whom the Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the maximum number of Stockholder Nominees has been reached.

Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to the proxy access provision exceeds the maximum number of nominees allowed. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders exceeds the maximum number of nominees allowed, the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder will be selected for inclusion in the proxy materials until the maximum number is reached, going in order of the amount (largest to smallest) of shares of Nasdaq's outstanding common stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to Nasdaq. If the maximum number is not reached after the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder has been selected, this process will continue as many times as necessary, following the same order each time, until the maximum number is reached. Following such determination, if any Stockholder Nominee who satisfies the eligibility requirements thereafter is nominated by the Board, or is not included in the proxy materials or is not submitted for election as a director, in either case, as a result of the Eligible Stockholder becoming ineligible or withdrawing its nomination, the Stockholder Nominee becoming unwilling or unable to serve on the Board or the Eligible Stockholder or the Stockholder Nominee failing to comply with the proxy access provision of the By-Laws, no other nominee or nominees shall be included in the proxy materials or otherwise submitted for director election in substitution thereof.

The Company believes it is reasonable to limit the Board seats available to proxy access nominees, to establish procedures for selecting candidates if the nominee limit is exceeded and to exclude further proxy access nominees in the cases set forth above. The limitation on Board seats available to proxy access nominees ensures that proxy access cannot be used to take over the entire Board, which is not the stated purpose of proxy access campaigns. The procedures for selecting candidates if the nominee limit is exceeded establish clear and rational guidelines for an orderly nomination process to avoid the Company having to make arbitrary judgments among candidates. Finally, the exclusion of further proxy access nominees in certain cases will avoid further time and expense to the Company when the proxy access nominee has been nominated by the Board, in which case the goal of the proxy access nomination has been achieved, or in certain cases when the Eligible Stockholder or Stockholder Nominee is at fault.

Proposed Section 3.6(d) of the By-Laws

Proposed Section 3.6(d) clarifies, for the avoidance of doubt, how ''ownership'' will be defined for purposes of meeting the Required Ownership Percentage (discussed further below). Specifically, an Eligible Stockholder shall be deemed to ''own'' only those outstanding shares of Nasdaq's common stock as to which the stockholder possesses both: (i) The full voting and investment rights pertaining to the shares; and (ii) the full economic interest in (including the opportunity for profit from and risk of loss on) such shares; provided that the number of shares calculated in accordance with clauses (i) and (ii) shall not include any shares:

- Sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed, including any short sale;
- borrowed by such stockholder or any of its affiliates for any purposes or purchased by such stockholder or any of its affiliates pursuant to an agreement to resell; or
- subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar agreement entered into by such stockholder or any of its affiliates, whether any such instrument or agreement is to be settled with shares or with cash based on the notional amount or value of shares of Nasdaq's outstanding common stock, in any such case which instrument or agreement has, or is intended to have, or if exercised by either party would have, the purpose or effect of:
  - Reducing in any manner, to any extent or at any time in the future, such stockholder's or its affiliates' full right to vote or direct the voting of any such shares; and/or
  - hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or its affiliates.

Further, a stockholder shall ''own'' shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has delegated any voting power by means of

a proxy, power of attorney or other instrument or arrangement which is revocable at any time by the stockholder. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has loaned such shares provided that the stockholder has the power to recall such loaned shares on three (3) business days' notice, has recalled such loaned shares as of the date of the Notice of Proxy Access Nomination and holds such shares through the date of the annual meeting. The terms ''owned,'' ''owning'' and other variations of the word ''own'' shall have correlative meanings. Whether outstanding shares of Nasdaq's common stock are ''owned'' for these purposes shall be determined by the Board or any committee thereof, in each case, in its sole discretion. For purposes of the proxy access provision of the By-Laws, the term ''affiliate'' or ''affiliates'' shall have the meaning ascribed thereto under the rules and regulations of the Act.[9] An Eligible Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to own for the purposes of the proxy access provision of the By-Laws.

Proposed Section 3.6(e) of the By-Laws

The first paragraph of proposed Section 3.6(e) establishes certain requirements for an Eligible Stockholder to make a proxy access nomination. Specifically, an Eligible Stockholder must have owned (defined as discussed above) 3% or more (the ''Required Ownership Percentage'') of Nasdaq's outstanding common stock (the ''Required Shares'') continuously for 3 years (the ''Minimum Holding Period'') as of both the date the Notice of Proxy Access Nomination is received by Nasdaq's Corporate Secretary and the record date for determining the stockholders entitled to vote at the annual meeting and must continue to own the Required Shares through the meeting date.

Proposed Section 3.6(e) also sets forth the information that an Eligible Stockholder must provide to Nasdaq's Corporate Secretary in writing within the deadline discussed above in order to make a proxy access nomination. This information includes:

- One or more written statements from the record holder of the shares (and from each intermediary through which the shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Notice of Proxy Access Nomination is delivered to, or mailed to and received by, Nasdaq's Corporate Secretary, the Eligible Stockholder owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder's agreement to provide, within five (5) business days after the record date for the annual meeting, written statements from the record holder and intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date; [10]
- a copy of the Schedule 14N that has been filed with the SEC as required by Rule 14a–18 under the Act; [11]
- the information, representations and agreements with respect to the Eligible Stockholder that are the same as those that would be required to be set forth in a stockholder's notice of nomination with respect to a ''Proposing Person'' pursuant to Section 3.1(b)(i) and Section 3.1(b)(iii) of the By-Laws; [12]
- the consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected; [13]
- a representation that the Eligible Stockholder:
  - Acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of Nasdaq, and does not presently have such intent; [14]
  - presently intends to maintain qualifying ownership of the Required Shares through the date of the annual meeting; [15]
  - has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s); [16]
  - has not engaged and will not engage in, and has not and will not be a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting, other than its Stockholder Nominee(s) or a nominee of the Board; [17]
  - agrees to comply with all applicable laws and regulations with respect to any solicitation in connection with the meeting or applicable to the filing and use, if any, of soliciting material; [18]
  - will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; [19] and
  - as to any two or more funds whose shares are aggregated to count as one stockholder for the purpose of constituting an Eligible Stockholder, within five business days after the date of the Notice of Proxy Access Nomination, will provide to Nasdaq documentation reasonably satisfactory to Nasdaq that demonstrates that the funds satisfy the requirements in the By-Laws, which were discussed above, for the funds to qualify as one Eligible Stockholder; [20]
- a representation as to the Eligible Stockholder's intentions with respect to maintaining qualifying ownership of the Required Shares for at least one year following the annual meeting; [21]
- an undertaking that the Eligible Stockholder agrees to:
  - Assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder's communications with Nasdaq's stockholders or out of the information that the Eligible Stockholder provided to Nasdaq; [22]

[9] Pursuant to Rule 12b–2 under the Act, ''[a]n 'affiliate' of, or a person 'affiliated' with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.'' 17 CFR 240.12b–2. Further, ''[t]he term 'control' (including the terms 'controlling,' 'controlled by' and 'under common control with') means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'' 17 CFR 240.12b–2.

[10] *See* proposed Section 3.6(e)(i) of the By-Laws.

[11] *See* proposed Section 3.6(e)(ii) of the By-Laws; *see also* 17 CFR 240.14n–101 and 17 CFR 240.14a–18, which generally require a Nominating Stockholder to provide notice to the Company of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to the Company.

[12] *See* proposed Section 3.6(e)(iii) of the By-Laws; *see also* Sections 3.1(b)(i) and 3.1(b)(iii) of the By-Laws, which constitute part of Nasdaq's ''advance notice'' provision under which a ''Proposing Person'' may, among other things, nominate a person for election to the Board.

[13] *See* proposed Section 3.6(e)(iv) of the By-Laws.

[14] *See* proposed Section 3.6(e)(v)(A) of the By-Laws.

[15] *See* proposed Section 3.6(e)(v)(B) of the By-Laws.

[16] *See* proposed Section 3.6(e)(v)(C) of the By-Laws.

[17] *See* proposed Section 3.6(e)(v)(D) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[18] *See* proposed Section 3.6(e)(v)(E) of the By-Laws.

[19] *See* proposed Section 3.6(e)(v)(F) of the By-Laws.

[20] *See* proposed Section 3.6(e)(v)(G) of the By-Laws.

[21] *See* proposed Section 3.6(e)(vi) of the By-Laws.

[22] *See* proposed Section 3.6(e)(vii)(A) of the By-Laws.

○ indemnify and hold harmless Nasdaq and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against Nasdaq or any of its directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to the proxy access provision; [23] and

○ file with the SEC any solicitation or other communication with Nasdaq's stockholders relating to the meeting at which the Stockholder Nominee will be nominated, regardless of whether any such filing is required under Regulation 14A of the Act or whether any exemption from filing is available thereunder; [24] and

• in the case of a nomination by a group of stockholders that together is an Eligible Stockholder, the designation by all group members of one group member that is authorized to act on behalf of all such members with respect to the nomination and matters related thereto, including withdrawal of the nomination.[25]

In proposing the Required Ownership Percentage and the Minimum Holding Period, Nasdaq seeks to ensure that the Eligible Stockholder has had a sufficient stake in the Company for a sufficient amount of time and is not pursuing a short-term agenda. In proposing the informational requirements for the Eligible Stockholder, Nasdaq's goal is to gather sufficient information about the Eligible Stockholder for both itself and its stockholders. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(f) of the By-Laws

Proposed Section 3.6(f) establishes the information the Stockholder Nominee must deliver to Nasdaq's Corporate Secretary within the time period specified for delivering the Notice of Proxy Access Nomination. This information includes:

• The information required with respect to persons whom a stockholder proposes to nominate for election or reelection as a director by Section 3.1(b)(i) of the By-Laws [26] including, but not limited to, the signed questionnaire, representation and agreement required by Section 3.1(b)(i)(D) of the By-Laws; [27] and

• a written representation and agreement that such person:

○ Will act as a representative of all of Nasdaq's stockholders while serving as a director; and

○ will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects (and shall not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading).

In addition, at the request of Nasdaq, the Stockholder Nominee(s) must submit all completed and signed questionnaires required of Nasdaq's directors and officers. Nasdaq may request such additional information as necessary to (y) permit the Board to determine if each Stockholder Nominee satisfies the requirements of the proxy access provision of the By-Laws or if each Stockholder Nominee is independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing the independence of Nasdaq's directors [28] and/or (z) permit Nasdaq's Corporate Secretary to determine the classification of such nominee as an Industry, Non-Industry, Issuer or Public Director, if applicable, in order to make the certification referenced in Section 4.13(h)(iii) of the By-Laws.[29]

Like the informational requirements for an Eligible Stockholder, which are set forth above, the informational requirements for the Stockholder Nominee ensure that both Nasdaq and its stockholders will have sufficient information about the Stockholder Nominee. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(g) of the By-Laws

Pursuant to proposed Section 3.6(g), each Eligible Stockholder or Stockholder Nominee must promptly notify Nasdaq's Corporate Secretary of any information or communications provided by the Eligible Stockholder or Stockholder Nominee to Nasdaq or its stockholders that ceases to be true and correct in all material respects or omits a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading and of the information that is required to correct any such defect. This provision further states that providing any such notification shall not be deemed to cure any defect or, with respect to any defect that Nasdaq determines is material, limit Nasdaq's rights to omit a Stockholder Nominee from its proxy materials. This provision is intended to protect Nasdaq's stockholders by requiring an Eligible Stockholder or Stockholder Nominee to give Nasdaq notice of information previously provided that is materially untrue. Nasdaq may then decide what action to take with respect to such defect, which may include, with respect to a material defect, omitting the relevant Stockholder Nominee from its proxy materials.

Proposed Section 3.6(h) of the By-Laws

Proposed Section 3.6(h) provides that Nasdaq shall not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders under certain circumstances. In these situations, the

[23] *See* proposed Section 3.6(e)(vii)(B) of the By-Laws.

[24] *See* proposed Section 3.6(e)(vii)(C) of the By-Laws; *see also* 17 CFR 240.14a–1—14b–2, which governs solicitations of proxies.

[25] *See* proposed Section 3.6(e)(viii) of the By-Laws.

[26] Section 3.1(b)(i) of the By-Laws describes the information that a proposing stockholder must provide about an individual the stockholder proposes to nominate for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[27] Section 3.1(b)(i)(D) of the By-Laws requires a completed and signed questionnaire, representation and agreement, each containing certain information, from each individual proposed to be nominated for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[28] Currently, the independence of Nasdaq's directors is determined pursuant to the definition of ''Independent Director'' in Listing Rule 5605(a)(2) of The NASDAQ Stock Market, under which certain categories of individuals cannot be deemed independent and with respect to other individuals, the Board must make an affirmative determination that such individual has no relationship that, in the opinion of the Board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Other independence standards under the SEC rules and the Listing Rules of The NASDAQ Stock Market apply to members of certain of the Board's committees. As detailed below, the Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board.

[29] Section 4.13(h)(iii) of the By-Laws requires Nasdaq's Corporate Secretary to collect from each nominee for director such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, Issuer, or Public Director, if applicable, and to certify to the Committee each nominee's classification, if applicable. Detailed definitions of the terms ''Industry Director,'' ''Non-Industry Director,'' ''Issuer Director'' and ''Public Director'' are included in Article I of the By-Laws.

proxy access nomination shall be disregarded and no vote on such Stockholder Nominee will occur, even if Nasdaq has received proxies in respect of the vote. These circumstances occur when the Stockholder Nominee:

- Has been nominated by an Eligible Stockholder who has engaged in or is currently engaged in, or has been or is a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board; [30]
- is not independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing independence of Nasdaq's directors, in each case as determined by the Board in its sole discretion; [31]
- would, if elected as a member of the Board, cause Nasdaq to be in violation of the By-Laws (including but not limited to the compositional requirements of the Board set forth in Section 4.3 of the By-Laws), its Amended and Restated Certificate of Incorporation, the rules and listing standards of The NASDAQ Stock Market, or any applicable state or federal law, rule or regulation; [32]
- is or has been, within the past three (3) years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914; [33]
- is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past ten (10) years; [34]
- is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended; [35]
- is subject to ''statutory disqualification'' under Section 3(a)(39) of the Act; [36]
- has, or the applicable Eligible Stockholder has, provided information to Nasdaq in respect of the proxy access nomination that was untrue in any material respect or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, as determined by the Board or any committee thereof, in each case, in its sole discretion; [37] or
- breaches or fails, or the applicable Eligible Stockholder breaches or fails, to comply with its obligations pursuant to the By-Laws, including, but not limited to, the proxy access provisions and any agreement, representation or undertaking required by the proxy access provisions.[38]

Nasdaq believes these provisions will protect the Company and its stockholders by allowing it to exclude certain categories of objectionable Stockholder Nominees from the proxy statement.

Proposed Section 3.6(i) of the By-Laws

Under proposed Section 3.6(i), the Board or the chairman of the meeting of stockholders shall declare a proxy access nomination invalid, and such nomination shall be disregarded even if proxies in respect of such nomination have been received by the Company, if:

- The Stockholder Nominee(s) and/or the applicable Eligible Stockholder have breached its or their obligations under the proxy access provision of the By-Laws, as determined by the Board or the chairman of the meeting of stockholders, in each case, in its or his sole discretion; or
- the Eligible Stockholder (or a qualified representative thereof) does not appear at the meeting of stockholders to present the proxy access nomination.

Nasdaq believes this provision protects the Company and its stockholders by providing the Board or the chairman of the stockholder meeting limited authority to disqualify a proxy access nominee when that nominee or the sponsoring stockholder(s) have breached an obligation under the proxy access provision, including the obligation to appear at the stockholder meeting to present the proxy access nomination.

Proposed Section 3.6(j) of the By-Laws

Proposed Section 3.6(j) states that the following Stockholder Nominees who are included in the Company's proxy materials for a particular annual meeting of stockholders will be ineligible to be a Stockholder Nominee for the next two annual meetings:

- A Stockholder Nominee who withdraws from or becomes ineligible or unavailable for election at the annual meeting; or
- a Stockholder Nominee who does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election.

This provision will save the Company and its stockholders the time and expense of analyzing and addressing subsequent proxy access nominations regarding individuals who were included in the proxy materials for a particular annual meeting but ultimately did not stand for election or receive a substantial amount of votes. After the next two annual meetings, these Stockholder Nominees would again be eligible for nomination through the proxy access provisions of the By-Laws.

Proposed Section 3.6(k) of the By-Laws

In case there are matters involving a proxy access nomination that are open to interpretation, proposed Section 3.6(k) states that the Board (or any other person or body authorized by the Board) shall have exclusive power and authority to interpret the proxy access provisions of the By-Laws and make all determinations deemed necessary or advisable as to any person, facts or circumstances. In addition, all actions, interpretations and determinations of the Board (or any person or body authorized by the Board) with respect to the proxy access provisions shall be

[30] *See* proposed Section 3.6(h)(i) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[31] *See* proposed Section 3.6(h)(ii) of the By-Laws; *see also* footnote 28, *supra*. The Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board. The Commission further notes that, according to Nasdaq, should the Board decide to adopt additional, more stringent standards than those required under Nasdaq listing standards and any requirements under Commission rules, all director nominees would be evaluated against these standards—not just those shareholder candidates nominated under the provisions of proposed Section 3.6.

[32] *See* proposed Section 3.6(h)(iii) of the By-Laws; *see also* Section 4.3 of the By-Laws, which provides that the number of Non-Industry Directors on the Board must equal or exceed the number of Industry Directors. In addition, the Board must include at least two Public Directors and may include at least one, but no more than two, Issuer Directors. Finally, the Board shall include no more than one Staff Director, unless the Board consists of ten or more directors, in which case, the Board shall include no more than two Staff Directors. Detailed definitions of the terms ''Non-Industry Director,'' ''Industry Director,'' ''Public Director,'' ''Issuer Director'' and ''Staff Director'' are included in Article I of the By-Laws.

[33] *See* proposed Section 3.6(h)(iv) of the By-Laws; *see also* 15 U.S.C. 19(a)(1), which generally provides that ''[n]o person shall, at the same time, serve as a director or officer in any two corporations'' that are ''competitors'' such that ''the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.''

[34] *See* proposed Section 3.6(h)(v) of the By-Laws.

[35] *See* proposed Section 3.6(h)(vi) of the By-Laws; *see also* 17 CFR 230.506(d), which generally disqualifies offerings involving certain felons and other bad actors from relying on the ''safe harbor'' in Rule 506 of Regulation D from registration under the Securities Act of 1933, as amended.

[36] *See* proposed Section 3.6(h)(vii) of the By-Laws; *see also* 15 U.S.C. 78c(a)(39), which disqualifies certain categories of individuals who generally have engaged in misconduct from membership or participation in, or association with a member of, a self-regulatory organization.

[37] *See* proposed Section 3.6(h)(viii) of the By-Laws.

[38] *See* proposed Section 3.6(h)(ix) of the By-Laws.

final, conclusive and binding on the Company, the stockholders and all other parties. While Nasdaq has attempted to implement a clear, detailed and thorough proxy access provision, there may be matters about future proxy access nominations that are open to interpretation. In these cases, Nasdaq believes it is reasonable and necessary to designate an arbiter to make final decisions on these points and that the Board is best-suited to act as that arbiter.

Proposed Section 3.6(l) of the By-Laws

Proposed Section 3.6(l) prohibits a stockholder from joining more than one group of stockholders to become an Eligible Stockholder for purposes of submitting a proxy access nomination for each annual meeting of stockholders. Nasdaq analogizes this provision to Article IV, Paragraph C(1) of its Amended and Restated Certificate of Incorporation, under which each holder of Nasdaq's common stock shall be entitled to one vote per share on all matters presented to the stockholders for a vote. Similar to that provision, Nasdaq believes it is reasonable for each share to count only once in submitting a proxy access nomination.

Proposed Section 3.6(m) of the By-Laws

For the avoidance of doubt, proposed Section 3.6(m) states that the proxy access provisions outlined in Section 3.6 of the By-Laws shall be the exclusive means for stockholders to include nominees in the Company's proxy materials. Stockholders may, of course, continue to propose nominees to the Committee and Board through other means, but the Committee and Board will have final authority to determine whether to include those nominees in the Company's proxy materials.

Revisions to Other Sections of the By-Laws

Nasdaq also proposes to make conforming changes to Sections 3.1(a), 3.3(a), 3.3(c) and 3.5 of the By-Laws to provide clarifications and prevent confusion. Specifically, current Section 3.1(a) enumerates the methods by which nominations of persons for election to the Board may be made at an annual meeting of stockholders; Nasdaq proposes to add proxy access nominations to the list of methods. Current Section 3.3(a) specifies that, among other things, only such persons who are nominated in accordance with the procedures set forth in Article III of the By-Laws [39] shall be eligible to be elected at an annual or special meeting of Nasdaq's stockholders to serve as directors; for the avoidance of doubt, Nasdaq proposes to clarify that the reference to Article III includes the proxy access provision in Section 3.6 of the By-Laws with respect to director nominations in connection with annual meetings. Current Section 3.3(c) states, among other things, that compliance with Section 3.1(a)(iii) and (b) [40] shall be the exclusive means for a stockholder to make a director nomination; Nasdaq proposes to add proxy access as an additional means for a stockholder to make a director nomination. Finally, current Section 3.5 requires Nasdaq's director nominees to submit to Nasdaq's Corporate Secretary a questionnaire, representation and agreement within certain time periods; Nasdaq proposes to clarify that proxy access nominees must submit these materials within the time periods prescribed for delivery of a Notice of Proxy Access Nomination, as described above.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[41] in general, and furthers the objectives of Section 6(b)(5) of the Act,[42] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

In response to feedback from its investors, Nasdaq is proposing changes to its By-Laws to implement proxy access. The Exchange believes that, by permitting an Eligible Stockholder of Nasdaq that meets the stated requirements to nominate directors and have its nominees included in Nasdaq's annual meeting proxy statement, the proposed rule change strengthens the corporate governance of the Exchange's ultimate parent company, which is beneficial to both investors and the public interest.

In drafting its proxy access provision, Nasdaq has attempted to strike an appropriate balance between responding to investor feedback and including certain procedural and informational requirements for the protection of the Company and its investors. Specifically, the procedural requirements will protect investors by stating clearly and explicitly the procedures stockholders must follow in order to submit a proper proxy access nomination. The informational requirements will enhance investor protection by ensuring, among other things, that the Company and its stockholders have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees comply with applicable laws, regulations and other requirements.

Finally, the remaining changes are clarifying in nature, and they enhance investor protection and the public interest by preventing confusion with respect to the operation of the By-Law provisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

Because the proposed rule change relates to the governance of the Company and not to the operations of the Exchange, 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.

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

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

[39] Article III of the By-Laws relates to stockholder meetings.

[40] As part of Nasdaq's ''advance notice'' provision, Sections 3.1(a)(iii) and (b) of the By-Laws describe certain procedures that a stockholder must follow to, among other things, nominate a person for election to the Board.

[41] 15 U.S.C. 78f(b).

[42] 15 U.S.C. 78f(b)(5).

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–PHLX–2016–93 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–PHLX–2016–93. 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–2016–93 and should be submitted on or before October 26, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Robert W. Errett,

Deputy Secretary.

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[43] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78977; File No. SR–NASDAQ–2016–132]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Nasdaq's Fees and Credits at Rules 7014 and 7018

September 29, 2016.

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 September 28, 2016, 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's fees and credits at Rules 7014 and 7018.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on September 1, 2016.[3]

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 purpose of the proposed rule change is to amend Rule 7014 to: (i) Add a new charge of $0.0029 assessed Qualified Market Makers (''QMMs'') for orders in securities listed on exchanges other than Nasdaq priced at $1 or more; (ii) amend the requirement to qualify for a rebate under the NBBO program; and (iii) add the new Nasdaq Growth Program. The Exchange is also proposing to amend Rule 7018 to: (i) Replace an existing $0.0001 per share executed credit tier with two new credit tiers providing $0.0001 and $0.0002 per share executed, respectively; (ii) amend the criteria and fees assessed for transactions in the Closing Cross; and (iii) amend the criteria and fees assessed for transactions in the opening cross, and make a clarifying change to the opening cross rules.

First Change

The purpose of the first change is to increase incentives provided by the Exchange under Rule 7014(e) by providing a new $0.0029 per share executed fee to QMMs that, in addition to meeting the Tier 2 eligibility criteria also have a combined Consolidated Volume of at least 3.5%. A QMM is a member that makes a significant contribution to market quality by providing certain levels of Consolidated Volume through one or more of its Nasdaq Market Center MPIDs. In return, a QMM receives rebates with respect to all other displayed orders (other than Designated Retail Orders, as defined in Rule 7018) in securities priced at $1 or more per share that provide liquidity and were for securities listed on NYSE (''Tape A''), securities listed on exchanges other than NYSE or Nasdaq (''Tape B''), or securities listed on Nasdaq (''Tape C''). There are currently two Tiers of rebates provided, which are based on the amount of shares of liquidity provided a QMM executes in all securities through one or more of its Nasdaq Market Center MPIDs that represent certain levels of Consolidated Volume.[4]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The proposed fees were initially filed with the Commission as an immediately effective and operative rule change on September 1, 2016. *See* SR–NASDAQ–2016–125. On September 16, 2016 the Exchange withdrew SR–NASDAQ–2016–125 and replaced it with SR–NASDAQ–2016–128. To correct a technical issue with the filing, on September 16, 2016 the Exchange replaced SR–NASDAQ–2016–128 with SR–NASDAQ–2016–129. This filing replaces SR–NASDAQ–2016–129.

[4] Tier 1 requires a QMM to provide above 0.70% up to and including 0.90% of Consolidated Volume during the month, and Tier 2 requires above 0.90% of Consolidated Volume.

The Exchange further provides reduced charges to QMMs for removing liquidity from the Exchange in securities priced at $1 or more if the QMM's volume of liquidity added through one or more of its Nasdaq Market Center MPIDs during the month (as a percentage of Consolidated Volume) is no less than 0.80%. The Exchange is proposing to assess a new $0.0029 per share executed fee, assessed on a QMM that meets the Tier 2 criteria, for orders in Tape A and B securities priced at $1 or more per share that access liquidity on the Nasdaq Market Center, if the QMM also has a combined Consolidated Volume (adding and removing liquidity) of at least 3.5%. Thus, in addition to providing at least the minimum level of Consolidated Volume in adding liquidity as required by Tier 2, the QMM must also have a significant level of combined Consolidated Volume, *i.e.,* both adding and removing liquidity.

Second Change

The purpose of the second change is to amend the requirement to qualify for a rebate under the NBBO program. The NBBO Program provides members with per share executed rebates with respect to all other displayed orders (other than Designated Retail Orders) in securities priced at $1 or more per share that provide liquidity and establish the NBBO. First, the Exchange is proposing to limit eligibility for the credit provided by the program to executions from orders originating on ports that have a ratio of at least 25% NBBO liquidity provided to liquidity provided during the month. As described in the rule, NBBO liquidity provided means liquidity provided from orders (other than Designated Retail Orders, as defined in Rule 7018), that establish the NBBO, and displayed a quantity of at least one round lot at the time of execution. Under the NBBO program, the Exchange provides a $0.0004 per share executed rebate in Tape A and B securities if a member executes shares of liquidity provided in all securities through one or more Nasdaq Market Center MPIDs that represents 1.0% or more of Consolidated Volume during the month. The Exchange also provides an additional $0.0002 per share executed rebate for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity priced at $1 or more, if the member meets certain criteria, including having a ratio of at least 25% NBBO liquidity provided to liquidity provided during the month. The Exchange is now proposing to extend the 25% NBBO liquidity provided requirement to the ports used by the member to qualify for the $0.0004 per share executed rebate, in addition to applying the current Consolidated Volume eligibility requirement that the member must execute shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represents 1% or more of Consolidated Volume during the month.

Third Change

The Exchange is proposing to adopt the new Nasdaq Growth Program under Rule 7014(j). The Nasdaq Growth Program will provide a member a $0.0025 per share executed credit in securities priced $1 or more per share if it meets certain criteria. The proposed credit will be provided in lieu of other credits provided to the member for displayed quotes/orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity under Rule 7018, if the credit under the Nasdaq Growth Program is greater than the credit attained under Rule 7018. To be eligible for the credit a member must: (i) Add greater than 750,000 shares a day on average during the month through one or more of its Nasdaq Market Center MPIDs; and (ii) increase its shares of liquidity provided through one or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume by 25% versus the member's Growth Baseline. The Exchange is defining Growth Baseline as the member's shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs as a percentage of Consolidated Volume during the last month a member qualified for the Nasdaq Growth Program. If a member has not qualified for a credit under this program, its August 2016 share of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume will be used to establish a baseline. Thus, the purpose of the credit is to provide an incentive to members that do not qualify for other credits under Rule 7018 in excess of the Nasdaq Growth Program credit to increase their participation on the Exchange.

Fourth Change

The Exchange is proposing to amend Rule 7018(a)(3), which provides the fees and credits for execution and routing of orders in Tape B securities priced $1 or greater. Currently, the Exchange provides a $0.0001 per share executed credit to a member for displayed quotes and orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity to a member with shares of liquidity provided in all securities during the month representing at least 0.2% of Consolidated Volume during the month, through one or more of its Nasdaq Market Center MPIDs. The credit is provided in addition to the credits provided for displayed quotes and orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity. The Exchange is proposing to eliminate this credit tier and replace it with two new credit tiers that provide $0.0001 and $0.0002 per share executed, respectively. First, the Exchange is proposing to adopt a $0.0001 per share executed credit available to a member with shares of liquidity provided in securities that are listed on exchanges other than Nasdaq or NYSE (*i.e.,* Tape B) during the month representing at least 0.045% but less than 0.075% of Consolidated Volume during the month through one or more of its Nasdaq Market Center MPIDs. The Exchange is also proposing to adopt a $0.0002 per share executed credit to a member with shares of liquidity provided in securities that are listed on exchanges other than Nasdaq or NYSE (*i.e.,* Tape B) during the month representing at least 0.075% of Consolidated Volume during the month through one or more of its Nasdaq Market Center MPIDs. Thus, the Exchange is focusing the required shares of liquidity required to qualify for the credit on Tape B securities and reducing the level of Consolidated Volume required to qualify for either of the new credits in contrast to the existing credit. Like the current $0.0001 per share executed credit that is being replaced, the proposed new credits are provided in addition to the credits provided for displayed quotes and orders (other than Supplemental Orders or Designated Retail Orders) that provide liquidity.

Fifth Change

The Exchange is proposing to amend the criteria and fees assessed for transactions in the Closing Cross under Rule 7018(d). First, the Exchange is proposing to increase the fee assessed members for all quotes and orders (other than Market-on-Close and Limit-on-Close orders) executed in the Nasdaq Closing Cross from $0.0008 to $0.00085 per share executed. Second, the Exchange is proposing to increase the level of Consolidated Volume required to qualify for the lowest fee assessed for Market-on-Close (''MOC'') and Limit-on-Close (''LOC'') orders under Tier A from 1.4% to 1.8%. As a consequence, the Exchange is also proposing to amend Tier B to reflect the increase range of Consolidated Volume required to

qualify under the tier. Third, the Exchange is proposing to increase the Tier D fee from $0.0013 to $0.00135 per share executed, the Tier E fee from $0.00135 to $0.00145 per share executed, and the Tier F fee from $0.0015 to $0.0016 per share executed.

Sixth Change

The Exchange is proposing to amend the criteria and fees assessed for transactions in the Opening Cross, and make a clarifying change to the opening cross rules under Rule 7018(e). First, the Exchange is proposing to increase the fee assessed members under paragraph (1) of the rule for all quotes and orders (other than Market-on-Open, Limit-on-Open, Good-till-Cancelled, and Immediate-or-Cancel orders) executed in the Nasdaq Opening Cross from $0.0008 to $0.00085 per share executed. Second, the Exchange is proposing to increase the monthly fee cap provided under paragraph (2) of the rule from $30,000 to $35,000. Last, the Exchange is proposing to clarify the qualification criteria of the fee cap under paragraph (2) to make it clear that a member must add at least one million shares of liquidity, on average *per day,* per month, which is how the criteria is currently applied and how it was announced to market participants when it was adopted.[5] As it is currently written, the criteria is vague on the time period over which a member must have one million shares of liquidity.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[6] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[7] in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is 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; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

First Change

The Exchange believes that assessing a new $0.0029 fee under the QMM Program is reasonable because it is set at a level that is lower than the standard removal fee of $0.0030 per share executed, thereby providing an incentive to market participants, and it is also based on the Exchange's analysis of the cost to the Exchange of offering a lower fee, thereby decreasing the revenue derived from transactions by members that qualify for the new fee, and the desired benefit to the market provided by the members that meet the new fee's qualification criteria. In this case, the criteria provides an incentive to members to increase their participation in the market as measured by Consolidated Volume, which benefits all market participants. Currently, members may qualify for a $0.00295 per share executed fee for removing liquidity in Tape A or B securities priced at $1 or more if the member's volume of liquidity added through one or more of its Nasdaq Market Center MPIDs during the month (as a percentage of Consolidated Volume) is not less than 0.80%. The Exchange is proposing a similar fee for removing liquidity in Tape A or B securities priced at $1 or more if the member qualifies under the Tier 2 criteria that requires the member to execute shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent above 0.90% of Consolidated Volume during the month, and the member must also have a combined Consolidated Volume (adding and removing liquidity) of at least 3.5%. Thus, to qualify for a lower transaction fee for removing liquidity in Tape A or B securities under the QMM Program, the member must both provide greater Consolidated Volume through adding liquidity during the month (*i.e.,* 0.90% versus 0.80%) and provide a certain level of combined Consolidated Volume, which accounts for both adding liquidity and removing liquidity. The Exchange believes that the new fee is an equitable allocation and is not unfairly discriminatory because all members that participate on the Exchange may qualify for the proposed reduced Tape A and B removal fee if they elect to provide the Consolidated Volume required. The Exchange uses Consolidated Volume as a measure of the member's activity in comparison to that of the market as a whole. Thus, the proposed fee and criteria required to qualify for the fee does not discriminate unfairly and is equitably allocated, as eligibility for the fee is tied to the member's performance in comparison to other participants in aggregate.

Second Change

The Exchange believes that the $0.0004 per share executed rebate of the NBBO Program to executions from orders originating on a port that has a ratio of at least 25% NBBO liquidity provided to liquidity provided is reasonable because it is the same rebate that the Exchange currently applies under the program and is based on the Exchange's continued belief that it is the appropriate level of rebate provided in return for the market-improving liquidity required to receive the rebate. The Exchange believes that tying eligibility for the $0.0004 per share executed rebate of the NBBO Program to executions from orders originating on a port that has a ratio of at least 25% NBBO liquidity provided to liquidity provided is an equitable allocation and is not unfairly discriminatory because the measurement criteria is identical to the criteria used to qualify for the $0.0002 per share executed rebate, although the $0.0002 rebate is measured across one or more of a members Nasdaq Market Center MPIDs. NBBO liquidity provided to liquidity provided is a ratio of the member's liquidity provided that establishes the NBBO and displayed at a quantity of at least one round lot as compared to all liquidity provided by the member. Thus, the Exchange is making a member provide more market-improving activity (in addition to the Consolidated Volume requirement) to receive the rebate. The Exchange believes that limiting the NBBO liquidity provided to executions from orders on that port is an equitable allocation and is not unfairly discriminatory because it directly ties the member's beneficial activity to the ports through which the rebate is applied. The Exchange believes this will create greater incentive for firms to establish the NBBO while more closely tying the credit to the market improving behavior the Exchange is trying to incentivize.

Thus, any member may choose to participate in the market in a manner to meet the NBBO liquidity criteria.

Third Change

The Exchange believes that the $0.0025 per share executed credit provided by the Nasdaq Growth Program is reasonable because it is set at a level that the Exchange believes will provide adequate incentive to market participants to improve their participation on the Exchange. The

[5] *See* Securities Exchange Act Release No. 71925 (April 10, 2014), 79 FR 21328 (April 15, 2014) (SR–NASDAQ–2014–031); *see also http://www.nasdaqtrader.com/TraderNews.aspx?id=ETA2014-28.*

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(4) and (5).

credit is also based on the Exchange's analysis of the cost to the Exchange of providing credits to members that qualify for the new credit and the desired benefit to the market provided by the members that meet the new fee's qualification criteria and thereby increase liquidity on the Exchange. The Exchange believes that the Nasdaq Growth Program is an equitable allocation and is not unfairly discriminatory because it is designed to improve the market for all market participants on the Exchange, even though not all members will be eligible for the new credit. The Exchange is targeting members that may not have adequate participation to qualify for certain credits under Rule 7018(a), and who may be significantly far from reaching a level of participation to qualify for such credits. The Exchange believes it is important to provide such members incentive to incrementally increase their participation in the market, which will benefit all market participants. The Exchange is proposing to achieve this by requiring a member to both add greater than 750,000 shares a day on average during the month through one or more of its Nasdaq Market Center MPIDs and increase its share of liquidity provided through on or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume by 25% versus the member's Growth Baseline. The Exchange believes that this criteria is an equitable allocation and is not unfairly discriminatory because it requires a minimum level of participation in the market and it ensures that members meaningfully remain in the market. There are tiers under Rule 7018 that afford members a $0.0025 per share executed credit, for example, member with shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs that represent more than 0.10% of Consolidated Volume during the month, and the growth program aims to provide a path for firms to hit the Rule 7018 thresholds by receiving benefits as they continue to grow. The Exchange is also proposing to require a member to increase its shares of liquidity provided through one or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume by 25% versus the member's Growth Baseline. The Growth Baseline will be defined as the member's shares of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume during the last month a member qualified for the Nasdaq Growth Program. As a consequence, although any member may qualify under the program if it meets the criteria, members that currently qualify for higher credits under Rule 7018(a) will not receive the proposed credit. The Exchange believes that this is an equitable allocation and is not unfairly discriminatory because such members are receiving higher credits in lieu of the lower proposed credit, and the increased liquidity provided by the members that qualify under the new program benefit all market participants. Moreover, the program is designed to provide incentive to members to continue to increase their participation until such time that they qualify for other, higher credits under Rule 7018(a). If a member has not qualified for a credit under this program, its August 2016 share of liquidity provided in all securities through one or more of its Nasdaq Market Center MPIDs as a percent of Consolidated Volume will be used to establish a baseline. Thus, the second criteria requires a certain level of increased participation in the market. The Exchange believes that the program is an equitable allocation and is not unfairly discriminatory because members must continue to improve their participation in the market month over month in order to continue receiving the credit until such a time that it qualifies for a higher credit under Rule 7018(a). As a consequence, a member that qualifies for the new credit will eventually become ineligible for the credit by either failing to grow its shares of liquidity or graduating to a higher credit in lieu of proposed new credit. The Exchange chose to use August 2016 as the initial baseline since it was the last month of activity prior to the start of the program and there were no market holidays in the month.

Fourth Change

The Exchange believes that eliminating the $0.0001 per share executed credit under Rule 7018(a)(3) provided to a member with shares of liquidity provided in all securities of at least 0.2% of Consolidated Volume during the month in the securities of any Tape, and replacing it with two new credits of $0.0001 and $0.0002 per share executed that are based on certain levels of Consolidated Volume in Tape B securities during the month is reasonable because the level of credit provided is identical to, or very close to, the current credit provided. The Exchange believes that the two credits are sufficient to provide incentive to members to meet the criteria. Moreover, the credit is based on the Exchange's analysis of the cost to the Exchange of providing credits to members that qualify for the new credit and the desired benefit to the market provided by the members that meet the new fee's qualification criteria and thereby increase liquidity on the Exchange.

The Exchange believes that eliminating the $0.0001 per share executed credit under Rule 7018(a)(3) provided to a member with shares of liquidity provided in all securities of at least 0.2% of Consolidated Volume during the month in the securities of any Tape, and replacing it with two new credits that are based on certain levels of Consolidated Volume in Tape B securities during the month is an equitable allocation and is not unfairly discriminatory because it more closely ties the criteria to improving the market on the Exchange in Tape B securities. Currently, members are provided the $0.0001 per share executed credit for displayed quotes and orders (other than Supplemental Orders or Designated Retail Orders) in Tape B securities if the member provides the required Consolidated Volume. In lieu of the current criteria, the Exchange is requiring a member provide at least 0.045% but less than 0.075% of Consolidated Volume in Tape B securities to receive a $0.0001 per share executed credit, and is requiring a member provide at least 0.075% of Consolidated Volume in Tape B securities during the month to receive a $0.0002 per share executed credit. Thus, the Exchange is reducing the level of Consolidated Volume required to receive either of the proposed credits in comparison to the current credit, which is reflective of limiting the Consolidated Volume considered for the credits to Tape B securities. The Exchange believes that the proposed $0.0002 per share credit is an equitable allocation and is not unfairly discriminatory because it requires significantly greater Consolidated Volume in Tape B securities during the month than the proposed $0.0001 eligibility criteria. The Exchange also believes that the proposed change is an equitable allocation and is not unfairly discriminatory because a member is free to choose which securities it transacts in and may choose to increase its level of activity in Tape B securities to qualify for the proposed credits. The Exchange notes that some members may continue to qualify for the credit because the Exchange has proposed reduced levels of Consolidated Volume, which members may already provide. To the extent that a member qualified for the current credit based largely on its activity in Tape A and C securities, it may have to increase its activity in Tape

B securities to receive one of the new credits. The Exchange is not proposing similar credits for transactions in Tape C and A securities under Rules 7018(a)(1) and (2), respectively, because it must balance its desire to provide incentives to market participants to improve the market where it deems it is most needed against the cost to the Exchange in providing such incentives. Thus, the Exchange believes that focusing the changes on activity in Tape B securities is an equitable allocation and is not unfairly discriminatory because it will provide further incentive to members to participate in Tape B securities, the market in which the Exchange is seeking to further improve.

Fifth Change

The Exchange believes that increasing the fees under Rule 7018(d), including the changes to the criteria for certain fees that make it more difficult to qualify for a lower fee, are reasonable because the Exchange notes that the fees assessed for participation in the Closing Cross are significantly less than the fees assessed for participation in regular market hours trading. From time to time the Exchange must assess the level of fees collected in comparison to the costs associated with offering services, such as the Closing Cross. In this case, the Exchange has determined that raising the fees for use of the Closing Cross is appropriate. The Exchange believes that the proposed changes to fees assessed under Rule 7018(d) for participation in the Closing Cross is an equitable allocation and is not unfairly discriminatory because it is increasing the fees and criteria to qualify for the lowest fee to better align the fees collected for participation in the Closing Cross with the costs associated with operating the Closing Cross. As noted, the fees assessed for participation in the Closing Cross are significantly less than the fees assessed for participation in regular market hours trading. Also as noted, from time to time the Exchange must assess the level of fees collected in comparison to the costs associated with offering services, such as the Closing Cross. In this case, the Exchange is proposing the increased fees and more stringent criteria to increase revenue provided by the Closing Cross to cover the costs associated with offering the service. The Exchange does not believe that the proposed changes will affect participation in the Closing Cross, but to the extent the Exchange realizes less participation in the Closing Cross as a result of the fee increases and change to the Tier A criteria, it may realize a reduction in revenue. The Exchange notes that, in addition to increasing the fee assessed for quotes and orders (other than Market-on-Close and Limit-on-Close orders) executed in the Closing Cross, it is increasing fees for MOC and LOC orders under Tiers D, E and F, which may provide incentive to market participants in these tiers to increase their shares of liquidity provided to qualify for a Tier with a lower fee. In this regard, the Exchange has observed that most members qualify under Tiers D, E and F, and consequently increasing the fee may incentivize members to increase the level of shares of liquidity provided to qualify for a lower fee. The Exchange is increasing the level of Consolidated Volume required to qualify for the lowest fee under Tier A, which will make qualifying for the credit more difficult to the extent a member does not qualify under the alternative MOC/LOC volume standard. In lieu of increasing the fee, the Exchange has determined to increase the level of Consolidated Volume in all securities to make the tier more meaningful.

Thus, the Exchange believes that increasing the criteria required to qualify for Tier A and increasing the fees assessed for Tiers D, E and F is an equitable allocation and is not unfairly discriminatory because the Exchange has observed the most members qualifying under these tiers. Accordingly, the Exchange believes that the changes to these tiers, and not the remaining tiers is appropriate.

Sixth Change

The Exchange believes that increasing the fee assessed for transactions in the Opening Cross and the fee cap thereon is reasonable because it better aligns the fees collected for participation in the Opening Cross with the costs associated with operating the Opening Cross. The Exchange notes that the fee assessed for participation in the Opening Cross is significantly less that the fees assessed for participation in regular market hours trading. From time to time the Exchange must assess the level of fees collected in comparison to the costs associated with offering services, such as the Opening Cross. In this case, the Exchange is proposing the increased fee and increased fee cap to increase revenue provided by the Opening Cross to cover the costs associated with offering the service. The Exchange does not believe that the proposed changes will affect participation in the Opening Cross, but to the extent the Exchange realizes less participation in the Opening Cross as a result of the fee increase and increased fee cap, it may realize a reduction in revenue.

The Exchange believes that the increased fee assessed for all quotes and orders executed in the Nasdaq Opening Cross, other than Market-on-Open, Limit-on-Open, Good-till-Cancelled, and Immediate-or-Cancel orders, is an equitable allocation and is not unfairly discriminatory because even with the increase this fee is lower than the other opening cross fees assessed under Rule 7018(e)(1), and thus continues to promote entry of orders covered by the fee. The Exchange believes that increasing the fee cap is an equitable allocation and is not unfairly discriminatory because those members that are most impacted by the fee cap increase are also the heaviest users of the cross and receive the most benefit from its use.

Last, the Exchange believes that the new clarifying language it is proposing to add to the fee cap eligibility criteria under Rule 7018(e)(2) 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 because it clarifies the level of shares of liquidity added that a member must have to qualify for the fee cap, which is currently unclear in the current rule text.

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 changes to the charges assessed and credits available to member firms for execution of securities in securities of all three Tapes do 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. In this instance, changes to the incentive fees and rebates provided under Rule 7014 are reflective of the Exchange's need to balance the incentives provided and the resulting beneficial market behavior with the cost of such incentives to the Exchange and their effectiveness. The Exchange is both offering new incentives and strengthening criteria for other incentives. Similarly, the changes to the credits and fees assessed for the use of the order execution and routing services of the Nasdaq Market Center by members for all securities priced at $1 or more that it trades are reflective of the same analysis of the benefits versus costs incurred by the Exchange in offering execution and routing services. In this present case, the Exchange is modifying and adding new credits while also increasing fees assessed for use of the Nasdaq Opening and Closing Crosses. All of the proposed changes are subject to intense competition among trading venues, which are free to make changes to their fees and credits that they provide as a competitive response to the Exchange's proposed changes. Moreover, the proposed changes do not impose a burden on competition because Exchange membership and participation is optional and is also the subject of competition from other trading venues. A member may elect to participate on another exchange to extent it believes that fees assessed by Nasdaq are too high, or credits and rebates provided are too low. For these reasons, the Exchange does not believe that any of the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets. Last, because there are numerous competitive alternatives to the use of the Exchange, it is likely that the Exchange will lose market share as a result of the changes if they are unattractive to market participants.

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.[8]

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–2016–132 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–2016–132. 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–2016–132, and should be submitted on or before October 26, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Robert W. Errett,

Deputy Secretary.

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[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78979; File No. SR–NASDAQ–2016–127]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change To Amend the By-Laws of Nasdaq, Inc. To Implement Proxy Access

September 29, 2016.

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 September 15, 2016, 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 is filing this proposed rule change with respect to amendments of the By-Laws (the ''By-Laws'') of its parent corporation, Nasdaq, Inc. (''Nasdaq'' or the ''Company''), to implement proxy access. The proposed amendments will be implemented on a date designated by the Company following approval by the Commission.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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

Background

At Nasdaq's 2016 annual meeting held on May 5, 2016, Nasdaq's stockholders considered a stockholder proposal submitted under Rule 14a–8 under the Act.[3] The proposal, which passed with 73.52% of the votes cast, requested that Nasdaq's Board of Directors (the ''Board'') take steps to implement a ''proxy access'' by-law. Proxy access by-laws allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on a board and have those candidates included in a company's proxy materials. Such provisions allow stockholders to nominate candidates without undertaking the expense of a proxy solicitation.

Following the 2016 annual meeting, the Nominating & Governance Committee (the ''Committee'') of the Board and the Board reviewed the voting results on the stockholder proposal and discussed proxy access generally. The Committee ultimately recommended to the Board, and the Board approved, certain changes to Nasdaq's By-Laws to implement proxy access. Nasdaq now proposes to make these changes by adopting new Section 3.6 of the By-Laws and making certain conforming changes to current Sections 3.1, 3.3 and 3.5 of the By-Laws, all of which are described further below.

In developing its proposal, Nasdaq has generally tried to balance the relative weight of arguments for and against proxy access provisions. On the one hand, Nasdaq recognizes the significance of this issue to some investors, who see proxy access as an important accountability mechanism that allows them to participate in board elections through the nomination of stockholder candidates that are presented in a company's proxy statement. On the other hand, Nasdaq's proposed proxy access provision includes certain procedural requirements that ensure, among other things, that the Company and its stockholders will have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees will comply with applicable laws, regulations and other requirements.

Proposed Section 3.6(a) of the By-Laws

To respond to feedback from its stockholders, Nasdaq proposes to amend its By-Laws to, as set forth in the first sentence of proposed Section 3.6(a), require the Company to include in its proxy statement, its form proxy and any ballot distributed at the stockholder meeting, the name of, and certain Required Information[4] about, any person nominated for election (the ''Stockholder Nominee'') to the Board by a stockholder or group of stockholders (the ''Eligible Stockholder'')[5] that satisfies the requirements set forth in the proxy access provision of Nasdaq's By-Laws.[6] To utilize this provision, the Eligible Stockholder must expressly elect at the time of providing a required notice to the Company of the proxy access nomination (the ''Notice of Proxy Access Nomination'') to have its nominee included in the Company's proxy materials. Stockholders will be eligible to submit proxy access nominations only at annual meetings of stockholders when the Board solicits proxies with respect to the election of directors.

The next two sentences of Section 3.6(a) provide some additional clarification on the term ''Eligible Stockholder.'' First, in calculating the number of stockholders in a group seeking to qualify as an Eligible Stockholder, two or more of the following types of funds shall be counted as one stockholder: (i) Funds under common management and investment control, (ii) funds under common management and funded primarily by the same employer, or (iii) funds that are a ''group of investment companies'' as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Company Act of 1940, as amended.[7] Nasdaq views this as a stockholder-friendly provision that will make it easier for such funds to participate in a proxy access nomination since they will not have to comply with the procedural requirements in the proxy access provision multiple times. Second, in the event that the Eligible Stockholder consists of a group of stockholders, any and all requirements and obligations for an individual Eligible Stockholder shall apply to each member of the group, except that the Required Ownership Percentage (discussed further below) shall apply to the ownership of the group in the aggregate. Generally, the applicable requirements and obligations relate to information that each member of the nominating group must provide to Nasdaq about itself, as discussed further below. Nasdaq believes it is reasonable to require each member of the nominating group to provide such information so that both the Company and its stockholders are fully informed about the entire group making the proxy access nomination.

The final sentence of proposed Section 3.6(a) allows Nasdaq to omit from its proxy materials any information or Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law or regulation. This provision allows Nasdaq to comply with Rule 14a–9 under the Act[8] and to

[3] *See* 17 CFR 240.14a–8, which establishes procedures pursuant to which stockholders of a public company may have their proposals placed alongside management's proposals in the company's proxy materials for presentation to a vote at a meeting of stockholders.

[4] The Required Information is the information provided to Nasdaq's Corporate Secretary about the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Company's proxy statement by the regulations promulgated under the Act, and if the Eligible Stockholder so elects, a written statement, not to exceed 500 words, in support of the Stockholder Nominee(s)' candidacy (the ''Statement'').

[5] As used throughout Nasdaq's By-Laws, the term ''Eligible Stockholder'' includes each member of a stockholder group that submits a proxy access nomination to the extent the context requires.

[6] When the Company includes proxy access nominees in the proxy materials, such individuals will be included in addition to any persons nominated for election to the Board or any committee thereof.

[7] *See* 15 U.S.C. 80a–12(d)(1)(G)(ii), which defines ''group of investment companies'' as any two or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.

[8] *See* 17 CFR 240.14a–9, which generally prohibits proxy solicitations that contain any statement which, at the time and in the light of the

protect its stockholders from information that is materially untrue or that violates any law or regulation. The final sentence of proposed Section 3.6(a) also explicitly allows Nasdaq to solicit against, and include in the proxy statement its own statement relating to, any Stockholder Nominee. This provision merely clarifies that just because Nasdaq must include a proxy access nominee in its proxy materials if the proxy access provisions are satisfied, Nasdaq does not necessarily have to support that nominee.

Proposed Section 3.6(b) of the By-Laws

Proposed Section 3.6(b) of the By-Laws establishes the deadline for a timely Notice of Proxy Access Nomination. Specifically, such a notice must be addressed to, and received by, Nasdaq's Corporate Secretary no earlier than one hundred fifty (150) days and no later than one hundred twenty (120) days before the anniversary of the date that Nasdaq issued its proxy statement for the previous year's annual meeting of stockholders. The Company believes this notice period will provide stockholders an adequate window to submit nominees via proxy access, while also providing the Company adequate time to diligence [sic] a proxy access nominee before including them in the proxy statement for the next annual meeting of stockholders.

Proposed Section 3.6(c) of the By-Laws

Proposed Section 3.6(c) specifies that the maximum number of Stockholder Nominees nominated by all Eligible Stockholders that will be included in Nasdaq's proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two and 25% of the total number of directors in office (rounded down to the nearest whole number) as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with the proxy access provision of the By-Laws (the ''Final Proxy Access Nomination Date''). In the event that one or more vacancies for any reason occurs after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board resolves to reduce the size of the Board in connection therewith, the maximum number of Stockholder Nominees included in Nasdaq's proxy materials shall be calculated based on the number of directors in office as so reduced. Any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision of the By-Laws whom the Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the maximum number of Stockholder Nominees has been reached.

Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to the proxy access provision exceeds the maximum number of nominees allowed. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders exceeds the maximum number of nominees allowed, the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder will be selected for inclusion in the proxy materials until the maximum number is reached, going in order of the amount (largest to smallest) of shares of Nasdaq's outstanding common stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to Nasdaq. If the maximum number is not reached after the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder has been selected, this process will continue as many times as necessary, following the same order each time, until the maximum number is reached. Following such determination, if any Stockholder Nominee who satisfies the eligibility requirements thereafter is nominated by the Board, or is not included in the proxy materials or is not submitted for election as a director, in either case, as a result of the Eligible Stockholder becoming ineligible or withdrawing its nomination, the Stockholder Nominee becoming unwilling or unable to serve on the Board or the Eligible Stockholder or the Stockholder Nominee failing to comply with the proxy access provision of the By-Laws, no other nominee or nominees shall be included in the proxy materials or otherwise submitted for director election in substitution thereof.

The Company believes it is reasonable to limit the Board seats available to proxy access nominees, to establish procedures for selecting candidates if the nominee limit is exceeded and to exclude further proxy access nominees in the cases set forth above. The limitation on Board seats available to proxy access nominees ensures that proxy access cannot be used to take over the entire Board, which is not the stated purpose of proxy access campaigns. The procedures for selecting candidates if the nominee limit is exceeded establish clear and rational guidelines for an orderly nomination process to avoid the Company having to make arbitrary judgments among candidates. Finally, the exclusion of further proxy access nominees in certain cases will avoid further time and expense to the Company when the proxy access nominee has been nominated by the Board, in which case the goal of the proxy access nomination has been achieved, or in certain cases when the Eligible Stockholder or Stockholder Nominee is at fault.

Proposed Section 3.6(d) of the By-Laws

Proposed Section 3.6(d) clarifies, for the avoidance of doubt, how ''ownership'' will be defined for purposes of meeting the Required Ownership Percentage (discussed further below). Specifically, an Eligible Stockholder shall be deemed to ''own'' only those outstanding shares of Nasdaq's common stock as to which the stockholder possesses both: (i) The full voting and investment rights pertaining to the shares; and (ii) the full economic interest in (including the opportunity for profit from and risk of loss on) such shares; provided that the number of shares calculated in accordance with clauses (i) and (ii) shall not include any shares:

- Sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed, including any short sale;
- borrowed by such stockholder or any of its affiliates for any purposes or purchased by such stockholder or any of its affiliates pursuant to an agreement to resell; or
- subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar agreement entered into by such stockholder or any of its affiliates, whether any such instrument or agreement is to be settled with shares or with cash based on the notional amount or value of shares of Nasdaq's outstanding common stock, in any such case which instrument or

circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

agreement has, or is intended to have, or if exercised by either party would have, the purpose or effect of:

○ Reducing in any manner, to any extent or at any time in the future, such stockholder's or its affiliates' full right to vote or direct the voting of any such shares; and/or

○ hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or its affiliates.

Further, a stockholder shall ''own'' shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has delegated any voting power by means of a proxy, power of attorney or other instrument or arrangement which is revocable at any time by the stockholder. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has loaned such shares provided that the stockholder has the power to recall such loaned shares on three (3) business days' notice, has recalled such loaned shares as of the date of the Notice of Proxy Access Nomination and holds such shares through the date of the annual meeting. The terms ''owned,'' ''owning'' and other variations of the word ''own'' shall have correlative meanings. Whether outstanding shares of Nasdaq's common stock are ''owned'' for these purposes shall be determined by the Board or any committee thereof, in each case, in its sole discretion. For purposes of the proxy access provision of the By-Laws, the term ''affiliate'' or ''affiliates'' shall have the meaning ascribed thereto under the rules and regulations of the Act.[9] An Eligible Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to own for the purposes of the proxy access provision of the By-Laws.

Proposed Section 3.6(e) of the By-Laws

The first paragraph of proposed Section 3.6(e) establishes certain requirements for an Eligible Stockholder to make a proxy access nomination. Specifically, an Eligible Stockholder must have owned (defined as discussed above) 3% or more (the ''Required Ownership Percentage'') of Nasdaq's outstanding common stock (the ''Required Shares'') continuously for 3 years (the ''Minimum Holding Period'') as of both the date the Notice of Proxy Access Nomination is received by Nasdaq's Corporate Secretary and the record date for determining the stockholders entitled to vote at the annual meeting and must continue to own the Required Shares through the meeting date.

Proposed Section 3.6(e) also sets forth the information that an Eligible Stockholder must provide to Nasdaq's Corporate Secretary in writing within the deadline discussed above in order to make a proxy access nomination. This information includes:

• one or more written statements from the record holder of the shares (and from each intermediary through which the shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Notice of Proxy Access Nomination is delivered to, or mailed to and received by, Nasdaq's Corporate Secretary, the Eligible Stockholder owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder's agreement to provide, within five (5) business days after the record date for the annual meeting, written statements from the record holder and intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date; [10]

• a copy of the Schedule 14N that has been filed with the SEC as required by Rule 14a–18 under the Act; [11]

• the information, representations and agreements with respect to the Eligible Stockholder that are the same as those that would be required to be set forth in a stockholder's notice of nomination with respect to a ''Proposing Person'' pursuant to Section 3.1(b)(i) and Section 3.1(b)(iii) of the By-Laws; [12]

• the consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected; [13]

• a representation that the Eligible Stockholder:

○ acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of Nasdaq, and does not presently have such intent;[14]

○ presently intends to maintain qualifying ownership of the Required Shares through the date of the annual meeting; [15]

○ has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s); [16]

○ has not engaged and will not engage in, and has not and will not be a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting, other than its Stockholder Nominee(s) or a nominee of the Board; [17]

○ agrees to comply with all applicable laws and regulations with respect to any solicitation in connection with the meeting or applicable to the filing and use, if any, of soliciting material; [18]

○ will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; [19] and

○ as to any two or more funds whose shares are aggregated to count as one stockholder for the purpose of constituting an Eligible Stockholder, within five business days after the date

[9] Pursuant to Rule 12b–2 under the Act, ''[a]n 'affiliate' of, or a person 'affiliated' with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.'' 17 CFR 240.12b–2. Further, ''[t]he term 'control' (including the terms 'controlling,' 'controlled by' and 'under common control with') means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'' 17 CFR 240.12b–2.

[10] *See* proposed Section 3.6(e)(i) of the By-Laws.

[11] *See* proposed Section 3.6(e)(ii) of the By-Laws; *see also* 17 CFR 240.14n–101 and 17 CFR 240.14a–18, which generally require a Nominating Stockholder to provide notice to the Company of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to the Company.

[12] *See* proposed Section 3.6(e)(iii) of the By-Laws; *see also* Sections 3.1(b)(i) and 3.1(b)(iii) of the By-Laws, which constitute part of Nasdaq's ''advance notice'' provision under which a ''Proposing Person'' may, among other things, nominate a person for election to the Board.

[13] *See* proposed Section 3.6(e)(iv) of the By-Laws.

[14] *See* proposed Section 3.6(e)(v)(A) of the By-Laws.

[15] *See* proposed Section 3.6(e)(v)(B) of the By-Laws.

[16] *See* proposed Section 3.6(e)(v)(C) of the By-Laws.

[17] *See* proposed Section 3.6(e)(v)(D) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[18] *See* proposed Section 3.6(e)(v)(E) of the By-Laws.

[19] *See* proposed Section 3.6(e)(v)(F) of the By-Laws.

of the Notice of Proxy Access Nomination, will provide to Nasdaq documentation reasonably satisfactory to Nasdaq that demonstrates that the funds satisfy the requirements in the By-Laws, which were discussed above, for the funds to qualify as one Eligible Stockholder; [20]

- a representation as to the Eligible Stockholder's intentions with respect to maintaining qualifying ownership of the Required Shares for at least one year following the annual meeting; [21]
- an undertaking that the Eligible Stockholder agrees to:
  - assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder's communications with Nasdaq's stockholders or out of the information that the Eligible Stockholder provided to Nasdaq; [22]
  - indemnify and hold harmless Nasdaq and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against Nasdaq or any of its directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to the proxy access provision; [23] and
  - file with the SEC any solicitation or other communication with Nasdaq's stockholders relating to the meeting at which the Stockholder Nominee will be nominated, regardless of whether any such filing is required under Regulation 14A of the Act or whether any exemption from filing is available thereunder; [24] and
- in the case of a nomination by a group of stockholders that together is an Eligible Stockholder, the designation by all group members of one group member that is authorized to act on behalf of all such members with respect to the nomination and matters related thereto, including withdrawal of the nomination.[25]

In proposing the Required Ownership Percentage and the Minimum Holding Period, Nasdaq seeks to ensure that the Eligible Stockholder has had a sufficient stake in the Company for a sufficient amount of time and is not pursuing a short-term agenda. In proposing the informational requirements for the Eligible Stockholder, Nasdaq's goal is to gather sufficient information about the Eligible Stockholder for both itself and its stockholders. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(f) of the By-Laws

Proposed Section 3.6(f) establishes the information the Stockholder Nominee must deliver to Nasdaq's Corporate Secretary within the time period specified for delivering the Notice of Proxy Access Nomination. This information includes:

- the information required with respect to persons whom a stockholder proposes to nominate for election or reelection as a director by Section 3.1(b)(i) of the By-Laws [26] including, but not limited to, the signed questionnaire, representation and agreement required by Section 3.1(b)(i)(D) of the By-Laws; [27] and
- a written representation and agreement that such person:
  - will act as a representative of all of Nasdaq's stockholders while serving as a director; and
  - will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects (and shall not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading).

In addition, at the request of Nasdaq, the Stockholder Nominee(s) must submit all completed and signed questionnaires required of Nasdaq's directors and officers. Nasdaq may request such additional information as necessary to (y) permit the Board to determine if each Stockholder Nominee satisfies the requirements of the proxy access provision of the By-Laws or if each Stockholder Nominee is independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing the independence of Nasdaq's directors [28] and/or (z) permit Nasdaq's Corporate Secretary to determine the classification of such nominee as an Industry, Non-Industry, Issuer or Public Director, if applicable, in order to make the certification referenced in Section 4.13(h)(iii) of the By-Laws.[29]

Like the informational requirements for an Eligible Stockholder, which are set forth above, the informational requirements for the Stockholder Nominee ensure that both Nasdaq and its stockholders will have sufficient information about the Stockholder Nominee. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(g) of the By-Laws

Pursuant to proposed Section 3.6(g), each Eligible Stockholder or Stockholder Nominee must promptly notify Nasdaq's Corporate Secretary of any information or communications provided by the Eligible Stockholder or Stockholder Nominee to Nasdaq or its stockholders that ceases to be true and correct in all material respects or omits a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading and of the information that is required to correct any such defect. This provision further

[20] *See* proposed Section 3.6(e)(v)(G) of the By-Laws.

[21] *See* proposed Section 3.6(e)(vi) of the By-Laws.

[22] *See* proposed Section 3.6(e)(vii)(A) of the By-Laws.

[23] *See* proposed Section 3.6(e)(vii)(B) of the By-Laws.

[24] *See* proposed Section 3.6(e)(vii)(C) of the By-Laws; *see also* 17 CFR 240.14a–1–14b–2, which governs solicitations of proxies.

[25] *See* proposed Section 3.6(e)(viii) of the By-Laws.

[26] Section 3.1(b)(i) of the By-Laws describes the information that a proposing stockholder must provide about an individual the stockholder proposes to nominate for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[27] Section 3.1(b)(i)(D) of the By-Laws requires a completed and signed questionnaire, representation and agreement, each containing certain information, from each individual proposed to be nominated for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[28] Currently, the independence of Nasdaq's directors is determined pursuant to the definition of ''Independent Director'' in Listing Rule 5605(a)(2) of The NASDAQ Stock Market, under which certain categories of individuals cannot be deemed independent and with respect to other individuals, the Board must make an affirmative determination that such individual has no relationship that, in the opinion of the Board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Other independence standards under the SEC rules and the Listing Rules of The NASDAQ Stock Market apply to members of certain of the Board's committees. As detailed below, the Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board.

[29] Section 4.13(h)(iii) of the By-Laws requires Nasdaq's Corporate Secretary to collect from each nominee for director such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, Issuer, or Public Director, if applicable, and to certify to the Committee each nominee's classification, if applicable. Detailed definitions of the terms ''Industry Director,'' ''Non-Industry Director,'' ''Issuer Director'' and ''Public Director'' are included in Article I of the By-Laws.

states that providing any such notification shall not be deemed to cure any defect or, with respect to any defect that Nasdaq determines is material, limit Nasdaq's rights to omit a Stockholder Nominee from its proxy materials. This provision is intended to protect Nasdaq's stockholders by requiring an Eligible Stockholder or Stockholder Nominee to give Nasdaq notice of information previously provided that is materially untrue. Nasdaq may then decide what action to take with respect to such defect, which may include, with respect to a material defect, omitting the relevant Stockholder Nominee from its proxy materials.

Proposed Section 3.6(h) of the By-Laws

Proposed Section 3.6(h) provides that Nasdaq shall not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders under certain circumstances. In these situations, the proxy access nomination shall be disregarded and no vote on such Stockholder Nominee will occur, even if Nasdaq has received proxies in respect of the vote. These circumstances occur when the Stockholder Nominee:

- Has been nominated by an Eligible Stockholder who has engaged in or is currently engaged in, or has been or is a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board; [30]
- is not independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing independence of Nasdaq's directors, in each case as determined by the Board in its sole discretion; [31]
- would, if elected as a member of the Board, cause Nasdaq to be in violation of the By-Laws (including but not limited to the compositional requirements of the Board set forth in Section 4.3 of the By-Laws), its Amended and Restated Certificate of Incorporation, the rules and listing standards of The NASDAQ Stock Market, or any applicable state or federal law, rule or regulation; [32]
- is or has been, within the past three (3) years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914; [33]
- is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past ten (10) years; [34]
- is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended; [35]
- is subject to ''statutory disqualification'' under Section 3(a)(39) of the Act; [36]
- has, or the applicable Eligible Stockholder has, provided information to Nasdaq in respect of the proxy access nomination that was untrue in any material respect or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, as determined by the Board or any committee thereof, in each case, in its sole discretion; [37] or
- breaches or fails, or the applicable Eligible Stockholder breaches or fails, to comply with its obligations pursuant to the By-Laws, including, but not limited to, the proxy access provisions and any agreement, representation or undertaking required by the proxy access provisions.[38]

Nasdaq believes these provisions will protect the Company and its stockholders by allowing it to exclude certain categories of objectionable Stockholder Nominees from the proxy statement.

Proposed Section 3.6(i) of the By-Laws

Under proposed Section 3.6(i), the Board or the chairman of the meeting of stockholders shall declare a proxy access nomination invalid, and such nomination shall be disregarded even if proxies in respect of such nomination have been received by the Company, if:

- The Stockholder Nominee(s) and/or the applicable Eligible Stockholder have breached its or their obligations under the proxy access provision of the By-Laws, as determined by the Board or the chairman of the meeting of stockholders, in each case, in its or his sole discretion; or
- the Eligible Stockholder (or a qualified representative thereof) does not appear at the meeting of stockholders to present the proxy access nomination.

Nasdaq believes this provision protects the Company and its stockholders by providing the Board or the chairman of the stockholder meeting limited authority to disqualify a proxy access nominee when that nominee or the sponsoring stockholder(s) have breached an obligation under the proxy access provision, including the obligation to appear at the stockholder meeting to present the proxy access nomination.

Proposed Section 3.6(j) of the By-Laws

Proposed Section 3.6(j) states that the following Stockholder Nominees who are included in the Company's proxy materials for a particular annual meeting of stockholders will be ineligible to be a Stockholder Nominee for the next two annual meetings:

- A Stockholder Nominee who withdraws from or becomes ineligible or unavailable for election at the annual meeting; or
- a Stockholder Nominee who does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election.

This provision will save the Company and its stockholders the time and

[30] *See* proposed Section 3.6(h)(i) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[31] *See* proposed Section 3.6(h)(ii) of the By-Laws; *see also* footnote 28, *supra.* The Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board. The Commission further notes that, according to Nasdaq, should the Board decide to adopt additional, more stringent standards than those required under Nasdaq listing standards and any requirements under Commission rules, all director nominees would be evaluated against these standards—not just those shareholder candidates nominated under the provisions of proposed Section 3.6.

[32] *See* proposed Section 3.6(h)(iii) of the By-Laws; *see also* Section 4.3 of the By-Laws, which provides that the number of Non-Industry Directors on the Board must equal or exceed the number of Industry Directors. In addition, the Board must include at least two Public Directors and may include at least one, but no more than two, Issuer Directors. Finally, the Board shall include no more than one Staff Director, unless the Board consists of ten or more directors, in which case, the Board shall include no more than two Staff Directors. Detailed definitions of the terms ''Non-Industry Director,'' ''Industry Director,'' ''Public Director,'' ''Issuer Director'' and ''Staff Director'' are included in Article I of the By-Laws.

[33] *See* proposed Section 3.6(h)(iv) of the By-Laws; *see also* 15 U.S.C. 19(a)(1), which generally provides that ''[n]o person shall, at the same time, serve as a director or officer in any two corporations'' that are ''competitors'' such that ''the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.''

[34] *See* proposed Section 3.6(h)(v) of the By-Laws.

[35] *See* proposed Section 3.6(h)(vi) of the By-Laws; *see also* 17 CFR 230.506(d), which generally disqualifies offerings involving certain felons and other bad actors from relying on the ''safe harbor'' in Rule 506 of Regulation D from registration under the Securities Act of 1933, as amended.

[36] *See* proposed Section 3.6(h)(vii) of the By-Laws; *see also* 15 U.S.C. 78c(a)(39), which disqualifies certain categories of individuals who generally have engaged in misconduct from membership or participation in, or association with a member of, a self-regulatory organization.

[37] *See* proposed Section 3.6(h)(viii) of the By-Laws.

[38] *See* proposed Section 3.6(h)(ix) of the By-Laws.

expense of analyzing and addressing subsequent proxy access nominations regarding individuals who were included in the proxy materials for a particular annual meeting but ultimately did not stand for election or receive a substantial amount of votes. After the next two annual meetings, these Stockholder Nominees would again be eligible for nomination through the proxy access provisions of the By-Laws.

Proposed Section 3.6(k) of the By-Laws

In case there are matters involving a proxy access nomination that are open to interpretation, proposed Section 3.6(k) states that the Board (or any other person or body authorized by the Board) shall have exclusive power and authority to interpret the proxy access provisions of the By-Laws and make all determinations deemed necessary or advisable as to any person, facts or circumstances. In addition, all actions, interpretations and determinations of the Board (or any person or body authorized by the Board) with respect to the proxy access provisions shall be final, conclusive and binding on the Company, the stockholders and all other parties. While Nasdaq has attempted to implement a clear, detailed and thorough proxy access provision, there may be matters about future proxy access nominations that are open to interpretation. In these cases, Nasdaq believes it is reasonable and necessary to designate an arbiter to make final decisions on these points and that the Board is best-suited to act as that arbiter.

Proposed Section 3.6(l) of the By-Laws

Proposed Section 3.6(l) prohibits a stockholder from joining more than one group of stockholders to become an Eligible Stockholder for purposes of submitting a proxy access nomination for each annual meeting of stockholders. Nasdaq analogizes this provision to Article IV, Paragraph C(1) of its Amended and Restated Certificate of Incorporation, under which each holder of Nasdaq's common stock shall be entitled to one vote per share on all matters presented to the stockholders for a vote. Similar to that provision, Nasdaq believes it is reasonable for each share to count only once in submitting a proxy access nomination.

Proposed Section 3.6(m) of the By-Laws

For the avoidance of doubt, proposed Section 3.6(m) states that the proxy access provisions outlined in Section 3.6 of the By-Laws shall be the exclusive means for stockholders to include nominees in the Company's proxy materials. Stockholders may, of course, continue to propose nominees to the Committee and Board through other means, but the Committee and Board will have final authority to determine whether to include those nominees in the Company's proxy materials.

Revisions to Other Sections of the By-Laws

Nasdaq also proposes to make conforming changes to Sections 3.1(a), 3.3(a), 3.3(c) and 3.5 of the By-Laws to provide clarifications and prevent confusion. Specifically, current Section 3.1(a) enumerates the methods by which nominations of persons for election to the Board may be made at an annual meeting of stockholders; Nasdaq proposes to add proxy access nominations to the list of methods. Current Section 3.3(a) specifies that, among other things, only such persons who are nominated in accordance with the procedures set forth in Article III of the By-Laws [39] shall be eligible to be elected at an annual or special meeting of Nasdaq's stockholders to serve as directors; for the avoidance of doubt, Nasdaq proposes to clarify that the reference to Article III includes the proxy access provision in Section 3.6 of the By-Laws with respect to director nominations in connection with annual meetings. Current Section 3.3(c) states, among other things, that compliance with Section 3.1(a)(iii) and (b) [40] shall be the exclusive means for a stockholder to make a director nomination; Nasdaq proposes to add proxy access as an additional means for a stockholder to make a director nomination. Finally, current Section 3.5 requires Nasdaq's director nominees to submit to Nasdaq's Corporate Secretary a questionnaire, representation and agreement within certain time periods; Nasdaq proposes to clarify that proxy access nominees must submit these materials within the time periods prescribed for delivery of a Notice of Proxy Access Nomination, as described above.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[41] in general, and furthers the objectives of Section 6(b)(5) of the Act,[42] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

In response to feedback from its investors, Nasdaq is proposing changes to its By-Laws to implement proxy access. The Exchange believes that, by permitting an Eligible Stockholder of Nasdaq that meets the stated requirements to nominate directors and have its nominees included in Nasdaq's annual meeting proxy statement, the proposed rule change strengthens the corporate governance of the Exchange's ultimate parent company, which is beneficial to both investors and the public interest.

In drafting its proxy access provision, Nasdaq has attempted to strike an appropriate balance between responding to investor feedback and including certain procedural and informational requirements for the protection of the Company and its investors. Specifically, the procedural requirements will protect investors by stating clearly and explicitly the procedures stockholders must follow in order to submit a proper proxy access nomination. The informational requirements will enhance investor protection by ensuring, among other things, that the Company and its stockholders have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees comply with applicable laws, regulations and other requirements.

Finally, the remaining changes are clarifying in nature, and they enhance investor protection and the public interest by preventing confusion with respect to the operation of the By-Law provisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

Because the proposed rule change relates to the governance of the Company and not to the operations of the Exchange, 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.

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

Within 45 days of the date of publication of this notice in the **Federal**

[39] Article III of the By-Laws relates to stockholder meetings.

[40] As part of Nasdaq's ''advance notice'' provision, Sections 3.1(a)(iii) and (b) of the By-Laws describe certain procedures that a stockholder must follow to, among other things, nominate a person for election to the Board.

[41] 15 U.S.C. 78f(b).

[42] 15 U.S.C. 78f(b)(5).

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–2016–127 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–2016–127. 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–2016–127 and should be submitted on or before October 26, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–24001 Filed 10–4–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78986; File No. SR–BX–2016–051]

Self-Regulatory Organizations; NASDAQ BX, Inc.; Notice of Filing of Proposed Rule Change To Amend the By-Laws of Nasdaq, Inc. to Implement Proxy Access

September 29, 2016.

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 September 15, 2016, NASDAQ 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 is filing this proposed rule change with respect to amendments of the By-Laws (the ''By-Laws'') of its parent corporation, Nasdaq, Inc. (''Nasdaq'' or the ''Company''), to implement proxy access. The proposed amendments will be implemented on a date designated by the Company following approval by the Commission. The text of the proposed rule change is available on the Exchange's Web site at *http://nasdaqbx.cchwallstreet.com/,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

At Nasdaq's 2016 annual meeting held on May 5, 2016, Nasdaq's stockholders considered a stockholder proposal submitted under Rule 14a–8 under the Act.[3] The proposal, which passed with 73.52% of the votes cast, requested that Nasdaq's Board of Directors (the ''Board'') take steps to implement a ''proxy access'' by-law. Proxy access by-laws allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on a board and have those candidates included in a company's proxy materials. Such provisions allow stockholders to nominate candidates without undertaking the expense of a proxy solicitation.

Following the 2016 annual meeting, the Nominating & Governance Committee (the ''Committee'') of the Board and the Board reviewed the voting results on the stockholder proposal and discussed proxy access generally. The Committee ultimately recommended to the Board, and the Board approved, certain changes to Nasdaq's By-Laws to implement proxy access. Nasdaq now proposes to make these changes by adopting new Section 3.6 of the By-Laws and making certain conforming changes to current Sections 3.1, 3.3 and 3.5 of the By-Laws, all of which are described further below.

In developing its proposal, Nasdaq has generally tried to balance the relative weight of arguments for and against proxy access provisions. On the

[43] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* 17 CFR 240.14a–8, which establishes procedures pursuant to which stockholders of a public company may have their proposals placed alongside management's proposals in the company's proxy materials for presentation to a vote at a meeting of stockholders.

one hand, Nasdaq recognizes the significance of this issue to some investors, who see proxy access as an important accountability mechanism that allows them to participate in board elections through the nomination of stockholder candidates that are presented in a company's proxy statement. On the other hand, Nasdaq's proposed proxy access provision includes certain procedural requirements that ensure, among other things, that the Company and its stockholders will have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees will comply with applicable laws, regulations and other requirements.

Proposed Section 3.6(a) of the By-Laws

To respond to feedback from its stockholders, Nasdaq proposes to amend its By-Laws to, as set forth in the first sentence of proposed Section 3.6(a), require the Company to include in its proxy statement, its form proxy and any ballot distributed at the stockholder meeting, the name of, and certain Required Information [4] about, any person nominated for election (the ''Stockholder Nominee'') to the Board by a stockholder or group of stockholders (the ''Eligible Stockholder'') [5] that satisfies the requirements set forth in the proxy access provision of Nasdaq's By-Laws.[6] To utilize this provision, the Eligible Stockholder must expressly elect at the time of providing a required notice to the Company of the proxy access nomination (the ''Notice of Proxy Access Nomination'') to have its nominee included in the Company's proxy materials. Stockholders will be eligible to submit proxy access nominations only at annual meetings of stockholders when the Board solicits proxies with respect to the election of directors.

The next two sentences of Section 3.6(a) provide some additional clarification on the term ''Eligible Stockholder.'' First, in calculating the number of stockholders in a group seeking to qualify as an Eligible Stockholder, two or more of the following types of funds shall be counted as one stockholder: (i) Funds under common management and investment control, (ii) funds under common management and funded primarily by the same employer, or (iii) funds that are a ''group of investment companies'' as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Company Act of 1940, as amended.[7] Nasdaq views this as a stockholder-friendly provision that will make it easier for such funds to participate in a proxy access nomination since they will not have to comply with the procedural requirements in the proxy access provision multiple times. Second, in the event that the Eligible Stockholder consists of a group of stockholders, any and all requirements and obligations for an individual Eligible Stockholder shall apply to each member of the group, except that the Required Ownership Percentage (discussed further below) shall apply to the ownership of the group in the aggregate. Generally, the applicable requirements and obligations relate to information that each member of the nominating group must provide to Nasdaq about itself, as discussed further below. Nasdaq believes it is reasonable to require each member of the nominating group to provide such information so that both the Company and its stockholders are fully informed about the entire group making the proxy access nomination.

The final sentence of proposed Section 3.6(a) allows Nasdaq to omit from its proxy materials any information or Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law or regulation. This provision allows Nasdaq to comply with Rule 14a–9 under the Act [8] and to protect its stockholders from information that is materially untrue or that violates any law or regulation. The final sentence of proposed Section 3.6(a) also explicitly allows Nasdaq to solicit against, and include in the proxy statement its own statement relating to, any Stockholder Nominee. This provision merely clarifies that just because Nasdaq must include a proxy access nominee in its proxy materials if the proxy access provisions are satisfied, Nasdaq does not necessarily have to support that nominee.

Proposed Section 3.6(b) of the By-Laws

Proposed Section 3.6(b) of the By-Laws establishes the deadline for a timely Notice of Proxy Access Nomination. Specifically, such a notice must be addressed to, and received by, Nasdaq's Corporate Secretary no earlier than one hundred fifty (150) days and no later than one hundred twenty (120) days before the anniversary of the date that Nasdaq issued its proxy statement for the previous year's annual meeting of stockholders. The Company believes this notice period will provide stockholders an adequate window to submit nominees via proxy access, while also providing the Company adequate time to diligence [sic] a proxy access nominee before including them in the proxy statement for the next annual meeting of stockholders.

Proposed Section 3.6(c) of the By-Laws

Proposed Section 3.6(c) specifies that the maximum number of Stockholder Nominees nominated by all Eligible Stockholders that will be included in Nasdaq's proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two and 25% of the total number of directors in office (rounded down to the nearest whole number) as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with the proxy access provision of the By-Laws (the ''Final Proxy Access Nomination Date''). In the event that one or more vacancies for any reason occurs after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board resolves to reduce the size of the Board in connection therewith, the maximum number of Stockholder Nominees included in Nasdaq's proxy materials shall be calculated based on the number of directors in office as so reduced. Any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision of the By-Laws whom the Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access

[4] The Required Information is the information provided to Nasdaq's Corporate Secretary about the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Company's proxy statement by the regulations promulgated under the Act, and if the Eligible Stockholder so elects, a written statement, not to exceed 500 words, in support of the Stockholder Nominee(s)' candidacy (the ''Statement'').

[5] As used throughout Nasdaq's By-Laws, the term ''Eligible Stockholder'' includes each member of a stockholder group that submits a proxy access nomination to the extent the context requires.

[6] When the Company includes proxy access nominees in the proxy materials, such individuals will be included in addition to any persons nominated for election to the Board or any committee thereof.

[7] *See* 15 U.S.C. 80a–12(d)(1)(G)(ii), which defines ''group of investment companies'' as any two or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.

[8] *See* 17 CFR 240.14a–9, which generally prohibits proxy solicitations that contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

provision but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the maximum number of Stockholder Nominees has been reached.

Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to the proxy access provision exceeds the maximum number of nominees allowed. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders exceeds the maximum number of nominees allowed, the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder will be selected for inclusion in the proxy materials until the maximum number is reached, going in order of the amount (largest to smallest) of shares of Nasdaq's outstanding common stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to Nasdaq. If the maximum number is not reached after the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder has been selected, this process will continue as many times as necessary, following the same order each time, until the maximum number is reached. Following such determination, if any Stockholder Nominee who satisfies the eligibility requirements thereafter is nominated by the Board, or is not included in the proxy materials or is not submitted for election as a director, in either case, as a result of the Eligible Stockholder becoming ineligible or withdrawing its nomination, the Stockholder Nominee becoming unwilling or unable to serve on the Board or the Eligible Stockholder or the Stockholder Nominee failing to comply with the proxy access provision of the By-Laws, no other nominee or nominees shall be included in the proxy materials or otherwise submitted for director election in substitution thereof.

The Company believes it is reasonable to limit the Board seats available to proxy access nominees, to establish procedures for selecting candidates if the nominee limit is exceeded and to exclude further proxy access nominees in the cases set forth above. The limitation on Board seats available to proxy access nominees ensures that proxy access cannot be used to take over the entire Board, which is not the stated purpose of proxy access campaigns. The procedures for selecting candidates if the nominee limit is exceeded establish clear and rational guidelines for an orderly nomination process to avoid the Company having to make arbitrary judgments among candidates. Finally, the exclusion of further proxy access nominees in certain cases will avoid further time and expense to the Company when the proxy access nominee has been nominated by the Board, in which case the goal of the proxy access nomination has been achieved, or in certain cases when the Eligible Stockholder or Stockholder Nominee is at fault.

Proposed Section 3.6(d) of the By-Laws

Proposed Section 3.6(d) clarifies, for the avoidance of doubt, how ''ownership'' will be defined for purposes of meeting the Required Ownership Percentage (discussed further below). Specifically, an Eligible Stockholder shall be deemed to ''own'' only those outstanding shares of Nasdaq's common stock as to which the stockholder possesses both: (i) The full voting and investment rights pertaining to the shares; and (ii) the full economic interest in (including the opportunity for profit from and risk of loss on) such shares; provided that the number of shares calculated in accordance with clauses (i) and (ii) shall not include any shares:

- Sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed, including any short sale;
- borrowed by such stockholder or any of its affiliates for any purposes or purchased by such stockholder or any of its affiliates pursuant to an agreement to resell; or
- subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar agreement entered into by such stockholder or any of its affiliates, whether any such instrument or agreement is to be settled with shares or with cash based on the notional amount or value of shares of Nasdaq's outstanding common stock, in any such case which instrument or agreement has, or is intended to have, or if exercised by either party would have, the purpose or effect of:

○ Reducing in any manner, to any extent or at any time in the future, such stockholder's or its affiliates' full right to vote or direct the voting of any such shares; and/or

○ hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or its affiliates.

Further, a stockholder shall ''own'' shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has delegated any voting power by means of a proxy, power of attorney or other instrument or arrangement which is revocable at any time by the stockholder. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has loaned such shares provided that the stockholder has the power to recall such loaned shares on three (3) business days' notice, has recalled such loaned shares as of the date of the Notice of Proxy Access Nomination and holds such shares through the date of the annual meeting. The terms ''owned,'' ''owning'' and other variations of the word ''own'' shall have correlative meanings. Whether outstanding shares of Nasdaq's common stock are ''owned'' for these purposes shall be determined by the Board or any committee thereof, in each case, in its sole discretion. For purposes of the proxy access provision of the By-Laws, the term ''affiliate'' or ''affiliates'' shall have the meaning ascribed thereto under the rules and regulations of the Act.[9] An Eligible Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to own for the purposes of the proxy access provision of the By-Laws.

Proposed Section 3.6(e) of the By-Laws

The first paragraph of proposed Section 3.6(e) establishes certain requirements for an Eligible Stockholder to make a proxy access nomination. Specifically, an Eligible Stockholder must have owned (defined as discussed above) 3% or more (the ''Required

[9] Pursuant to Rule 12b–2 under the Act, ''[a]n 'affiliate' of, or a person 'affiliated' with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.'' 17 CFR 240.12b–2. Further, ''[t]he term 'control' (including the terms 'controlling,' 'controlled by' and 'under common control with') means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'' 17 CFR 240.12b–2.

Ownership Percentage'') of Nasdaq's outstanding common stock (the ''Required Shares'') continuously for 3 years (the ''Minimum Holding Period'') as of both the date the Notice of Proxy Access Nomination is received by Nasdaq's Corporate Secretary and the record date for determining the stockholders entitled to vote at the annual meeting and must continue to own the Required Shares through the meeting date.

Proposed Section 3.6(e) also sets forth the information that an Eligible Stockholder must provide to Nasdaq's Corporate Secretary in writing within the deadline discussed above in order to make a proxy access nomination. This information includes:

- One or more written statements from the record holder of the shares (and from each intermediary through which the shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Notice of Proxy Access Nomination is delivered to, or mailed to and received by, Nasdaq's Corporate Secretary, the Eligible Stockholder owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder's agreement to provide, within five (5) business days after the record date for the annual meeting, written statements from the record holder and intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date; [10]
- a copy of the Schedule 14N that has been filed with the SEC as required by Rule 14a-18 under the Act; [11]
- the information, representations and agreements with respect to the Eligible Stockholder that are the same as those that would be required to be set forth in a stockholder's notice of nomination with respect to a ''Proposing Person'' pursuant to Section 3.1(b)(i) and Section 3.1(b)(iii) of the By-Laws; [12]
- the consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected; [13]
- a representation that the Eligible Stockholder:
  - Acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of Nasdaq, and does not presently have such intent; [14]
  - presently intends to maintain qualifying ownership of the Required Shares through the date of the annual meeting; [15]
  - has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s); [16]
  - has not engaged and will not engage in, and has not and will not be a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting, other than its Stockholder Nominee(s) or a nominee of the Board; [17]
  - agrees to comply with all applicable laws and regulations with respect to any solicitation in connection with the meeting or applicable to the filing and use, if any, of soliciting material; [18]
  - will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; [19] and
  - as to any two or more funds whose shares are aggregated to count as one stockholder for the purpose of constituting an Eligible Stockholder, within five business days after the date of the Notice of Proxy Access Nomination, will provide to Nasdaq documentation reasonably satisfactory to Nasdaq that demonstrates that the funds satisfy the requirements in the By-Laws, which were discussed above, for the funds to qualify as one Eligible Stockholder; [20]
- a representation as to the Eligible Stockholder's intentions with respect to maintaining qualifying ownership of the Required Shares for at least one year following the annual meeting; [21]
- an undertaking that the Eligible Stockholder agrees to:
  - Assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder's communications with Nasdaq's stockholders or out of the information that the Eligible Stockholder provided to Nasdaq; [22]
  - indemnify and hold harmless Nasdaq and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against Nasdaq or any of its directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to the proxy access provision; [23] and
  - file with the SEC any solicitation or other communication with Nasdaq's stockholders relating to the meeting at which the Stockholder Nominee will be nominated, regardless of whether any such filing is required under Regulation 14A of the Act or whether any exemption from filing is available thereunder; [24] and
- in the case of a nomination by a group of stockholders that together is an Eligible Stockholder, the designation by all group members of one group member that is authorized to act on behalf of all such members with respect to the nomination and matters related thereto, including withdrawal of the nomination.[25]

In proposing the Required Ownership Percentage and the Minimum Holding Period, Nasdaq seeks to ensure that the Eligible Stockholder has had a sufficient stake in the Company for a sufficient amount of time and is not pursuing a short-term agenda. In proposing the informational requirements for the Eligible Stockholder, Nasdaq's goal is to gather sufficient information about the Eligible Stockholder for both itself and its stockholders. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable

[10] *See* proposed Section 3.6(e)(i) of the By-Laws.

[11] *See* proposed Section 3.6(e)(ii) of the By-Laws; *see also* 17 CFR 240.14n–101 and 17 CFR 240.14a–18, which generally require a Nominating Stockholder to provide notice to the Company of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to the Company.

[12] *See* proposed Section 3.6(e)(iii) of the By-Laws; *see also* Sections 3.1(b)(i) and 3.1(b)(iii) of the By-Laws, which constitute part of Nasdaq's ''advance notice'' provision under which a ''Proposing Person'' may, among other things, nominate a person for election to the Board.

[13] *See* proposed Section 3.6(e)(iv) of the By-Laws.

[14] *See* proposed Section 3.6(e)(v)(A) of the By-Laws.

[15] *See* proposed Section 3.6(e)(v)(B) of the By-Laws.

[16] *See* proposed Section 3.6(e)(v)(C) of the By-Laws.

[17] *See* proposed Section 3.6(e)(v)(D) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[18] *See* proposed Section 3.6(e)(v)(E) of the By-Laws.

[19] *See* proposed Section 3.6(e)(v)(F) of the By-Laws.

[20] *See* proposed Section 3.6(e)(v)(G) of the By-Laws.

[21] *See* proposed Section 3.6(e)(vi) of the By-Laws.

[22] *See* proposed Section 3.6(e)(vii)(A) of the By-Laws.

[23] *See* proposed Section 3.6(e)(vii)(B) of the By-Laws.

[24] *See* proposed Section 3.6(e)(vii)(C) of the By-Laws; *see also* 17 CFR 240.14a–1—14b–2, which governs solicitations of proxies.

[25] *See* proposed Section 3.6(e)(viii) of the By-Laws.

law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(f) of the By-Laws

Proposed Section 3.6(f) establishes the information the Stockholder Nominee must deliver to Nasdaq's Corporate Secretary within the time period specified for delivering the Notice of Proxy Access Nomination. This information includes:

- The information required with respect to persons whom a stockholder proposes to nominate for election or reelection as a director by Section 3.1(b)(i) of the By-Laws [26] including, but not limited to, the signed questionnaire, representation and agreement required by Section 3.1(b)(i)(D) of the By-Laws; [27] and
- a written representation and agreement that such person:
  - Will act as a representative of all of Nasdaq's stockholders while serving as a director; and
  - will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects (and shall not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading).

In addition, at the request of Nasdaq, the Stockholder Nominee(s) must submit all completed and signed questionnaires required of Nasdaq's directors and officers. Nasdaq may request such additional information as necessary to (y) permit the Board to determine if each Stockholder Nominee satisfies the requirements of the proxy access provision of the By-Laws or if each Stockholder Nominee is independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing the independence of Nasdaq's directors [28] and/or (z) permit Nasdaq's Corporate Secretary to determine the classification of such nominee as an Industry, Non-Industry, Issuer or Public Director, if applicable, in order to make the certification referenced in Section 4.13(h)(iii) of the By-Laws.[29]

Like the informational requirements for an Eligible Stockholder, which are set forth above, the informational requirements for the Stockholder Nominee ensure that both Nasdaq and its stockholders will have sufficient information about the Stockholder Nominee. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(g) of the By-Laws

Pursuant to proposed Section 3.6(g), each Eligible Stockholder or Stockholder Nominee must promptly notify Nasdaq's Corporate Secretary of any information or communications provided by the Eligible Stockholder or Stockholder Nominee to Nasdaq or its stockholders that ceases to be true and correct in all material respects or omits a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading and of the information that is required to correct any such defect. This provision further states that providing any such notification shall not be deemed to cure any defect or, with respect to any defect that Nasdaq determines is material, limit Nasdaq's rights to omit a Stockholder Nominee from its proxy materials. This provision is intended to protect Nasdaq's stockholders by requiring an Eligible Stockholder or Stockholder Nominee to give Nasdaq notice of information previously provided that is materially untrue. Nasdaq may then decide what action to take with respect to such defect, which may include, with respect to a material defect, omitting the relevant Stockholder Nominee from its proxy materials.

Proposed Section 3.6(h) of the By-Laws

Proposed Section 3.6(h) provides that Nasdaq shall not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders under certain circumstances. In these situations, the proxy access nomination shall be disregarded and no vote on such Stockholder Nominee will occur, even if Nasdaq has received proxies in respect of the vote. These circumstances occur when the Stockholder Nominee:

- Has been nominated by an Eligible Stockholder who has engaged in or is currently engaged in, or has been or is a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board; [30]
- is not independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing independence of Nasdaq's directors, in each case as determined by the Board in its sole discretion; [31]
- would, if elected as a member of the Board, cause Nasdaq to be in violation of the By-Laws (including but not limited to the compositional requirements of the Board set forth in Section 4.3 of the By-Laws), its Amended and Restated Certificate of Incorporation, the rules and listing standards of The NASDAQ Stock Market, or any applicable state or federal law, rule or regulation; [32]

[26] Section 3.1(b)(i) of the By-Laws describes the information that a proposing stockholder must provide about an individual the stockholder proposes to nominate for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[27] Section 3.1(b)(i)(D) of the By-Laws requires a completed and signed questionnaire, representation and agreement, each containing certain information, from each individual proposed to be nominated for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[28] Currently, the independence of Nasdaq's directors is determined pursuant to the definition of ''Independent Director'' in Listing Rule 5605(a)(2) of The NASDAQ Stock Market, under which certain categories of individuals cannot be deemed independent and with respect to other individuals, the Board must make an affirmative determination that such individual has no relationship that, in the opinion of the Board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Other independence standards under the SEC rules and the Listing Rules of The NASDAQ Stock Market apply to members of certain of the Board's committees. As detailed below, the Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board.

[29] Section 4.13(h)(iii) of the By-Laws requires Nasdaq's Corporate Secretary to collect from each nominee for director such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, Issuer, or Public Director, if applicable, and to certify to the Committee each nominee's classification, if applicable. Detailed definitions of the terms ''Industry Director,'' ''Non-Industry Director,'' ''Issuer Director'' and ''Public Director'' are included in Article I of the By-Laws.

[30] *See* proposed Section 3.6(h)(i) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[31] *See* proposed Section 3.6(h)(ii) of the By-Laws; *see also* footnote 28, *supra.* The Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board. The Commission further notes that, according to Nasdaq, should the Board decide to adopt additional, more stringent standards than those required under Nasdaq listing standards and any requirements under Commission rules, all director nominees would be evaluated against these standards—not just those shareholder candidates nominated under the provisions of proposed Section 3.6.

[32] *See* proposed Section 3.6(h)(iii) of the By-Laws; *see also* Section 4.3 of the By-Laws, which provides

• is or has been, within the past three (3) years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914; [33]

• is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past ten (10) years; [34]

• is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended; [35]

• is subject to ''statutory disqualification'' under Section 3(a)(39) of the Act; [36]

• has, or the applicable Eligible Stockholder has, provided information to Nasdaq in respect of the proxy access nomination that was untrue in any material respect or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, as determined by the Board or any committee thereof, in each case, in its sole discretion; [37] or

• breaches or fails, or the applicable Eligible Stockholder breaches or fails, to comply with its obligations pursuant to the By-Laws, including, but not limited to, the proxy access provisions and any agreement, representation or undertaking required by the proxy access provisions.[38]

Nasdaq believes these provisions will protect the Company and its stockholders by allowing it to exclude certain categories of objectionable Stockholder Nominees from the proxy statement.

Proposed Section 3.6(i) of the By-Laws

Under proposed Section 3.6(i), the Board or the chairman of the meeting of stockholders shall declare a proxy access nomination invalid, and such nomination shall be disregarded even if proxies in respect of such nomination have been received by the Company, if:

• The Stockholder Nominee(s) and/or the applicable Eligible Stockholder have breached its or their obligations under the proxy access provision of the By-Laws, as determined by the Board or the chairman of the meeting of stockholders, in each case, in its or his sole discretion; or

• the Eligible Stockholder (or a qualified representative thereof) does not appear at the meeting of stockholders to present the proxy access nomination.

Nasdaq believes this provision protects the Company and its stockholders by providing the Board or the chairman of the stockholder meeting limited authority to disqualify a proxy access nominee when that nominee or the sponsoring stockholder(s) have breached an obligation under the proxy access provision, including the obligation to appear at the stockholder meeting to present the proxy access nomination.

Proposed Section 3.6(j) of the By-Laws

Proposed Section 3.6(j) states that the following Stockholder Nominees who are included in the Company's proxy materials for a particular annual meeting of stockholders will be ineligible to be a Stockholder Nominee for the next two annual meetings:

• A Stockholder Nominee who withdraws from or becomes ineligible or unavailable for election at the annual meeting; or

• a Stockholder Nominee who does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election.

This provision will save the Company and its stockholders the time and expense of analyzing and addressing subsequent proxy access nominations regarding individuals who were included in the proxy materials for a particular annual meeting but ultimately did not stand for election or receive a substantial amount of votes. After the next two annual meetings, these Stockholder Nominees would again be eligible for nomination through the proxy access provisions of the By-Laws.

Proposed Section 3.6(k) of the By-Laws

In case there are matters involving a proxy access nomination that are open to interpretation, proposed Section 3.6(k) states that the Board (or any other person or body authorized by the Board) shall have exclusive power and authority to interpret the proxy access provisions of the By-Laws and make all determinations deemed necessary or advisable as to any person, facts or circumstances. In addition, all actions, interpretations and determinations of the Board (or any person or body authorized by the Board) with respect to the proxy access provisions shall be final, conclusive and binding on the Company, the stockholders and all other parties. While Nasdaq has attempted to implement a clear, detailed and thorough proxy access provision, there may be matters about future proxy access nominations that are open to interpretation. In these cases, Nasdaq believes it is reasonable and necessary to designate an arbiter to make final decisions on these points and that the Board is best-suited to act as that arbiter.

Proposed Section 3.6(l) of the By-Laws

Proposed Section 3.6(l) prohibits a stockholder from joining more than one group of stockholders to become an Eligible Stockholder for purposes of submitting a proxy access nomination for each annual meeting of stockholders. Nasdaq analogizes this provision to Article IV, Paragraph C(1) of its Amended and Restated Certificate of Incorporation, under which each holder of Nasdaq's common stock shall be entitled to one vote per share on all matters presented to the stockholders for a vote. Similar to that provision, Nasdaq believes it is reasonable for each share to count only once in submitting a proxy access nomination.

Proposed Section 3.6(m) of the By-Laws

For the avoidance of doubt, proposed Section 3.6(m) states that the proxy access provisions outlined in Section 3.6 of the By-Laws shall be the exclusive means for stockholders to include nominees in the Company's proxy materials. Stockholders may, of course, continue to propose nominees to the Committee and Board through other means, but the Committee and Board will have final authority to determine whether to include those nominees in the Company's proxy materials.

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that the number of Non-Industry Directors on the Board must equal or exceed the number of Industry Directors. In addition, the Board must include at least two Public Directors and may include at least one, but no more than two, Issuer Directors. Finally, the Board shall include no more than one Staff Director, unless the Board consists of ten or more directors, in which case, the Board shall include no more than two Staff Directors. Detailed definitions of the terms ''Non-Industry Director,'' ''Industry Director,'' ''Public Director,'' ''Issuer Director'' and ''Staff Director'' are included in Article I of the By-Laws.

[33] *See* proposed Section 3.6(h)(iv) of the By-Laws; *see also* 15 U.S.C. 19(a)(1), which generally provides that ''[n]o person shall, at the same time, serve as a director or officer in any two corporations'' that are ''competitors'' such that ''the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.''

[34] *See* proposed Section 3.6(h)(v) of the By-Laws.

[35] *See* proposed Section 3.6(h)(vi) of the By-Laws; *see also* 17 CFR 230.506(d), which generally disqualifies offerings involving certain felons and other bad actors from relying on the ''safe harbor'' in Rule 506 of Regulation D from registration under the Securities Act of 1933, as amended.

[36] *See* proposed Section 3.6(h)(vii) of the By-Laws; *see also* 15 U.S.C. 78c(a)(39), which disqualifies certain categories of individuals who generally have engaged in misconduct from membership or participation in, or association with a member of, a self-regulatory organization.

[37] *See* proposed Section 3.6(h)(viii) of the By-Laws.

[38] *See* proposed Section 3.6(h)(ix) of the By-Laws.

Revisions to Other Sections of the By-Laws

Nasdaq also proposes to make conforming changes to Sections 3.1(a), 3.3(a), 3.3(c) and 3.5 of the By-Laws to provide clarifications and prevent confusion. Specifically, current Section 3.1(a) enumerates the methods by which nominations of persons for election to the Board may be made at an annual meeting of stockholders; Nasdaq proposes to add proxy access nominations to the list of methods. Current Section 3.3(a) specifies that, among other things, only such persons who are nominated in accordance with the procedures set forth in Article III of the By-Laws [39] shall be eligible to be elected at an annual or special meeting of Nasdaq's stockholders to serve as directors; for the avoidance of doubt, Nasdaq proposes to clarify that the reference to Article III includes the proxy access provision in Section 3.6 of the By-Laws with respect to director nominations in connection with annual meetings. Current Section 3.3(c) states, among other things, that compliance with Section 3.1(a)(iii) and (b) [40] shall be the exclusive means for a stockholder to make a director nomination; Nasdaq proposes to add proxy access as an additional means for a stockholder to make a director nomination. Finally, current Section 3.5 requires Nasdaq's director nominees to submit to Nasdaq's Corporate Secretary a questionnaire, representation and agreement within certain time periods; Nasdaq proposes to clarify that proxy access nominees must submit these materials within the time periods prescribed for delivery of a Notice of Proxy Access Nomination, as described above.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[41] in general, and furthers the objectives of Section 6(b)(5) of the Act,[42] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

In response to feedback from its investors, Nasdaq is proposing changes to its By-Laws to implement proxy access. The Exchange believes that, by permitting an Eligible Stockholder of Nasdaq that meets the stated requirements to nominate directors and have its nominees included in Nasdaq's annual meeting proxy statement, the proposed rule change strengthens the corporate governance of the Exchange's ultimate parent company, which is beneficial to both investors and the public interest.

In drafting its proxy access provision, Nasdaq has attempted to strike an appropriate balance between responding to investor feedback and including certain procedural and informational requirements for the protection of the Company and its investors. Specifically, the procedural requirements will protect investors by stating clearly and explicitly the procedures stockholders must follow in order to submit a proper proxy access nomination. The informational requirements will enhance investor protection by ensuring, among other things, that the Company and its stockholders have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees comply with applicable laws, regulations and other requirements.

Finally, the remaining changes are clarifying in nature, and they enhance investor protection and the public interest by preventing confusion with respect to the operation of the By-Law provisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

Because the proposed rule change relates to the governance of the Company and not to the operations of the Exchange, 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.

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

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–BX–2016–051 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–2016–051.* 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–2016–051* and should be submitted on or before October 26, 2016.

[39] Article III of the By-Laws relates to stockholder meetings.

[40] As part of Nasdaq's ''advance notice'' provision, Sections 3.1(a)(iii) and (b) of the By-Laws describe certain procedures that a stockholder must follow to, among other things, nominate a person for election to the Board.

[41] 15 U.S.C. 78f(b).

[42] 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–24008 Filed 10–4–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78982; File No. SR–BSECC–2016–001]

Self-Regulatory Organizations; Boston Stock Exchange Clearing Corporation; Notice of Filing of Proposed Rule Change To Amend the By-Laws of Nasdaq, Inc. To Implement Proxy Access

September 29, 2016.

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 September 15, 2016, Boston Stock Exchange Clearing Corporation (''BSECC'') 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 clearing agency. 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

BSECC is filing this proposed rule change with respect to amendments of the By-Laws (the ''By-Laws'') of its parent corporation, Nasdaq, Inc. (''Nasdaq'' or the ''Company''), to implement proxy access. The proposed amendments will be implemented on a date designated by the Company following approval by the Commission. The text of the proposed rule change is available on BSECC's Web site at *http://nasdaqbx.cchwallstreet.com,* at the principal office of BSECC, 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, BSECC 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. BSECC 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

At Nasdaq's 2016 annual meeting held on May 5, 2016, Nasdaq's stockholders considered a stockholder proposal submitted under Rule 14a–8 under the Act.[3] The proposal, which passed with 73.52% of the votes cast, requested that Nasdaq's Board of Directors (the ''Board'') take steps to implement a ''proxy access'' by-law. Proxy access by-laws allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on a board and have those candidates included in a company's proxy materials. Such provisions allow stockholders to nominate candidates without undertaking the expense of a proxy solicitation.

Following the 2016 annual meeting, the Nominating & Governance Committee (the ''Committee'') of the Board and the Board reviewed the voting results on the stockholder proposal and discussed proxy access generally. The Committee ultimately recommended to the Board, and the Board approved, certain changes to Nasdaq's By-Laws to implement proxy access. Nasdaq now proposes to make these changes by adopting new Section 3.6 of the By-Laws and making certain conforming changes to current Sections 3.1, 3.3 and 3.5 of the By-Laws, all of which are described further below.

In developing its proposal, Nasdaq has generally tried to balance the relative weight of arguments for and against proxy access provisions. On the one hand, Nasdaq recognizes the significance of this issue to some investors, who see proxy access as an important accountability mechanism that allows them to participate in board elections through the nomination of stockholder candidates that are presented in a company's proxy statement. On the other hand, Nasdaq's proposed proxy access provision includes certain procedural requirements that ensure, among other things, that the Company and its stockholders will have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees will comply with applicable laws, regulations and other requirements.

Proposed Section 3.6(a) of the By-Laws

To respond to feedback from its stockholders, Nasdaq proposes to amend its By-Laws to, as set forth in the first sentence of proposed Section 3.6(a), require the Company to include in its proxy statement, its form proxy and any ballot distributed at the stockholder meeting, the name of, and certain Required Information[4] about, any person nominated for election (the ''Stockholder Nominee'') to the Board by a stockholder or group of stockholders (the ''Eligible Stockholder'')[5] that satisfies the requirements set forth in the proxy access provision of Nasdaq's By-Laws.[6] To utilize this provision, the Eligible Stockholder must expressly elect at the time of providing a required notice to the Company of the proxy access nomination (the ''Notice of Proxy Access Nomination'') to have its nominee included in the Company's proxy materials. Stockholders will be eligible to submit proxy access nominations only at annual meetings of stockholders when the Board solicits proxies with respect to the election of directors.

The next two sentences of Section 3.6(a) provide some additional clarification on the term ''Eligible Stockholder.'' First, in calculating the number of stockholders in a group seeking to qualify as an Eligible Stockholder, two or more of the following types of funds shall be counted as one stockholder: (i) Funds under common management and investment control, (ii) funds under common management and funded primarily by the same employer, or (iii)

[43] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* 17 CFR 240.14a–8, which establishes procedures pursuant to which stockholders of a public company may have their proposals placed alongside management's proposals in the company's proxy materials for presentation to a vote at a meeting of stockholders.

[4] The Required Information is the information provided to Nasdaq's Corporate Secretary about the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Company's proxy statement by the regulations promulgated under the Act, and if the Eligible Stockholder so elects, a written statement, not to exceed 500 words, in support of the Stockholder Nominee(s)' candidacy (the ''Statement'').

[5] As used throughout Nasdaq's By-Laws, the term ''Eligible Stockholder'' includes each member of a stockholder group that submits a proxy access nomination to the extent the context requires.

[6] When the Company includes proxy access nominees in the proxy materials, such individuals will be included in addition to any persons nominated for election to the Board or any committee thereof.

funds that are a ''group of investment companies'' as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Company Act of 1940, as amended.[7] Nasdaq views this as a stockholder-friendly provision that will make it easier for such funds to participate in a proxy access nomination since they will not have to comply with the procedural requirements in the proxy access provision multiple times. Second, in the event that the Eligible Stockholder consists of a group of stockholders, any and all requirements and obligations for an individual Eligible Stockholder shall apply to each member of the group, except that the Required Ownership Percentage (discussed further below) shall apply to the ownership of the group in the aggregate. Generally, the applicable requirements and obligations relate to information that each member of the nominating group must provide to Nasdaq about itself, as discussed further below. Nasdaq believes it is reasonable to require each member of the nominating group to provide such information so that both the Company and its stockholders are fully informed about the entire group making the proxy access nomination.

The final sentence of proposed Section 3.6(a) allows Nasdaq to omit from its proxy materials any information or Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law or regulation. This provision allows Nasdaq to comply with Rule 14a–9 under the Act [8] and to protect its stockholders from information that is materially untrue or that violates any law or regulation. The final sentence of proposed Section 3.6(a) also explicitly allows Nasdaq to solicit against, and include in the proxy statement its own statement relating to, any Stockholder Nominee. This provision merely clarifies that just because Nasdaq must include a proxy access nominee in its proxy materials if the proxy access provisions are satisfied, Nasdaq does not necessarily have to support that nominee.

Proposed Section 3.6(b) of the By-Laws

Proposed Section 3.6(b) of the By-Laws establishes the deadline for a timely Notice of Proxy Access Nomination. Specifically, such a notice must be addressed to, and received by, Nasdaq's Corporate Secretary no earlier than one hundred fifty (150) days and no later than one hundred twenty (120) days before the anniversary of the date that Nasdaq issued its proxy statement for the previous year's annual meeting of stockholders. The Company believes this notice period will provide stockholders an adequate window to submit nominees via proxy access, while also providing the Company adequate time to diligence [sic] a proxy access nominee before including them in the proxy statement for the next annual meeting of stockholders.

Proposed Section 3.6(c) of the By-Laws

Proposed Section 3.6(c) specifies that the maximum number of Stockholder Nominees nominated by all Eligible Stockholders that will be included in Nasdaq's proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two and 25% of the total number of directors in office (rounded down to the nearest whole number) as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with the proxy access provision of the By-Laws (the ''Final Proxy Access Nomination Date''). In the event that one or more vacancies for any reason occurs after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board resolves to reduce the size of the Board in connection therewith, the maximum number of Stockholder Nominees included in Nasdaq's proxy materials shall be calculated based on the number of directors in office as so reduced. Any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision of the By-Laws whom the Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the maximum number of Stockholder Nominees has been reached.

Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to the proxy access provision exceeds the maximum number of nominees allowed. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders exceeds the maximum number of nominees allowed, the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder will be selected for inclusion in the proxy materials until the maximum number is reached, going in order of the amount (largest to smallest) of shares of Nasdaq's outstanding common stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to Nasdaq. If the maximum number is not reached after the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder has been selected, this process will continue as many times as necessary, following the same order each time, until the maximum number is reached. Following such determination, if any Stockholder Nominee who satisfies the eligibility requirements thereafter is nominated by the Board, or is not included in the proxy materials or is not submitted for election as a director, in either case, as a result of the Eligible Stockholder becoming ineligible or withdrawing its nomination, the Stockholder Nominee becoming unwilling or unable to serve on the Board or the Eligible Stockholder or the Stockholder Nominee failing to comply with the proxy access provision of the By-Laws, no other nominee or nominees shall be included in the proxy materials or otherwise submitted for director election in substitution thereof.

The Company believes it is reasonable to limit the Board seats available to proxy access nominees, to establish procedures for selecting candidates if the nominee limit is exceeded and to exclude further proxy access nominees in the cases set forth above. The limitation on Board seats available to proxy access nominees ensures that proxy access cannot be used to take over the entire Board, which is not the stated purpose of proxy access campaigns. The procedures for selecting candidates if the nominee limit is exceeded establish clear and rational guidelines for an

[7] *See* 15 U.S.C. 80a–12(d)(1)(G)(ii), which defines ''group of investment companies'' as any two or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.

[8] *See* 17 CFR 240.14a–9, which generally prohibits proxy solicitations that contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

orderly nomination process to avoid the Company having to make arbitrary judgments among candidates. Finally, the exclusion of further proxy access nominees in certain cases will avoid further time and expense to the Company when the proxy access nominee has been nominated by the Board, in which case the goal of the proxy access nomination has been achieved, or in certain cases when the Eligible Stockholder or Stockholder Nominee is at fault.

Proposed Section 3.6(d) of the By-Laws

Proposed Section 3.6(d) clarifies, for the avoidance of doubt, how ''ownership'' will be defined for purposes of meeting the Required Ownership Percentage (discussed further below). Specifically, an Eligible Stockholder shall be deemed to ''own'' only those outstanding shares of Nasdaq's common stock as to which the stockholder possesses both: (i) The full voting and investment rights pertaining to the shares; and (ii) the full economic interest in (including the opportunity for profit from and risk of loss on) such shares; provided that the number of shares calculated in accordance with clauses (i) and (ii) shall not include any shares:

- Sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed, including any short sale;
- borrowed by such stockholder or any of its affiliates for any purposes or purchased by such stockholder or any of its affiliates pursuant to an agreement to resell; or
- subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar agreement entered into by such stockholder or any of its affiliates, whether any such instrument or agreement is to be settled with shares or with cash based on the notional amount or value of shares of Nasdaq's outstanding common stock, in any such case which instrument or agreement has, or is intended to have, or if exercised by either party would have, the purpose or effect of:

○ reducing in any manner, to any extent or at any time in the future, such stockholder's or its affiliates' full right to vote or direct the voting of any such shares; and/or

○ hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or its affiliates.

Further, a stockholder shall ''own'' shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has delegated any voting power by means of a proxy, power of attorney or other instrument or arrangement which is revocable at any time by the stockholder. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has loaned such shares provided that the stockholder has the power to recall such loaned shares on three (3) business days' notice, has recalled such loaned shares as of the date of the Notice of Proxy Access Nomination and holds such shares through the date of the annual meeting. The terms ''owned,'' ''owning'' and other variations of the word ''own'' shall have correlative meanings. Whether outstanding shares of Nasdaq's common stock are ''owned'' for these purposes shall be determined by the Board or any committee thereof, in each case, in its sole discretion. For purposes of the proxy access provision of the By-Laws, the term ''affiliate'' or ''affiliates'' shall have the meaning ascribed thereto under the rules and regulations of the Act.[9] An Eligible Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to own for the purposes of the proxy access provision of the By-Laws.

Proposed Section 3.6(e) of the By-Laws

The first paragraph of proposed Section 3.6(e) establishes certain requirements for an Eligible Stockholder to make a proxy access nomination. Specifically, an Eligible Stockholder must have owned (defined as discussed above) 3% or more (the ''Required Ownership Percentage'') of Nasdaq's outstanding common stock (the ''Required Shares'') continuously for 3 years (the ''Minimum Holding Period'') as of both the date the Notice of Proxy Access Nomination is received by Nasdaq's Corporate Secretary and the record date for determining the stockholders entitled to vote at the annual meeting and must continue to own the Required Shares through the meeting date.

Proposed Section 3.6(e) also sets forth the information that an Eligible Stockholder must provide to Nasdaq's Corporate Secretary in writing within the deadline discussed above in order to make a proxy access nomination. This information includes:

- One or more written statements from the record holder of the shares (and from each intermediary through which the shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Notice of Proxy Access Nomination is delivered to, or mailed to and received by, Nasdaq's Corporate Secretary, the Eligible Stockholder owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder's agreement to provide, within five (5) business days after the record date for the annual meeting, written statements from the record holder and intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date; [10]
- a copy of the Schedule 14N that has been filed with the SEC as required by Rule 14a–18 under the Act; [11]
- the information, representations and agreements with respect to the Eligible Stockholder that are the same as those that would be required to be set forth in a stockholder's notice of nomination with respect to a ''Proposing Person'' pursuant to Section 3.1(b)(i) and Section 3.1(b)(iii) of the By-Laws; [12]
- the consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected; [13]
- a representation that the Eligible Stockholder:

○ acquired the Required Shares in the ordinary course of business and not with the intent to change or influence

[9] Pursuant to Rule 12b–2 under the Act, ''[a]n 'affiliate' of, or a person 'affiliated' with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.'' 17 CFR 240.12b–2. Further, ''[t]he term 'control' (including the terms 'controlling,' 'controlled by' and 'under common control with') means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'' 17 CFR 240.12b–2.

[10] *See* proposed Section 3.6(e)(i) of the By-Laws.

[11] *See* proposed Section 3.6(e)(ii) of the By-Laws; *see also* 17 CFR 240.14n–101 and 17 CFR 240.14a–18, which generally require a Nominating Stockholder to provide notice to the Company of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to the Company.

[12] *See* proposed Section 3.6(e)(iii) of the By-Laws; *see also* Sections 3.1(b)(i) and 3.1(b)(iii) of the By-Laws, which constitute part of Nasdaq's ''advance notice'' provision under which a ''Proposing Person'' may, among other things, nominate a person for election to the Board.

[13] *See* proposed Section 3.6(e)(iv) of the By-Laws.

control of Nasdaq, and does not presently have such intent; [14]

○ presently intends to maintain qualifying ownership of the Required Shares through the date of the annual meeting; [15]

○ has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s); [16]

○ has not engaged and will not engage in, and has not and will not be a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting, other than its Stockholder Nominee(s) or a nominee of the Board; [17]

○ agrees to comply with all applicable laws and regulations with respect to any solicitation in connection with the meeting or applicable to the filing and use, if any, of soliciting material; [18]

○ will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; [19] and

○ as to any two or more funds whose shares are aggregated to count as one stockholder for the purpose of constituting an Eligible Stockholder, within five business days after the date of the Notice of Proxy Access Nomination, will provide to Nasdaq documentation reasonably satisfactory to Nasdaq that demonstrates that the funds satisfy the requirements in the By-Laws, which were discussed above, for the funds to qualify as one Eligible Stockholder; [20]

• a representation as to the Eligible Stockholder's intentions with respect to maintaining qualifying ownership of the Required Shares for at least one year following the annual meeting; [21]

• an undertaking that the Eligible Stockholder agrees to:

○ assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder's communications with Nasdaq's stockholders or out of the information that the Eligible Stockholder provided to Nasdaq; [22]

○ indemnify and hold harmless Nasdaq and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against Nasdaq or any of its directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to the proxy access provision; [23] and

○ file with the SEC any solicitation or other communication with Nasdaq's stockholders relating to the meeting at which the Stockholder Nominee will be nominated, regardless of whether any such filing is required under Regulation 14A of the Act or whether any exemption from filing is available thereunder; [24] and

• in the case of a nomination by a group of stockholders that together is an Eligible Stockholder, the designation by all group members of one group member that is authorized to act on behalf of all such members with respect to the nomination and matters related thereto, including withdrawal of the nomination.[25]

In proposing the Required Ownership Percentage and the Minimum Holding Period, Nasdaq seeks to ensure that the Eligible Stockholder has had a sufficient stake in the Company for a sufficient amount of time and is not pursuing a short-term agenda. In proposing the informational requirements for the Eligible Stockholder, Nasdaq's goal is to gather sufficient information about the Eligible Stockholder for both itself and its stockholders. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(f) of the By-Laws

Proposed Section 3.6(f) establishes the information the Stockholder Nominee must deliver to Nasdaq's Corporate Secretary within the time period specified for delivering the Notice of Proxy Access Nomination. This information includes:

• the information required with respect to persons whom a stockholder proposes to nominate for election or reelection as a director by Section 3.1(b)(i) of the By-Laws [26] including, but not limited to, the signed questionnaire, representation and agreement required by Section 3.1(b)(i)(D) of the By-Laws; [27] and

• a written representation and agreement that such person:

○ will act as a representative of all of Nasdaq's stockholders while serving as a director; and

○ will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects (and shall not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading).

In addition, at the request of Nasdaq, the Stockholder Nominee(s) must submit all completed and signed questionnaires required of Nasdaq's directors and officers. Nasdaq may request such additional information as necessary to (y) permit the Board to determine if each Stockholder Nominee satisfies the requirements of the proxy access provision of the By-Laws or if each Stockholder Nominee is independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing the independence of Nasdaq's directors [28] and/or (z) permit Nasdaq's

[14] *See* proposed Section 3.6(e)(v)(A) of the By-Laws.

[15] *See* proposed Section 3.6(e)(v)(B) of the By-Laws.

[16] *See* proposed Section 3.6(e)(v)(C) of the By-Laws.

[17] *See* proposed Section 3.6(e)(v)(D) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[18] *See* proposed Section 3.6(e)(v)(E) of the By-Laws.

[19] *See* proposed Section 3.6(e)(v)(F) of the By-Laws.

[20] *See* proposed Section 3.6(e)(v)(G) of the By-Laws.

[21] *See* proposed Section 3.6(e)(vi) of the By-Laws.

[22] *See* proposed Section 3.6(e)(vii)(A) of the By-Laws.

[23] *See* proposed Section 3.6(e)(vii)(B) of the By-Laws.

[24] *See* proposed Section 3.6(e)(vii)(C) of the By-Laws; *see also* 17 CFR 240.14a–1–14b–2, which governs solicitations of proxies.

[25] *See* proposed Section 3.6(e)(viii) of the By-Laws.

[26] Section 3.1(b)(i) of the By-Laws describes the information that a proposing stockholder must provide about an individual the stockholder proposes to nominate for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[27] Section 3.1(b)(i)(D) of the By-Laws requires a completed and signed questionnaire, representation and agreement, each containing certain information, from each individual proposed to be nominated for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[28] Currently, the independence of Nasdaq's directors is determined pursuant to the definition of ''Independent Director'' in Listing Rule 5605(a)(2) of The NASDAQ Stock Market, under which certain categories of individuals cannot be deemed independent and with respect to other individuals, the Board must make an affirmative determination that such individual has no relationship that, in the opinion of the Board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Other independence standards under the SEC rules and the Listing Rules of The NASDAQ Stock Market apply to members of certain of the Board's committees. As detailed below, the

Corporate Secretary to determine the classification of such nominee as an Industry, Non-Industry, Issuer or Public Director, if applicable, in order to make the certification referenced in Section 4.13(h)(iii) of the By-Laws.[29]

Like the informational requirements for an Eligible Stockholder, which are set forth above, the informational requirements for the Stockholder Nominee ensure that both Nasdaq and its stockholders will have sufficient information about the Stockholder Nominee. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(g) of the By-Laws

Pursuant to proposed Section 3.6(g), each Eligible Stockholder or Stockholder Nominee must promptly notify Nasdaq's Corporate Secretary of any information or communications provided by the Eligible Stockholder or Stockholder Nominee to Nasdaq or its stockholders that ceases to be true and correct in all material respects or omits a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading and of the information that is required to correct any such defect. This provision further states that providing any such notification shall not be deemed to cure any defect or, with respect to any defect that Nasdaq determines is material, limit Nasdaq's rights to omit a Stockholder Nominee from its proxy materials. This provision is intended to protect Nasdaq's stockholders by requiring an Eligible Stockholder or Stockholder Nominee to give Nasdaq notice of information previously provided that is materially untrue. Nasdaq may then decide what action to take with respect to such defect, which may include, with respect to a material defect, omitting the relevant Stockholder Nominee from its proxy materials.

Proposed Section 3.6(h) of the By-Laws

Proposed Section 3.6(h) provides that Nasdaq shall not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders under certain circumstances. In these situations, the proxy access nomination shall be disregarded and no vote on such Stockholder Nominee will occur, even if Nasdaq has received proxies in respect of the vote. These circumstances occur when the Stockholder Nominee:

- Has been nominated by an Eligible Stockholder who has engaged in or is currently engaged in, or has been or is a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board; [30]
- is not independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing independence of Nasdaq's directors, in each case as determined by the Board in its sole discretion; [31]
- would, if elected as a member of the Board, cause Nasdaq to be in violation of the By-Laws (including but not limited to the compositional requirements of the Board set forth in Section 4.3 of the By-Laws), its Amended and Restated Certificate of Incorporation, the rules and listing standards of The NASDAQ Stock Market, or any applicable state or federal law, rule or regulation; [32]
- is or has been, within the past three (3) years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914; [33]
- is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past ten (10) years; [34]
- is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended; [35]
- is subject to ''statutory disqualification'' under Section 3(a)(39) of the Act; [36]
- has, or the applicable Eligible Stockholder has, provided information to Nasdaq in respect of the proxy access nomination that was untrue in any material respect or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, as determined by the Board or any committee thereof, in each case, in its sole discretion; [37] or
- breaches or fails, or the applicable Eligible Stockholder breaches or fails, to comply with its obligations pursuant to the By-Laws, including, but not limited to, the proxy access provisions and any agreement, representation or undertaking required by the proxy access provisions.[38]

Nasdaq believes these provisions will protect the Company and its stockholders by allowing it to exclude certain categories of objectionable Stockholder Nominees from the proxy statement.

Proposed Section 3.6(i) of the By-Laws

Under proposed Section 3.6(i), the Board or the chairman of the meeting of

Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board.

[29] Section 4.13(h)(iii) of the By-Laws requires Nasdaq's Corporate Secretary to collect from each nominee for director such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, Issuer, or Public Director, if applicable, and to certify to the Committee each nominee's classification, if applicable. Detailed definitions of the terms ''Industry Director,'' ''Non-Industry Director,'' ''Issuer Director'' and ''Public Director'' are included in Article I of the By-Laws.

[30] *See* proposed Section 3.6(h)(i) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[31] *See* proposed Section 3.6(h)(ii) of the By-Laws; *see also* footnote 28, *supra.* The Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board. The Commission further notes that, according to Nasdaq, should the Board decide to adopt additional, more stringent standards than those required under Nasdaq listing standards and any requirements under Commission rules, all director nominees would be evaluated against these standards—not just those shareholder candidates nominated under the provisions of proposed Section 3.6.

[32] *See* proposed Section 3.6(h)(iii) of the By-Laws; *see also* Section 4.3 of the By-Laws, which provides that the number of Non-Industry Directors on the Board must equal or exceed the number of Industry Directors. In addition, the Board must include at least two Public Directors and may include at least one, but no more than two, Issuer Directors. Finally, the Board shall include no more than one Staff Director, unless the Board consists of ten or more directors, in which case, the Board shall include no more than two Staff Directors. Detailed definitions of the terms ''Non-Industry Director,'' ''Industry Director,'' ''Public Director,'' ''Issuer Director'' and ''Staff Director'' are included in Article I of the By-Laws.

[33] *See* proposed Section 3.6(h)(iv) of the By-Laws; *see also* 15 U.S.C. 19(a)(1), which generally provides that ''[n]o person shall, at the same time, serve as a director or officer in any two corporations'' that are ''competitors'' such that ''the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.''

[34] *See* proposed Section 3.6(h)(v) of the By-Laws.

[35] *See* proposed Section 3.6(h)(vi) of the By-Laws; *see also* 17 CFR 230.506(d), which generally disqualifies offerings involving certain felons and other bad actors from relying on the ''safe harbor'' in Rule 506 of Regulation D from registration under the Securities Act of 1933, as amended.

[36] *See* proposed Section 3.6(h)(vii) of the By-Laws; *see also* 15 U.S.C. 78c(a)(39), which disqualifies certain categories of individuals who generally have engaged in misconduct from membership or participation in, or association with a member of, a self-regulatory organization.

[37] *See* proposed Section 3.6(h)(viii) of the By-Laws.

[38] *See* proposed Section 3.6(h)(ix) of the By-Laws.

stockholders shall declare a proxy access nomination invalid, and such nomination shall be disregarded even if proxies in respect of such nomination have been received by the Company, if:

- the Stockholder Nominee(s) and/or the applicable Eligible Stockholder have breached its or their obligations under the proxy access provision of the By-Laws, as determined by the Board or the chairman of the meeting of stockholders, in each case, in its or his sole discretion; or
- the Eligible Stockholder (or a qualified representative thereof) does not appear at the meeting of stockholders to present the proxy access nomination.

Nasdaq believes this provision protects the Company and its stockholders by providing the Board or the chairman of the stockholder meeting limited authority to disqualify a proxy access nominee when that nominee or the sponsoring stockholder(s) have breached an obligation under the proxy access provision, including the obligation to appear at the stockholder meeting to present the proxy access nomination.

Proposed Section 3.6(j) of the By-Laws

Proposed Section 3.6(j) states that the following Stockholder Nominees who are included in the Company's proxy materials for a particular annual meeting of stockholders will be ineligible to be a Stockholder Nominee for the next two annual meetings:

- a Stockholder Nominee who withdraws from or becomes ineligible or unavailable for election at the annual meeting; or
- a Stockholder Nominee who does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election.

This provision will save the Company and its stockholders the time and expense of analyzing and addressing subsequent proxy access nominations regarding individuals who were included in the proxy materials for a particular annual meeting but ultimately did not stand for election or receive a substantial amount of votes. After the next two annual meetings, these Stockholder Nominees would again be eligible for nomination through the proxy access provisions of the By-Laws.

Proposed Section 3.6(k) of the By-Laws

In case there are matters involving a proxy access nomination that are open to interpretation, proposed Section 3.6(k) states that the Board (or any other person or body authorized by the Board) shall have exclusive power and authority to interpret the proxy access provisions of the By-Laws and make all determinations deemed necessary or advisable as to any person, facts or circumstances. In addition, all actions, interpretations and determinations of the Board (or any person or body authorized by the Board) with respect to the proxy access provisions shall be final, conclusive and binding on the Company, the stockholders and all other parties. While Nasdaq has attempted to implement a clear, detailed and thorough proxy access provision, there may be matters about future proxy access nominations that are open to interpretation. In these cases, Nasdaq believes it is reasonable and necessary to designate an arbiter to make final decisions on these points and that the Board is best-suited to act as that arbiter.

Proposed Section 3.6(l) of the By-Laws

Proposed Section 3.6(l) prohibits a stockholder from joining more than one group of stockholders to become an Eligible Stockholder for purposes of submitting a proxy access nomination for each annual meeting of stockholders. Nasdaq analogizes this provision to Article IV, Paragraph C(1) of its Amended and Restated Certificate of Incorporation, under which each holder of Nasdaq's common stock shall be entitled to one vote per share on all matters presented to the stockholders for a vote. Similar to that provision, Nasdaq believes it is reasonable for each share to count only once in submitting a proxy access nomination.

Proposed Section 3.6(m) of the By-Laws

For the avoidance of doubt, proposed Section 3.6(m) states that the proxy access provisions outlined in Section 3.6 of the By-Laws shall be the exclusive means for stockholders to include nominees in the Company's proxy materials. Stockholders may, of course, continue to propose nominees to the Committee and Board through other means, but the Committee and Board will have final authority to determine whether to include those nominees in the Company's proxy materials.

Revisions to Other Sections of the By-Laws

Nasdaq also proposes to make conforming changes to Sections 3.1(a), 3.3(a), 3.3(c) and 3.5 of the By-Laws to provide clarifications and prevent confusion. Specifically, current Section 3.1(a) enumerates the methods by which nominations of persons for election to the Board may be made at an annual meeting of stockholders; Nasdaq proposes to add proxy access nominations to the list of methods. Current Section 3.3(a) specifies that, among other things, only such persons who are nominated in accordance with the procedures set forth in Article III of the By-Laws [39] shall be eligible to be elected at an annual or special meeting of Nasdaq's stockholders to serve as directors; for the avoidance of doubt, Nasdaq proposes to clarify that the reference to Article III includes the proxy access provision in Section 3.6 of the By-Laws with respect to director nominations in connection with annual meetings. Current Section 3.3(c) states, among other things, that compliance with Section 3.1(a)(iii) and (b) [40] shall be the exclusive means for a stockholder to make a director nomination; Nasdaq proposes to add proxy access as an additional means for a stockholder to make a director nomination. Finally, current Section 3.5 requires Nasdaq's director nominees to submit to Nasdaq's Corporate Secretary a questionnaire, representation and agreement within certain time periods; Nasdaq proposes to clarify that proxy access nominees must submit these materials within the time periods prescribed for delivery of a Notice of Proxy Access Nomination, as described above.

2. Statutory Basis

BSECC believes that its proposal is consistent with Section 17A(b)(3)(C) of the Act,[41] in that it assures a fair representation of shareholders and participants in the selection of directors and administration of its affairs. While the proposal relates to the organizational documents of the Company, rather than BSECC, BSECC is indirectly owned by the Company, and therefore, the Company's stockholders have an indirect stake in BSECC. In addition, the participants in BSECC, to the extent any exist, could purchase stock in the Company in the open market, just like any other stockholder.

In response to feedback from its investors, Nasdaq is proposing changes to its By-Laws to implement proxy access. BSECC believes that, by permitting an Eligible Stockholder of Nasdaq that meets the stated requirements to nominate directors and have its nominees included in Nasdaq's annual meeting proxy statement, the proposed rule change strengthens the corporate governance of BSECC's ultimate parent company, which assures a fair representation of shareholders and

[39] Article III of the By-Laws relates to stockholder meetings.

[40] As part of Nasdaq's ''advance notice'' provision, Sections 3.1(a)(iii) and (b) of the By-Laws describe certain procedures that a stockholder must follow to, among other things, nominate a person for election to the Board.

[41] 15 U.S.C. 78q–1(b)(3)(C).

participants in the selection of directors and administration of its affairs.

In drafting its proxy access provision, Nasdaq has attempted to strike an appropriate balance between responding to investor feedback and including certain procedural and informational requirements to again assure a fair representation of shareholders and participants in the selection of directors and administration of its affairs. Specifically, the procedural requirements will achieve this objective by stating clearly and explicitly the procedures stockholders must follow in order to submit a proper proxy access nomination. The informational requirements will achieve this objective by ensuring, among other things, that the Company and its stockholders have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees comply with applicable laws, regulations and other requirements.

Finally, the remaining changes are clarifying in nature, and they assure fair representation by preventing confusion with respect to the operation of the By-Law provisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

Because the proposed rule change relates to the governance of the Company and not to the operations of BSECC, BSECC 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.

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

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 BSECC 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–BSECC–2016–001 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–BSECC–2016–001. 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 BSECC. 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–BSECC–2016–001 and should be submitted on or before October 26, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Robert W. Errett,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

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Self-Regulatory Organizations; ISE Gemini, LLC; Notice of Filing of Proposed Rule Change To Amend the By-Laws of Nasdaq, Inc. To Implement Proxy Access

September 29, 2016.

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 September 15, 2016, ISE Gemini, LLC (''ISE Gemini'') 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 is filing this proposed rule change with respect to amendments of the By-Laws (the ''By-Laws'') of its parent corporation, Nasdaq, Inc. (''Nasdaq'' or the ''Company''), to implement proxy access. The proposed amendments will be implemented on a date designated by the Company following approval by the Commission. The text of the proposed rule change is available on the Exchange's Web site at *www.ise.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

[42] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

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

Background

At Nasdaq's 2016 annual meeting held on May 5, 2016, Nasdaq's stockholders considered a stockholder proposal submitted under Rule 14a–8 under the Act.[3] The proposal, which passed with 73.52% of the votes cast, requested that Nasdaq's Board of Directors (the ''Board'') take steps to implement a ''proxy access'' by-law. Proxy access by-laws allow a stockholder, or group of stockholders, who comply with certain requirements, to nominate candidates for service on a board and have those candidates included in a company's proxy materials. Such provisions allow stockholders to nominate candidates without undertaking the expense of a proxy solicitation.

Following the 2016 annual meeting, the Nominating & Governance Committee (the ''Committee'') of the Board and the Board reviewed the voting results on the stockholder proposal and discussed proxy access generally. The Committee ultimately recommended to the Board, and the Board approved, certain changes to Nasdaq's By-Laws to implement proxy access. Nasdaq now proposes to make these changes by adopting new Section 3.6 of the By-Laws and making certain conforming changes to current Sections 3.1, 3.3 and 3.5 of the By-Laws, all of which are described further below.

In developing its proposal, Nasdaq has generally tried to balance the relative weight of arguments for and against proxy access provisions. On the one hand, Nasdaq recognizes the significance of this issue to some investors, who see proxy access as an important accountability mechanism that allows them to participate in board elections through the nomination of stockholder candidates that are presented in a company's proxy statement. On the other hand, Nasdaq's proposed proxy access provision includes certain procedural requirements that ensure, among other things, that the Company and its stockholders will have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees will comply with applicable laws, regulations and other requirements.

Proposed Section 3.6(a) of the By-Laws

To respond to feedback from its stockholders, Nasdaq proposes to amend its By-Laws to, as set forth in the first sentence of proposed Section 3.6(a), require the Company to include in its proxy statement, its form proxy and any ballot distributed at the stockholder meeting, the name of, and certain Required Information [4] about, any person nominated for election (the ''Stockholder Nominee'') to the Board by a stockholder or group of stockholders (the ''Eligible Stockholder'') [5] that satisfies the requirements set forth in the proxy access provision of Nasdaq's By-Laws.[6] To utilize this provision, the Eligible Stockholder must expressly elect at the time of providing a required notice to the Company of the proxy access nomination (the ''Notice of Proxy Access Nomination'') to have its nominee included in the Company's proxy materials. Stockholders will be eligible to submit proxy access nominations only at annual meetings of stockholders when the Board solicits proxies with respect to the election of directors.

The next two sentences of Section 3.6(a) provide some additional clarification on the term ''Eligible Stockholder.'' First, in calculating the number of stockholders in a group seeking to qualify as an Eligible Stockholder, two or more of the following types of funds shall be counted as one stockholder: (i) Funds under common management and investment control, (ii) funds under common management and funded primarily by the same employer, or (iii) funds that are a ''group of investment companies'' as such term is defined in Section 12(d)(1)(G)(ii) of the Investment Company Act of 1940, as amended.[7] Nasdaq views this as a stockholder-friendly provision that will make it easier for such funds to participate in a proxy access nomination since they will not have to comply with the procedural requirements in the proxy access provision multiple times. Second, in the event that the Eligible Stockholder consists of a group of stockholders, any and all requirements and obligations for an individual Eligible Stockholder shall apply to each member of the group, except that the Required Ownership Percentage (discussed further below) shall apply to the ownership of the group in the aggregate. Generally, the applicable requirements and obligations relate to information that each member of the nominating group must provide to Nasdaq about itself, as discussed further below. Nasdaq believes it is reasonable to require each member of the nominating group to provide such information so that both the Company and its stockholders are fully informed about the entire group making the proxy access nomination.

The final sentence of proposed Section 3.6(a) allows Nasdaq to omit from its proxy materials any information or Statement (or portion thereof) that it, in good faith, believes is untrue in any material respect (or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law or regulation. This provision allows Nasdaq to comply with Rule 14a–9 under the Act [8] and to protect its stockholders from information that is materially untrue or that violates any law or regulation. The final sentence of proposed Section 3.6(a) also explicitly allows Nasdaq to solicit against, and include in the proxy statement its own statement relating to, any Stockholder Nominee. This provision merely clarifies that just because Nasdaq must include a proxy access nominee in its proxy materials if the proxy access provisions are

[3] *See* 17 CFR 240.14a–8, which establishes procedures pursuant to which stockholders of a public company may have their proposals placed alongside management's proposals in the company's proxy materials for presentation to a vote at a meeting of stockholders.

[4] The Required Information is the information provided to Nasdaq's Corporate Secretary about the Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the Company's proxy statement by the regulations promulgated under the Act, and if the Eligible Stockholder so elects, a written statement, not to exceed 500 words, in support of the Stockholder Nominee(s)' candidacy (the ''Statement'').

[5] As used throughout Nasdaq's By-Laws, the term ''Eligible Stockholder'' includes each member of a stockholder group that submits a proxy access nomination to the extent the context requires.

[6] When the Company includes proxy access nominees in the proxy materials, such individuals will be included in addition to any persons nominated for election to the Board or any committee thereof.

[7] *See* 15 U.S.C. 80a–12(d)(1)(G)(ii), which defines ''group of investment companies'' as any two or more registered investment companies that hold themselves out to investors as related companies for purposes of investment and investor services.

[8] *See* 17 CFR 240.14a–9, which generally prohibits proxy solicitations that contain any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.

satisfied, Nasdaq does not necessarily have to support that nominee.

Proposed Section 3.6(b) of the By-Laws

Proposed Section 3.6(b) of the By-Laws establishes the deadline for a timely Notice of Proxy Access Nomination. Specifically, such a notice must be addressed to, and received by, Nasdaq's Corporate Secretary no earlier than one hundred fifty (150) days and no later than one hundred twenty (120) days before the anniversary of the date that Nasdaq issued its proxy statement for the previous year's annual meeting of stockholders. The Company believes this notice period will provide stockholders an adequate window to submit nominees via proxy access, while also providing the Company adequate time to diligence [sic] a proxy access nominee before including them in the proxy statement for the next annual meeting of stockholders.

Proposed Section 3.6(c) of the By-Laws

Proposed Section 3.6(c) specifies that the maximum number of Stockholder Nominees nominated by all Eligible Stockholders that will be included in Nasdaq's proxy materials with respect to an annual meeting of stockholders shall not exceed the greater of two and 25% of the total number of directors in office (rounded down to the nearest whole number) as of the last day on which a Notice of Proxy Access Nomination may be delivered pursuant to and in accordance with the proxy access provision of the By-Laws (the ''Final Proxy Access Nomination Date''). In the event that one or more vacancies for any reason occurs after the Final Proxy Access Nomination Date but before the date of the annual meeting and the Board resolves to reduce the size of the Board in connection therewith, the maximum number of Stockholder Nominees included in Nasdaq's proxy materials shall be calculated based on the number of directors in office as so reduced. Any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision of the By-Laws whom the Board decides to nominate as a nominee of the Board, and any individual nominated by an Eligible Stockholder for inclusion in the proxy materials pursuant to the proxy access provision but whose nomination is subsequently withdrawn, shall be counted as one of the Stockholder Nominees for purposes of determining when the maximum number of Stockholder Nominees has been reached.

Any Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the proxy materials shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the proxy statement in the event that the total number of Stockholder Nominees submitted by Eligible Stockholders pursuant to the proxy access provision exceeds the maximum number of nominees allowed. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders exceeds the maximum number of nominees allowed, the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder will be selected for inclusion in the proxy materials until the maximum number is reached, going in order of the amount (largest to smallest) of shares of Nasdaq's outstanding common stock each Eligible Stockholder disclosed as owned in its respective Notice of Proxy Access Nomination submitted to Nasdaq. If the maximum number is not reached after the highest ranking Stockholder Nominee who meets the requirements of the proxy access provision of the By-Laws from each Eligible Stockholder has been selected, this process will continue as many times as necessary, following the same order each time, until the maximum number is reached. Following such determination, if any Stockholder Nominee who satisfies the eligibility requirements thereafter is nominated by the Board, or is not included in the proxy materials or is not submitted for election as a director, in either case, as a result of the Eligible Stockholder becoming ineligible or withdrawing its nomination, the Stockholder Nominee becoming unwilling or unable to serve on the Board or the Eligible Stockholder or the Stockholder Nominee failing to comply with the proxy access provision of the By-Laws, no other nominee or nominees shall be included in the proxy materials or otherwise submitted for director election in substitution thereof.

The Company believes it is reasonable to limit the Board seats available to proxy access nominees, to establish procedures for selecting candidates if the nominee limit is exceeded and to exclude further proxy access nominees in the cases set forth above. The limitation on Board seats available to proxy access nominees ensures that proxy access cannot be used to take over the entire Board, which is not the stated purpose of proxy access campaigns. The procedures for selecting candidates if the nominee limit is exceeded establish clear and rational guidelines for an orderly nomination process to avoid the Company having to make arbitrary judgments among candidates. Finally, the exclusion of further proxy access nominees in certain cases will avoid further time and expense to the Company when the proxy access nominee has been nominated by the Board, in which case the goal of the proxy access nomination has been achieved, or in certain cases when the Eligible Stockholder or Stockholder Nominee is at fault.

Proposed Section 3.6(d) of the By-Laws

Proposed Section 3.6(d) clarifies, for the avoidance of doubt, how ''ownership'' will be defined for purposes of meeting the Required Ownership Percentage (discussed further below). Specifically, an Eligible Stockholder shall be deemed to ''own'' only those outstanding shares of Nasdaq's common stock as to which the stockholder possesses both: (i) The full voting and investment rights pertaining to the shares; and (ii) the full economic interest in (including the opportunity for profit from and risk of loss on) such shares; provided that the number of shares calculated in accordance with clauses (i) and (ii) shall not include any shares:

- Sold by such stockholder or any of its affiliates in any transaction that has not been settled or closed, including any short sale;
- borrowed by such stockholder or any of its affiliates for any purposes or purchased by such stockholder or any of its affiliates pursuant to an agreement to resell; or
- subject to any option, warrant, forward contract, swap, contract of sale, other derivative or similar agreement entered into by such stockholder or any of its affiliates, whether any such instrument or agreement is to be settled with shares or with cash based on the notional amount or value of shares of Nasdaq's outstanding common stock, in any such case which instrument or agreement has, or is intended to have, or if exercised by either party would have, the purpose or effect of:
  - Reducing in any manner, to any extent or at any time in the future, such stockholder's or its affiliates' full right to vote or direct the voting of any such shares; and/or
  - hedging, offsetting or altering to any degree any gain or loss realized or realizable from maintaining the full economic ownership of such shares by such stockholder or its affiliates.

Further, a stockholder shall ''own'' shares held in the name of a nominee or other intermediary so long as the stockholder retains the right to instruct

how the shares are voted with respect to the election of directors and possesses the full economic interest in the shares. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has delegated any voting power by means of a proxy, power of attorney or other instrument or arrangement which is revocable at any time by the stockholder. A stockholder's ownership of shares shall be deemed to continue during any period in which the stockholder has loaned such shares provided that the stockholder has the power to recall such loaned shares on three (3) business days' notice, has recalled such loaned shares as of the date of the Notice of Proxy Access Nomination and holds such shares through the date of the annual meeting. The terms ''owned,'' ''owning'' and other variations of the word ''own'' shall have correlative meanings. Whether outstanding shares of Nasdaq's common stock are ''owned'' for these purposes shall be determined by the Board or any committee thereof, in each case, in its sole discretion. For purposes of the proxy access provision of the By-Laws, the term ''affiliate'' or ''affiliates'' shall have the meaning ascribed thereto under the rules and regulations of the Act.[9] An Eligible Stockholder shall include in its Notice of Proxy Access Nomination the number of shares it is deemed to own for the purposes of the proxy access provision of the By-Laws.

Proposed Section 3.6(e) of the By-Laws

The first paragraph of proposed Section 3.6(e) establishes certain requirements for an Eligible Stockholder to make a proxy access nomination. Specifically, an Eligible Stockholder must have owned (defined as discussed above) 3% or more (the ''Required Ownership Percentage'') of Nasdaq's outstanding common stock (the ''Required Shares'') continuously for 3 years (the ''Minimum Holding Period'') as of both the date the Notice of Proxy Access Nomination is received by Nasdaq's Corporate Secretary and the record date for determining the stockholders entitled to vote at the annual meeting and must continue to own the Required Shares through the meeting date.

Proposed Section 3.6(e) also sets forth the information that an Eligible Stockholder must provide to Nasdaq's Corporate Secretary in writing within the deadline discussed above in order to make a proxy access nomination. This information includes:

- One or more written statements from the record holder of the shares (and from each intermediary through which the shares are or have been held during the Minimum Holding Period) verifying that, as of a date within seven calendar days prior to the date the Notice of Proxy Access Nomination is delivered to, or mailed to and received by, Nasdaq's Corporate Secretary, the Eligible Stockholder owns, and has owned continuously for the Minimum Holding Period, the Required Shares, and the Eligible Stockholder's agreement to provide, within five (5) business days after the record date for the annual meeting, written statements from the record holder and intermediaries verifying the Eligible Stockholder's continuous ownership of the Required Shares through the record date; [10]

- a copy of the Schedule 14N that has been filed with the SEC as required by Rule 14a–18 under the Act; [11]

- the information, representations and agreements with respect to the Eligible Stockholder that are the same as those that would be required to be set forth in a stockholder's notice of nomination with respect to a ''Proposing Person'' pursuant to Section 3.1(b)(i) and Section 3.1(b)(iii) of the By-Laws; [12]

- the consent of each Stockholder Nominee to being named in the proxy statement as a nominee and to serving as a director if elected; [13]

- a representation that the Eligible Stockholder:

○ Acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control of Nasdaq, and does not presently have such intent; [14]

○ presently intends to maintain qualifying ownership of the Required Shares through the date of the annual meeting; [15]

○ has not nominated and will not nominate for election any individual as a director at the annual meeting, other than its Stockholder Nominee(s); [16]

○ has not engaged and will not engage in, and has not and will not be a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting, other than its Stockholder Nominee(s) or a nominee of the Board; [17]

○ agrees to comply with all applicable laws and regulations with respect to any solicitation in connection with the meeting or applicable to the filing and use, if any, of soliciting material; [18]

○ will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects and do not and will not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; [19] and

○ as to any two or more funds whose shares are aggregated to count as one stockholder for the purpose of constituting an Eligible Stockholder, within five business days after the date of the Notice of Proxy Access Nomination, will provide to Nasdaq documentation reasonably satisfactory to Nasdaq that demonstrates that the funds satisfy the requirements in the By-Laws, which were discussed above, for the funds to qualify as one Eligible Stockholder; [20]

- a representation as to the Eligible Stockholder's intentions with respect to maintaining qualifying ownership of the Required Shares for at least one year following the annual meeting; [21]

- an undertaking that the Eligible Stockholder agrees to:

[9] Pursuant to Rule 12b–2 under the Act, ''[a]n 'affiliate' of, or a person 'affiliated' with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.'' 17 CFR 240.12b–2. Further, ''[t]he term 'control' (including the terms 'controlling,' 'controlled by' and 'under common control with') means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'' 17 CFR 240.12b–2.

[10] *See* proposed Section 3.6(e)(i) of the By-Laws.

[11] *See* proposed Section 3.6(e)(ii) of the By-Laws; *see also* 17 CFR 240.14n–101 and 17 CFR 240.14a–18, which generally require a Nominating Stockholder to provide notice to the Company of its intent to submit a proxy access nomination on a Schedule 14N and file that notice, including the required disclosure, with the Commission on the date first transmitted to the Company.

[12] *See* proposed Section 3.6(e)(iii) of the By-Laws; *see also* Sections 3.1(b)(i) and 3.1(b)(iii) of the By-Laws, which constitute part of Nasdaq's ''advance notice'' provision under which a ''Proposing Person'' may, among other things, nominate a person for election to the Board.

[13] *See* proposed Section 3.6(e)(iv) of the By-Laws.

[14] *See* proposed Section 3.6(e)(v)(A) of the By-Laws.

[15] *See* proposed Section 3.6(e)(v)(B) of the By-Laws.

[16] *See* proposed Section 3.6(e)(v)(C) of the By-Laws.

[17] *See* proposed Section 3.6(e)(v)(D) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[18] *See* proposed Section 3.6(e)(v)(E) of the By-Laws.

[19] *See* proposed Section 3.6(e)(v)(F) of the By-Laws.

[20] *See* proposed Section 3.6(e)(v)(G) of the By-Laws.

[21] *See* proposed Section 3.6(e)(vi) of the By-Laws.

○ Assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder's communications with Nasdaq's stockholders or out of the information that the Eligible Stockholder provided to Nasdaq; [22]

○ indemnify and hold harmless Nasdaq and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against Nasdaq or any of its directors, officers or employees arising out of any nomination submitted by the Eligible Stockholder pursuant to the proxy access provision; [23] and

○ file with the SEC any solicitation or other communication with Nasdaq's stockholders relating to the meeting at which the Stockholder Nominee will be nominated, regardless of whether any such filing is required under Regulation 14A of the Act or whether any exemption from filing is available thereunder; [24] and

• in the case of a nomination by a group of stockholders that together is an Eligible Stockholder, the designation by all group members of one group member that is authorized to act on behalf of all such members with respect to the nomination and matters related thereto, including withdrawal of the nomination.[25]

In proposing the Required Ownership Percentage and the Minimum Holding Period, Nasdaq seeks to ensure that the Eligible Stockholder has had a sufficient stake in the Company for a sufficient amount of time and is not pursuing a short-term agenda. In proposing the informational requirements for the Eligible Stockholder, Nasdaq's goal is to gather sufficient information about the Eligible Stockholder for both itself and its stockholders. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(f) of the By-Laws

Proposed Section 3.6(f) establishes the information the Stockholder Nominee must deliver to Nasdaq's Corporate Secretary within the time period specified for delivering the Notice of Proxy Access Nomination. This information includes:

• The information required with respect to persons whom a stockholder proposes to nominate for election or reelection as a director by Section 3.1(b)(i) of the By-Laws [26] including, but not limited to, the signed questionnaire, representation and agreement required by Section 3.1(b)(i)(D) of the By-Laws; [27] and

• a written representation and agreement that such person:

○ Will act as a representative of all of Nasdaq's stockholders while serving as a director; and

○ will provide facts, statements and other information in all communications with Nasdaq and its stockholders that are or will be true and correct in all material respects (and shall not omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading).

In addition, at the request of Nasdaq, the Stockholder Nominee(s) must submit all completed and signed questionnaires required of Nasdaq's directors and officers. Nasdaq may request such additional information as necessary to (y) permit the Board to determine if each Stockholder Nominee satisfies the requirements of the proxy access provision of the By-Laws or if each Stockholder Nominee is independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing the independence of Nasdaq's directors [28] and/or (z) permit Nasdaq's Corporate Secretary to determine the classification of such nominee as an Industry, Non-Industry, Issuer or Public Director, if applicable, in order to make the certification referenced in Section 4.13(h)(iii) of the By-Laws.[29]

Like the informational requirements for an Eligible Stockholder, which are set forth above, the informational requirements for the Stockholder Nominee ensure that both Nasdaq and its stockholders will have sufficient information about the Stockholder Nominee. Among other things, this information will ensure that Nasdaq is able to comply with its disclosure and other requirements under applicable law and that Nasdaq, its Board and its stockholders are able to assess the proxy access nomination adequately.

Proposed Section 3.6(g) of the By-Laws

Pursuant to proposed Section 3.6(g), each Eligible Stockholder or Stockholder Nominee must promptly notify Nasdaq's Corporate Secretary of any information or communications provided by the Eligible Stockholder or Stockholder Nominee to Nasdaq or its stockholders that ceases to be true and correct in all material respects or omits a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading and of the information that is required to correct any such defect. This provision further states that providing any such notification shall not be deemed to cure any defect or, with respect to any defect that Nasdaq determines is material, limit Nasdaq's rights to omit a Stockholder Nominee from its proxy materials. This provision is intended to protect Nasdaq's stockholders by requiring an Eligible Stockholder or Stockholder Nominee to give Nasdaq notice of information previously provided that is materially untrue. Nasdaq may then decide what action to take with respect to such defect, which may include, with respect to a material defect, omitting the relevant Stockholder Nominee from its proxy materials.

[22] *See* proposed Section 3.6(e)(vii)(A) of the By-Laws.

[23] *See* proposed Section 3.6(e)(vii)(B) of the By-Laws.

[24] *See* proposed Section 3.6(e)(vii)(C) of the By-Laws; *see also* 17 CFR 240.14a–1—14b–2, which governs solicitations of proxies.

[25] *See* proposed Section 3.6(e)(viii) of the By-Laws.

[26] Section 3.1(b)(i) of the By-Laws describes the information that a proposing stockholder must provide about an individual the stockholder proposes to nominate for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[27] Section 3.1(b)(i)(D) of the By-Laws requires a completed and signed questionnaire, representation and agreement, each containing certain information, from each individual proposed to be nominated for election or reelection as a director pursuant to the ''advance notice'' provision of the By-Laws.

[28] Currently, the independence of Nasdaq's directors is determined pursuant to the definition of ''Independent Director'' in Listing Rule 5605(a)(2) of The NASDAQ Stock Market, under which certain categories of individuals cannot be deemed independent and with respect to other individuals, the Board must make an affirmative determination that such individual has no relationship that, in the opinion of the Board, would interfere with the exercise of independent judgment in carrying out the responsibilities of a director. Other independence standards under the SEC rules and the Listing Rules of The NASDAQ Stock Market apply to members of certain of the Board's committees. As detailed below, the Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board.

[29] Section 4.13(h)(iii) of the By-Laws requires Nasdaq's Corporate Secretary to collect from each nominee for director such information as is reasonably necessary to serve as the basis for a determination of the nominee's classification as an Industry, Non-Industry, Issuer, or Public Director, if applicable, and to certify to the Committee each nominee's classification, if applicable. Detailed definitions of the terms ''Industry Director,'' ''Non-Industry Director,'' ''Issuer Director'' and ''Public Director'' are included in Article I of the By-Laws.

Proposed Section 3.6(h) of the By-Laws

Proposed Section 3.6(h) provides that Nasdaq shall not be required to include a Stockholder Nominee in its proxy materials for any meeting of stockholders under certain circumstances. In these situations, the proxy access nomination shall be disregarded and no vote on such Stockholder Nominee will occur, even if Nasdaq has received proxies in respect of the vote. These circumstances occur when the Stockholder Nominee:

- Has been nominated by an Eligible Stockholder who has engaged in or is currently engaged in, or has been or is a participant in another person's, ''solicitation'' within the meaning of Rule 14a–1(l) under the Act in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee(s) or a nominee of the Board; [30]
- is not independent under the listing standards of The NASDAQ Stock Market, any applicable rules of the SEC and any publicly disclosed standards used by the Board in determining and disclosing independence of Nasdaq's directors, in each case as determined by the Board in its sole discretion; [31]
- would, if elected as a member of the Board, cause Nasdaq to be in violation of the By-Laws (including but not limited to the compositional requirements of the Board set forth in Section 4.3 of the By-Laws), its Amended and Restated Certificate of Incorporation, the rules and listing standards of The NASDAQ Stock Market, or any applicable state or federal law, rule or regulation; [32]
- is or has been, within the past three (3) years, an officer or director of a competitor, as defined for purposes of Section 8 of the Clayton Antitrust Act of 1914; [33]
- is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in such a criminal proceeding within the past ten (10) years; [34]
- is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended; [35]
- is subject to ''statutory disqualification'' under Section 3(a)(39) of the Act; [36]
- has, or the applicable Eligible Stockholder has, provided information to Nasdaq in respect of the proxy access nomination that was untrue in any material respect or omitted to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, as determined by the Board or any committee thereof, in each case, in its sole discretion; [37] or
- breaches or fails, or the applicable Eligible Stockholder breaches or fails, to comply with its obligations pursuant to the By-Laws, including, but not limited to, the proxy access provisions and any agreement, representation or undertaking required by the proxy access provisions.[38]

Nasdaq believes these provisions will protect the Company and its stockholders by allowing it to exclude certain categories of objectionable Stockholder Nominees from the proxy statement.

Proposed Section 3.6(i) of the By-Laws

Under proposed Section 3.6(i), the Board or the chairman of the meeting of stockholders shall declare a proxy access nomination invalid, and such nomination shall be disregarded even if proxies in respect of such nomination have been received by the Company, if:

- The Stockholder Nominee(s) and/or the applicable Eligible Stockholder have breached its or their obligations under the proxy access provision of the By-Laws, as determined by the Board or the chairman of the meeting of stockholders, in each case, in its or his sole discretion; or
- the Eligible Stockholder (or a qualified representative thereof) does not appear at the meeting of stockholders to present the proxy access nomination.

Nasdaq believes this provision protects the Company and its stockholders by providing the Board or the chairman of the stockholder meeting limited authority to disqualify a proxy access nominee when that nominee or the sponsoring stockholder(s) have breached an obligation under the proxy access provision, including the obligation to appear at the stockholder meeting to present the proxy access nomination.

Proposed Section 3.6(j) of the By-Laws

Proposed Section 3.6(j) states that the following Stockholder Nominees who are included in the Company's proxy materials for a particular annual meeting of stockholders will be ineligible to be a Stockholder Nominee for the next two annual meetings:

- A Stockholder Nominee who withdraws from or becomes ineligible or unavailable for election at the annual meeting; or
- a Stockholder Nominee who does not receive at least 25% of the votes cast in favor of such Stockholder Nominee's election.

This provision will save the Company and its stockholders the time and expense of analyzing and addressing subsequent proxy access nominations regarding individuals who were included in the proxy materials for a particular annual meeting but ultimately did not stand for election or receive a substantial amount of votes. After the next two annual meetings, these Stockholder Nominees would again be eligible for nomination through the proxy access provisions of the By-Laws.

Proposed Section 3.6(k) of the By-Laws

In case there are matters involving a proxy access nomination that are open to interpretation, proposed Section 3.6(k) states that the Board (or any other person or body authorized by the Board) shall have exclusive power and authority to interpret the proxy access

[30] *See* proposed Section 3.6(h)(i) of the By-Laws; *see also* 17 CFR 240.14a–1(l), which defines the related terms ''solicit'' and ''solicitation.''

[31] *See* proposed Section 3.6(h)(ii) of the By-Laws; *see also* footnote 28, *supra.* The Commission notes that, while additional, more stringent independence standards may be adopted by the Board in the future, as of the date of this Notice no such standards have been adopted by the Board. The Commission further notes that, according to Nasdaq, should the Board decide to adopt additional, more stringent standards than those required under Nasdaq listing standards and any requirements under Commission rules, all director nominees would be evaluated against these standards—not just those shareholder candidates nominated under the provisions of proposed Section 3.6.

[32] *See* proposed Section 3.6(h)(iii) of the By-Laws; *see also* Section 4.3 of the By-Laws, which provides that the number of Non-Industry Directors on the Board must equal or exceed the number of Industry Directors. In addition, the Board must include at least two Public Directors and may include at least one, but no more than two, Issuer Directors. Finally, the Board shall include no more than one Staff Director, unless the Board consists of ten or more directors, in which case, the Board shall include no more than two Staff Directors. Detailed definitions of the terms ''Non-Industry Director,'' ''Industry Director,'' ''Public Director,'' ''Issuer Director'' and ''Staff Director'' are included in Article I of the By-Laws.

[33] *See* proposed Section 3.6(h)(iv) of the By-Laws; *see also* 15 U.S.C. 19(a)(1), which generally provides that ''[n]o person shall, at the same time, serve as a director or officer in any two corporations'' that are ''competitors'' such that ''the elimination of competition by agreement between them would constitute a violation of any of the antitrust laws.''

[34] *See* proposed Section 3.6(h)(v) of the By-Laws.

[35] *See* proposed Section 3.6(h)(vi) of the By-Laws; *see also* 17 CFR 230.506(d), which generally disqualifies offerings involving certain felons and other bad actors from relying on the ''safe harbor'' in Rule 506 of Regulation D from registration under the Securities Act of 1933, as amended.

[36] *See* proposed Section 3.6(h)(vii) of the By-Laws; *see also* 15 U.S.C. 78c(a)(39), which disqualifies certain categories of individuals who generally have engaged in misconduct from membership or participation in, or association with a member of, a self-regulatory organization.

[37] *See* proposed Section 3.6(h)(viii) of the By-Laws.

[38] *See* proposed Section 3.6(h)(ix) of the By-Laws.

provisions of the By-Laws and make all determinations deemed necessary or advisable as to any person, facts or circumstances. In addition, all actions, interpretations and determinations of the Board (or any person or body authorized by the Board) with respect to the proxy access provisions shall be final, conclusive and binding on the Company, the stockholders and all other parties. While Nasdaq has attempted to implement a clear, detailed and thorough proxy access provision, there may be matters about future proxy access nominations that are open to interpretation. In these cases, Nasdaq believes it is reasonable and necessary to designate an arbiter to make final decisions on these points and that the Board is best-suited to act as that arbiter.

Proposed Section 3.6(l) of the By-Laws

Proposed Section 3.6(l) prohibits a stockholder from joining more than one group of stockholders to become an Eligible Stockholder for purposes of submitting a proxy access nomination for each annual meeting of stockholders. Nasdaq analogizes this provision to Article IV, Paragraph C(1) of its Amended and Restated Certificate of Incorporation, under which each holder of Nasdaq's common stock shall be entitled to one vote per share on all matters presented to the stockholders for a vote. Similar to that provision, Nasdaq believes it is reasonable for each share to count only once in submitting a proxy access nomination.

Proposed Section 3.6(m) of the By-Laws

For the avoidance of doubt, proposed Section 3.6(m) states that the proxy access provisions outlined in Section 3.6 of the By-Laws shall be the exclusive means for stockholders to include nominees in the Company's proxy materials. Stockholders may, of course, continue to propose nominees to the Committee and Board through other means, but the Committee and Board will have final authority to determine whether to include those nominees in the Company's proxy materials.

Revisions to Other Sections of the By-Laws

Nasdaq also proposes to make conforming changes to Sections 3.1(a), 3.3(a), 3.3(c) and 3.5 of the By-Laws to provide clarifications and prevent confusion. Specifically, current Section 3.1(a) enumerates the methods by which nominations of persons for election to the Board may be made at an annual meeting of stockholders; Nasdaq proposes to add proxy access nominations to the list of methods. Current Section 3.3(a) specifies that, among other things, only such persons who are nominated in accordance with the procedures set forth in Article III of the By-Laws [39] shall be eligible to be elected at an annual or special meeting of Nasdaq's stockholders to serve as directors; for the avoidance of doubt, Nasdaq proposes to clarify that the reference to Article III includes the proxy access provision in Section 3.6 of the By-Laws with respect to director nominations in connection with annual meetings. Current Section 3.3(c) states, among other things, that compliance with Section 3.1(a)(iii) and (b) [40] shall be the exclusive means for a stockholder to make a director nomination; Nasdaq proposes to add proxy access as an additional means for a stockholder to make a director nomination. Finally, current Section 3.5 requires Nasdaq's director nominees to submit to Nasdaq's Corporate Secretary a questionnaire, representation and agreement within certain time periods; Nasdaq proposes to clarify that proxy access nominees must submit these materials within the time periods prescribed for delivery of a Notice of Proxy Access Nomination, as described above.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[41] in general, and furthers the objectives of Section 6(b)(5) of the Act,[42] in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

In response to feedback from its investors, Nasdaq is proposing changes to its By-Laws to implement proxy access. The Exchange believes that, by permitting an Eligible Stockholder of Nasdaq that meets the stated requirements to nominate directors and have its nominees included in Nasdaq's annual meeting proxy statement, the proposed rule change strengthens the corporate governance of the Exchange's ultimate parent company, which is beneficial to both investors and the public interest.

In drafting its proxy access provision, Nasdaq has attempted to strike an appropriate balance between responding to investor feedback and including certain procedural and informational requirements for the protection of the Company and its investors. Specifically, the procedural requirements will protect investors by stating clearly and explicitly the procedures stockholders must follow in order to submit a proper proxy access nomination. The informational requirements will enhance investor protection by ensuring, among other things, that the Company and its stockholders have full and accurate information about nominating stockholders and their nominees and that such stockholders and nominees comply with applicable laws, regulations and other requirements.

Finally, the remaining changes are clarifying in nature, and they enhance investor protection and the public interest by preventing confusion with respect to the operation of the By-Law provisions.

B. Self-Regulatory Organization's Statement on Burden on Competition

Because the proposed rule change relates to the governance of the Company and not to the operations of the Exchange, 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.

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

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:

[39] Article III of the By-Laws relates to stockholder meetings.

[40] As part of Nasdaq's ''advance notice'' provision, Sections 3.1(a)(iii) and (b) of the By-Laws describe certain procedures that a stockholder must follow to, among other things, nominate a person for election to the Board.

[41] 15 U.S.C. 78f(b).

[42] 15 U.S.C. 78f(b)(5).

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–ISEGemini–2016–10 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–ISEGemini–2016–10.* 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–ISEGemini–2016–10* and should be submitted on or before October 26, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[43]

Robert W. Errett,

Deputy Secretary.

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[43] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78988; File No. SR–BatsEDGX–2016–41]

Self-Regulatory Organizations; Bats EDGX Exchange, Inc.; Notice of Filing of a Proposed Rule Change Related to the Exchange's Equity Options Platform To Adopt a Price Improvement Auction, the Bats Auction Mechanism

September 29, 2016.

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 September 16, 2016, Bats EDGX Exchange, Inc. (the ''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The 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 for the Exchange's equity options platform (''EDGX Options'') to adopt a price improvement auction, the Bats Auction Mechanism, as further discussed below.

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.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Overview

The purpose of the proposed rule change is to establish a price improvement auction, the Bats Auction Mechanism (''BAM'', ''BAM Auction'', or ''Auction'') on the Exchange. BAM includes functionality in which a Member (an ''Initiating Member'') may electronically submit for execution an order it represents as agent on behalf of a Priority Customer,[3] broker dealer, or any other person or entity (''Agency Order'') against principal interest or against any other order it represents as agent (an ''Initiating Order'') provided it submits the Agency Order for electronic execution into the BAM Auction pursuant to the proposed Rule. For purposes of this filing and the proposed Rule, the term ''NBBO'' shall mean the national best bid or national best offer at the particular point in time applicable to the reference and the term ''Initial NBBO'' shall mean the national best bid or national best offer at the time an Auction is initiated.

The Exchange believes that the BAM Auction, as proposed herein, will encourage participants on EDGX Options to quote or display orders at the NBBO with additional size and thereby result in tighter and deeper markets, resulting in more liquidity on EDGX Options. Specifically, by offering all EDGX Options participants (''Users'') the ability to receive priority in the proposed allocation during the BAM Auction up to the size of their quote, an EDGX User will be encouraged to maintain quotes or orders with additional size outside of the BAM Auction at the best and most aggressive prices. The Exchange believes that this incentive may result in a narrowing of quotes and thus further enhance EDGX's market quality. Within the BAM Auction, EDGX believes that the rules that are proposed will encourage EDGX Users to compete vigorously to provide the opportunity for price improvement in a competitive auction process.

[3] The term ''Priority Customer'' means any person or entity that is not: (A) a broker or dealer in securities; or (B) a Professional. The term ''Priority Customer Order'' means an order for the account of a Priority Customer. *See* Rule 16.1(a)(45). A ''Professional'' is any person or entity that: (A) is not a broker or dealer in securities; and (B) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). All Professional orders shall be appropriately marked by Options Members. *See* Rule 16.1(a)(46).

Auction Eligibility Requirements

All options traded on the Exchange are eligible for BAM. Proposed Rule 21.19(a) describes the circumstances under which an Initiating Member may initiate an Auction. The Initiating Member may initiate an Auction provided the conditions which follow are met: the Initiating Member must stop the entire Agency Order as principal or with a solicited order at a price in an increment of $0.01 that is: (A) If the Agency Order is for less than 50 option contracts and the difference between the NBB and NBO is $0.01, the Initiating Member must stop the entire Agency Order at one minimum price improvement increment, which increment shall be determined by the Exchange but may not be smaller than $0.01; or (B) for any other Agency Order, the Initiating Member must stop the entire Agency Order at the better of the NBBO or the Agency Order's limit price (if the order is a limit order). Agency Orders that do not meet these conditions will be rejected. Also, Agency Orders submitted at or before the opening of trading or when the NBBO is crossed are not eligible to initiate an Auction and will be rejected.

Auction Process

Initiating and Pricing of Auctions

With respect to Agency Orders for less than 50 contracts, only one such Auction may be ongoing at any given time in a series and Auctions in the same series may not queue or overlap in any manner. Auctions for Agency Orders of 50 contracts or more will be allowed to occur at the same time as other Auctions in the same series. Because multiple Auctions of Agency Orders of 50 contracts or more will be allowed to occur at the same time as other Auctions, there will be no queuing of Auctions for Agency orders of 50 contracts or more.

To initiate the Auction, the Initiating Member must mark the Agency Order for Auction processing, and specify either: (i) A single price at which it seeks to execute the Agency Order (a ''single-price submission''); or (ii) that it is willing to automatically match as principal or as agent on behalf of an Initiating Order the price and size of all BAM Auction notification responses (''BAM responses'') and other trading interest (''auto-match'') as follows: (a) stopping the entire order at a single stop price and auto-matching BAM responses and other trading interest at all prices that improve the stop price to a specified price; or (b) stopping the entire order at a single stop price and auto-matching all BAM responses and other trading interest at all prices that improve the stop price. For both single-price submissions and auto-match, if the EDGX BBO on the same side of the market as the Agency Order represents a Priority Customer on the book, the stop price must be at least $0.01 better than the booked order's limit price. Once the Initiating Member has submitted an Agency Order for processing as described herein, such Agency Order may not be modified or cancelled. Under no circumstances will the Initiating Member receive an allocation percentage, at the final price point, of more than 50% of the initial Agency Order in the event there is one competing quote, order or BAM response or 40% of the initial Agency Order in the event there are multiple competing quotes, orders or BAM responses.[4]

Last Priority

When starting an Auction, the Initiating Member may submit the Initiating Order with a designation of ''last priority'' to other BAM participants (''Last Priority''), which will result in the Initiating Member forfeiting priority and trade allocation privileges to which it is otherwise entitled pursuant to the proposed Rule.[5] If Last Priority is specified, the Initiating Order will only trade if there is not enough interest available to fully execute the Agency Order at prices which are equal to or improve upon the stop price. Last Priority will not be applied if both the Initiating Order and Agency Order are Priority Customer Orders. Last Priority cannot be designated on an Agency Order specified as auto-match, and thus, is only compatible with single-price submissions. Finally, Last Priority information will not be available to other market participants and may not be modified.

Auction Notification Messages

When the Exchange receives an Agency Order for Auction processing, an auction notification message detailing the side, size, price, and options series of the Agency Order will be sent over the Exchange's Multicast PITCH Feed and Auction Feed.[6] Agency Orders will not be included in the Exchange's disseminated best bid or offer and will not be disseminated to OPRA.

Auction Period

The Auction will last for a period of time, as determined by the Exchange and announced on the Exchange's Web site. The Auction period will be no less than one hundred milliseconds and no more than one second.[7]

According to filings made by NASDAQ OMX PHLX LLC (''PHLX'') and BX Options,[8] PHLX staff previously distributed a survey to all PHLX market maker firms inquiring as to the timeframe within which these market participants respond to an auction with a duration time ranging from less than fifty (50) milliseconds to more than one (1) second. According to the Filings, an overwhelming number of the market maker firms that responded to the survey indicated that they were capable of responding to auctions with a duration time of at least 50 milliseconds.[9] Based on the results of the survey previously conducted by PHLX, the commonality of participants on the Exchange and other options exchanges, including PHLX, and the Exchange's direct knowledge of its own technology and customer base, the Exchange believes that allowing for an auction period of no less than one hundred (100) milliseconds and no more than one (1) second would provide a meaningful opportunity for Members to respond to the BAM Auction while at the same time facilitating the prompt execution of orders.[10] The Exchange believes that Members will have sufficient time to ensure competition for Agency Orders, and could provide

[4] *See* proposed Rule 21.19(b)(1)(A).

[5] The Chicago Board Options Exchange, Incorporated's (''CBOE'') has a process whereby initiating participants may elect to receive last priority in an allocation. *See* CBOE Rule 6.74A(b)(3)(J) (Automated Improvement Mechanism (''AIM''')). *See also* Miami International Securities Exchange, LLC (''MIAX'') Rule 5.15(A)(a)(2)(iii)(J); NASDAQ OMX BX, Inc. (''BX Options'') Chapter VI, Section 9(ii)(A)(1).

[6] Both data feeds are currently provided free of charge.

[7] CBOE's AIM auction is a duration of one second. *See* CBOE Rule 6.74A(b)(1)(C).

[8] *See, e.g.,* Securities Exchange Act Release No. 77557 (April 7, 2016), 81 FR 21935 (April 13, 2016) (SR–Phlx–2016–40) (the ''PHLX PIXL Amendment''); Securities Exchange Act Release No. 76301 (October 29, 2015), 80 FR 68347 (November 4, 2015) (SR–BX–2015–032) (the ''BX Options Prism Approval,'' and together with the PHLX PIXL Amendment, the ''Filings'').

[9] Of the thirty five (35) PHLX market maker firms that were surveyed, twenty (20) of these market makers responded to the survey and of those respondents 100% indicated that that their firm could respond to auctions with a duration time of at least 50 milliseconds. This survey was conducted in May 2014. *See id.*

[10] As of the date of this proposal, all Market Makers on EDGX Options are also members of the PHLX, and thus, rather than conduct an additional survey of the same market participants when such a survey was recently conducted, the Exchange is proposing to adopt the same Auction time parameters as have been approved based on that study. *See* BX Options PRISM Approval, supra note 8.

orders within the Auction additional opportunities for price improvement.

The Exchange believes the proposed rule change could provide orders within BAM an opportunity for price improvement. Also, the shorter duration of time for the auction reduces the market risk for all Members executing trades in BAM. Initiating Members are required to guarantee an execution at the NBBO or at a better price, and are subject to market risk while their Agency Order is exposed to other Options Members. While other Members are also subject to market risk, those providing responses in BAM may cancel or modify their orders while the Initiating Member cannot. The Exchange believes that the Initiating Member acts in a critical role within the BAM Auction. Their willingness to guarantee the orders entered into BAM an execution at the NBBO or a better price is the keystone to an order gaining the opportunity for price improvement. The Exchange believes that allowing for an auction period of no less than one hundred milliseconds and no more than one second will benefit Members trading in BAM. EDGX believes it is in these Members' best interests to minimize the auction time while continuing to allow Members adequate time to electronically respond. Both the order being exposed and the responding orders are subject to market risk during the auction.

While some Members may wait to respond until later in the auction, presumably to minimize their market risk, the Exchange believes that a majority of BAM participants will respond early in an Auction. BAM Auctions are intended to provide all market participants with sufficient time to respond, compete, and provide price improvement for orders while also providing investors and other market participants with timely executions, thereby reducing their market risk. The proposed rule to cap the Auction time at one second will allow participants to respond quickly at the most favorable price while reducing the risk that the market will move against the response.

EDGX believes that its Members operate electronic systems that enable them to react and respond to orders in a meaningful way in fractions of a second. EDGX believes that its Members will be able to compete within 100 milliseconds and this is a sufficient amount of time to respond to, compete for, and provide price improvement for orders, and will provide investors and other market participants with more timely executions, and reduce their market risk.

Auction Responses

As proposed, any person or entity other than the Initiating Member may submit responses to an Auction, provided such responses are properly marked specifying price, size, side of the market and information identifying the Auction to which the response is targeted. BAM responses will not be visible to Auction participants, and will not be disseminated to OPRA. A BAM response with a size greater than the size of the Agency Order will be capped at the size of the Agency Order (*i.e.,* the excess size will be ignored when processing the Auction).

Multiple BAM responses from the same User may be submitted during the Auction. Multiple orders at a particular price point submitted by a User in response to an Auction or resting on the EDGX Options Book will be aggregated together and will be capped at the size of the Agency Order (*i.e.,* the excess size will be ignored when processing the Auction).

BAM responses may be modified or cancelled during the Auction. BAM responses on the same side of the market as the Agency Order are considered invalid and will be immediately cancelled. BAM responses cannot cross the price of the Initial NBBO but will be executed, if possible, at the most aggressive permissible price within such Initial NBBO.

Finally, with respect to the impact of this proposal on System [11] capacity, EDGX has analyzed its capacity and represents that it has the necessary systems capacity to handle the potential additional traffic associated with BAM Auctions. Because neither BAM notification messages nor responses will be published to OPRA, the Exchange does not expect any additional capacity necessary with respect to OPRA and the operation of BAM on the Exchange. Additionally, in terms of overall capacity, the Exchange represents that its Systems will be able to sufficiently maintain an audit trail for order and trade information with the BAM Auction.

Conclusion of an Auction

The BAM Auction would conclude at the earliest of: the end of the Auction period, upon receipt by the Exchange of a Priority Customer order on the same side of the market and at the stop price of the Agency Order that is to be posted to the EDGX Options Book, upon receipt by the Exchange of an unrelated order on the same side of the market as the Agency Order that would cause the Agency Order's stop price to be outside of the EDGX BBO, at the close of trading, or any time there is a trading halt on the Exchange in the affected series.[12]

If the Auction concludes for any of the reasons set forth above other than a trading halt, then the Auction will be processed pursuant to the order allocation process set forth in proposed Rule 21.19(d), which is described in further detail below. In the event of a trading halt on the Exchange in the affected series, the Auction will be cancelled without execution.

An unrelated market or marketable limit order (against the EDGX BBO) on the opposite side of the market from the Agency Order received during the Auction will not cause the Auction to end early and will execute against interest outside of the Auction.[13] If contracts remain from such unrelated order at the time the Auction ends, they will be considered for participation in the order allocation process described below. The Exchange notes that it also proposes to make clear that all unrelated orders submitted to the Exchange with contracts remaining at the time the Auction ends, including orders marked as Post Only Orders pursuant to Rule 21.1(d)(8), will be considered for participation as described below.[14]

Order Allocation

Allocations

At the conclusion of the Auction, the Agency Order will be allocated at the best price(s) as follows. First, Priority Customer Orders would have time priority at each price level. Next, the Initiating Member would be allocated after Priority Customer Orders.

If the Initiating Member selected the single-price submission option of the Auction, BAM executions will occur at prices that improve the stop price, and then at the stop price with up to 40% of the initial Agency Order allocated to the Initiating Member.[15] However, if only one other quote, order or BAM response matches the stop price, then the Initiating Member may be allocated up to 50% of the initial Agency Order when executed at such price. Remaining contracts would be allocated, pursuant to proposed sub-paragraphs (iii) and (iv) to Rule 21.19(b)(4)(B), among remaining quotes, orders and BAM responses at the stop price. Thereafter, remaining

[11] The term ''System'' is defined in Rule 16.1(a)(59).

[12] *See* proposed Rule 21.19(b)(2).

[13] *See* proposed Rule 21.19(b)(3).

[14] *Id.*

[15] The Exchange notes that the International Securities Exchange (''ISE'') bases the percentage-based allocations to an initiating member on the initial or original size of an agency order before other interest is executed. *See* ISE Rule 723(d)(3).

contracts, if any, would be allocated to the Initiating Member. The allocation will account for Last Priority, if applicable.

If the Initiating Member selected the auto-match option of the Auction the Initiating Member would be allocated an equal number of contracts as the aggregate size of all other quotes, orders and BAM responses at each price point until a price point is reached where the balance of the order can be fully executed, except that the Initiating Member would be entitled to receive up to 40% (multiple competing quotes, orders or BAM responses) or 50% (one competing quote, order or BAM response) of the initial Agency Order at the final price point (including situations where the stop price is the final price) after Priority Customer interest has been satisfied but before remaining interest. If there are other quotes, orders and BAM responses at the final price point the contracts will be allocated to such interest pursuant to proposed sub-paragraphs (iii) and (iv) to Rule 21.19(b)(4)(B). Any remaining contracts would be allocated to the Initiating Member.

Next, for classes designated by the Exchange as eligible for ''Priority Quote'' status, Users with resting quotes and orders that were at a price that is equal to the Initial NBBO on the opposite side of the market from the Agency Order (''Priority Quotes'') would have priority up to their size in the Initial NBBO at each price level at or better than such Initial NBBO after Priority Customer and the Initiating Member have received allocations.[16] Priority Quotes and BAM responses will be allocated pursuant to the algorithm set forth in Rule 21.8(c).[17] Priority Quote status is only valid for the duration of the particular Auction.

Finally, after Priority Customers, the Initiating Member and Users with Priority Quotes, if applicable, have received allocations, all other interest will be allocated pursuant to Rule 21.8(c).[18]

Additional Details

Any unexecuted BAM responses will be cancelled.[19] With respect to ''Intermarket Sweep Orders'' or ''ISO'' Orders,[20] if an Auction is initiated for an Agency Order designated as an ISO Order, executions will be permitted at a price inferior to the Initial NBBO.[21] Specifically, a BAM ISO is the transmission of two orders for crossing without regard for better priced Protected Bids or Protected Offers because the Member transmitting the BAM ISO to the Exchange has, simultaneous with the routing of the BAM ISO, routed one or more ISOs, as necessary, to execute against the full size of any Protected Bid or Protected Offer that is superior to the Auction price, including all interest in the Exchange's book priced better than the proposed Auction price. The Exchange will accept a BAM ISO provided the order adheres to the Agency Order acceptance requirements, but without regard to the NBBO. The Exchange will execute the BAM ISO in the same manner as other Agency Orders, except that it will not protect prices away. Instead, order flow providers will bear the responsibility to clear all better priced interest away simultaneously with submitting the BAM ISO Order. There is no other impact to BAM functionality. Specifically, liquidity present at the end of the BAM Auction will continue to be included in the BAM Auction as it is with Agency Orders not marked as ISOs. This order type is offered by other options exchanges.[22]

The Exchange proposes to limit the use of Match Trade Prevention (''MTP'') functionality, set forth in Rule 21.1(g), in the context of BAM responses to the MTP Cancel Newest option. A BAM response with any other MTP modifier will be rejected.

Crossing and Agency Orders

In lieu of the procedures in proposed paragraphs (a)–(b) to Rule 21.19, an Initiating Member may enter an Agency Order for the account of a Priority Customer paired with an order for the account of a Priority Customer and such paired orders will be automatically executed without an Auction (''Customer-to-Customer Immediate Cross''), subject to the following proposed conditions. A Customer-to-Customer Immediate Cross must be priced at or between the EDGX BBO. Further, a Customer-to-Customer Immediate Cross will not be initiated but will instead be cancelled if there is a resting Priority Customer order on the same side of the market and at the same price as the Agency Order. Finally, a Customer-to-Customer Immediate Cross will not be initiated if there is a resting Priority Customer order on the opposite side of the market from, and at the same price as, the Agency Order. Instead, the Agency Order will be subject to the Auction process set forth above, and the resting Priority Customer order will participate in such process.[23]

Regulatory Provisions

Bona Fide Transactions; Disrupting or Manipulating Auctions

Under the proposed Rule, the Auction may be used only where there is a genuine intention to execute a bona fide transaction.[24] Also, under the proposed Rule, a pattern or practice of submitting orders or quotes for the purpose of disrupting or manipulating BAM Auctions would be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 3.1. It would also be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 3.1 to engage in a pattern of conduct where the Initiating Member breaks up an Agency Order into separate orders for the purpose of gaining a higher allocation percentage than the Initiating Member would have otherwise received in accordance with the allocation procedures contained in sub-paragraph (b)(4) of the proposed Rule.[25]

Order Exposure

EDGX Rule 22.12 prevents an Options Member from executing agency orders to increase its economic gain from trading against the order without first giving other trading interests on the Exchange an opportunity to either trade with the agency order or to trade at the execution price when the Options Member was already bidding or offering on the book. However, the Exchange recognizes that it may be possible for an Options Member to establish a relationship with a Priority Customer or other person to deny agency orders the opportunity to interact on the Exchange

[16] MIAX allocates executions resulting from Public Customer interest and priority Market Maker quotes ahead of other interest. MIAX's system may designate Market Maker quotes as either priority quotes or non-priority quotes in accordance with the provisions in MIAX Rule 517(b). Although not limited to EDGX Market Makers, the Exchange is prioritizing Priority Quote allocations in the proposed EDGX BAM Auction in a similar manner, ahead of other non-Priority Customer interest. *See also,* BX Options Chapter VI, Section 9(ii)(E)(3).

[17] *See* proposed Rule 21.19(b)(4)(B)(iii).

[18] *See* proposed Rule 21.19(b)(4)(B)(iv).

[19] *See* proposed Rule 21.19(b)(7).

[20] ''Intermarket Sweep Orders'' or ''ISO'' are limit orders that are designated as ISOs in the manner prescribed by EDGX and are executed within the System at one or multiple price levels without regard to Protected Quotations of other Eligible Exchanges as defined in Rule 27.1. ISOs are not eligible for routing pursuant to Rule 21.9.

[21] *See* proposed Rule 21.19(b)(7).

[22] *See* PHLX Rules at 1080(n), which indicates that PIXL ISO Orders are permissible. *See also* CBOE Rule 6.53(q); BX Options Chapter VI, Section 9(ii)(K).

[23] *See* proposed Rule 21.19(c).

[24] *See* proposed Interpretation and Policy .01 of Rule 21.19.

[25] *See* proposed Interpretation and Policy .02 of Rule 21.19.

and to realize similar economic benefits as it would achieve by executing agency orders as principal. Under the proposed Rule, it would be a violation of Rule 22.12 for an Options Member to circumvent such rule by providing an opportunity for (i) a Priority Customer affiliated with the Options Member, or (ii) a Priority Customer with whom the Options Member has an arrangement that allows the Options Member to realize similar economic benefits from the transaction as the Options Member would achieve by executing agency orders as principal, to regularly execute against agency orders handled by the firm immediately upon their entry as BAM Priority Customer-to-Priority Customer immediate crosses pursuant to paragraph (c) of the proposed Rule.[26] In addition to the proposed Interpretation and Policy described above, the Exchange proposes to amend Rule 22.12 to add reference to BAM as an exception to the general restriction on the execution of orders as principal against orders they represent as agent.

Pilot Program Information to the Commission

Subject to a Pilot expiring January 18, 2017, there will be no minimum size requirement for orders to be eligible for the Auction. During this Pilot Period, the Exchange will submit certain data, periodically as required by the Commission, to provide supporting evidence that, among other things, there is meaningful competition for all size orders and that there is an active and liquid market functioning on the Exchange outside of the Auction mechanism. Any raw data which is submitted to the Commission will be provided on a confidential basis.[27]

The Exchange will provide the following additional information on a monthly basis:

(1) The number of contracts (of orders of 50 contracts or greater) entered into BAM Auctions;

(2) the number of contracts (of orders of fewer than 50 contracts) entered into BAM Auctions;

(3) the number of orders of 50 contracts or greater entered into BAM Auctions; and

(4) the number of orders of fewer than 50 contracts entered into BAM Auctions.

Implementation

If the Commission approves this proposed rule change, the Exchange anticipates that it will deploy BAM within 45 days of approval. Members will be notified of the deployment date through a Trade Desk Notice.

Examples of Agency Order Executions

Example No. 1

Summary: Initiating Member & Priority Quote interest fully satisfies Agency Order; all participants eligible for Priority Quote status.

Assumptions:

- NBBO = .97–1.03
- EDGX BBO = .95–1.03(60) with Market Maker A and Member Firm 1 (non-Market Maker) offering 30 contracts each
- Class is designated as eligible for Priority Quotes
- Agency Order to buy 100 contracts stopped at 1.02 is received

BAM Process:

- Auction begins
- During Auction:
  - Market Maker A responds to sell 30 contracts at 1.02 (Priority Quote status);
  - Market Maker B responds to sell 20 contracts at 1.02; and
  - Member Firm 1 responds to sell 30 contracts at 1.02 (Priority Quote status).
- Auction ends:
  - Initiating Member is allocated 40 contracts at 1.02 (40% carve out);
  - Market Maker A and Member Firm 1 each trade 30 contracts since they maintained Priority Quotes for 30 contracts; and
  - Market Maker B's response is cancelled since there were no contracts open after Priority Quotes were filled at that price.

Example No. 2

Summary: Initiating Member & Priority Quote interest fully satisfies Agency Order with Priority Quote interest exceeding remainder; Pro-Rata Amongst Priority Quote interest.

Assumptions:

- NBBO = .97–1.03
- EDGX BBO = .95–1.03(60) with Market Maker A and Market Maker B offering 30 contracts each
- Class is designated as eligible for Priority Quotes
- Agency Order to buy 100 contracts stopped at 1.02 is received

BAM Process:

- Auction begins
- During auction:
  - Market Maker A responds to sell 30 contracts at 1.02;
  - Market Maker B responds to sell 30 contracts at 1.02;
  - Market Maker C responds to sell 10 at 1.01; and
  - Market Maker D responds to sell 10 contracts at 1.02.
- Auction ends:
  - Market Maker C trades 10 at 1.01 since it was the only interest offered at the best price;
  - Initiating Member is allocated 40 contracts at 1.02 (40% carve out);
  - Market Maker A and Market Maker B each trades 25 contracts (pro rata among Priority Quotes).
  - Market Maker D's response is cancelled since there were no contracts open after Priority Quotes were filled at that price.

Example No. 3

Summary: Market Makers improve upon the price and receive both Priority Quote status and non-Priority Quote status based on their size at initial NBBO; Initiating Member does not receive an allocation.

Assumptions:

- NBBO = .97–1.03
- EDGX BBO = .95–1.03(60) with Market Maker A and Market Maker B offering 30 contracts each
- Class is designated as eligible for Priority Quotes
- Agency Order to buy 90 contracts stopped at 1.03 is received

BAM Process:

- Auction begins
- During auction:
  - Market Maker A responds to sell 50 contracts at 1.02 (Priority Quote status for 30 contracts and non-Priority Quote status for 20 contracts);
  - Market Maker B responds to sell 50 contracts at 1.02 (Priority Quote status for 30 contracts and non-Priority Quote status for 20 contracts);
  - Market Maker C responds to sell 10 at 1.01; and
  - Market Maker D responds to sell 50 contracts at 1.02.
- Auction ends:
  - Market Maker C trades 10 at 1.01 since it was the only interest offered at the best price;
  - Market Maker A and Market Maker B each trade 30 contracts at 1.02 since they have priority up to their size at the NBBO when the Auction started;
  - Market Maker A, Market Maker B, and Market Maker D then pro-rata split the balance of 20 contracts at 1.02 based on their remaining interest size with Market Maker A being allocated 4 contracts (=20/90*20), Market Maker B being allocated 4 (=20/90*20) contracts, and Market Maker D being allocated 11 contracts (=50/90*20);
  - The residual 1 contract will be allocated in time priority to Market Maker A;
  - Initiating Member does not participate as entirety of order was price improved.

Example No. 4

Summary: Initiating Member utilizes Auto-Match feature with specified price and Market Makers with Priority Quotes participate; Initiating Member & Priority Quote interest fully satisfies Agency Order.

Assumptions:

- NBBO = .97–1.03
- EDGX BBO = .95–1.03(60) with Market Maker A and Market Maker B offering 30 contracts each
- Class is designated as eligible for Priority Quotes
- Agency Order to buy 90 contracts stopped at 1.03 with Auto-Match feature to 1.02 is received

BAM Process:

- Auction begins
- During auction:

[26] *See* proposed Interpretation and Policy .03 to Rule 21.19.

[27] *See* proposed Interpretation and Policy .04 to Rule 21.19.

- Market Maker A responds to sell 50 contracts at 1.02 (Priority Quote status for 30 contracts and non-Priority Quote status for 20 contracts);
- Market Maker B responds to sell 50 contracts at 1.02 (Priority Quote status for 30 contracts and non-Priority Quote status for 20 contracts);
- Market Maker C responds to sell 10 at 1.01; and
- Market Maker D responds to sell 50 contracts at 1.02.

- Auction ends:
  - Market Maker C trades 10 at 1.01 since it was the only interest offered at the best price; note that the Initiating Member specified a limit of 1.02 so such Initiating Member does not receive an Auto-Match execution at 1.01;
  - Initiating Member is allocated 40% or 36 contracts at 1.02 since it will be the final price point and Auto-Match is enabled;
  - Market Maker A and Market Maker B each trades 22 contracts at 1.02 since they have Priority Quote status ahead of Market Maker D up to their size at the NBBO when the Auction started; and
  - Market Maker D's response is cancelled.

Example No. 5

Summary: Initiating Member utilizes Auto-Match feature with specified price and Market Makers with Priority Quote status and non-Priority Quote status participate; Agency Order exceeds size of Initiating Member execution and Priority Quotes.

Assumptions:

- NBBO = .97–1.03
- EDGX BBO = .95–1.03(60) with Market Maker A and Market Maker B offering 30 contracts each
- Class is designated as eligible for Priority Quotes
- Agency Order to buy 150 contracts stopped at 1.03 with Auto-Match feature to 1.02 is received

BAM Process:

- Auction begins
- During auction:
  - Market Maker A responds to sell 50 contracts at 1.02 (Priority Quote status for 30 contracts and non-Priority Quote status for 20 contracts);
  - Market Maker B responds to sell 50 contracts at 1.02 (Priority Quote status for 30 contracts and non-Priority Quote status for 20 contracts);
  - Market Maker C responds to sell 10 at 1.01; and
  - Market Maker D responds to sell 50 contracts at 1.02.
- Auction ends:
  - Market Maker C trades 10 at 1.01 since it was the only interest offered at the best price; note that the Initiating Member specified a limit of 1.02 so such Initiating Member does not receive an Auto-Match execution at 1.01;
  - Initiating Member is allocated 40% or 60 contracts at 1.02 since it will be the final price point;
  - Market Maker A and Market Maker B each trade 30 contracts at 1.02 since they have Priority Quote status up to their size at the NBBO when the Auction started;
  - Market Maker A, Market Maker B, and Market Maker D then pro-rata split the balance with Market Maker A and Market Maker B each trading 4 additional contracts at 1.02 (20/90*20) and Market Maker D trading 11 contracts at 1.02 (50/90*20);
  - The residual 1 contract will be allocated in time priority to Market Maker A.

Example No. 6

Summary: Initiating Member utilizes Auto-Match feature without specified price and Market Makers with Priority Quote status and non-Priority Quote status participate; Agency Order exceeds size of Initiating Member execution and Priority Quotes.

Assumptions:

- NBBO = .97–1.03
- EDGX BBO = .95–1.03(60) with Market Maker A and Market Maker B offering 30 contracts each
- Class is designated as eligible for Priority Quotes
- Agency Order to buy 150 contracts stopped at 1.03 with Auto-Match feature is received

BAM Process:

- Auction begins
- During auction:
  - Market Maker A responds to sell 50 contracts at 1.02 (Priority Quote status for 30 contracts and non-Priority Quote status for 20 contracts);
  - Market Maker B responds to sell 50 contracts at 1.02 (Priority Quote status for 30 contracts and non-Priority Quote status for 20 contracts);
  - Market Maker C responds to sell 10 at 1.01; and
  - Market Maker D responds to sell 50 contracts at 1.02.
- Auction ends:
  - Market Maker C trades 10 at 1.01;
  - Initiating Member auto-matches and trades 10 at 1.01;
  - Initiating Member is allocated 40% or 60 contracts at 1.02 since it will be the final price point;
  - Market Maker A and Market Maker B each trade 30 contracts at 1.02 since they have Priority Quote status up to their size at the NBBO when the Auction started;
  - Market Maker A, Market Maker B, and Market Maker D then pro-rata split the balance with Market Maker A and Market Maker B each trading 2 contracts at 1.02 (20/90*10) and Market Maker D trading 6 contracts at 1.02 (50/90*10).

Example No. 7

Summary: All executions occurring at initial NBBO price and Public Customer order received.

Assumptions:

- NBBO = .97–1.03
- Class is designated as eligible for Priority Quotes
- EDGX BBO = .95–1.03(60) with Market Maker A and Market Maker B offering 30 contracts each
- Agency Order to buy 100 contracts stopped at 1.03 is received

BAM Process:

- Auction begins
- During auction:
  - Market Maker C responds to sell 20 at 1.03; and
  - Priority Customer offers 2 contracts at 1.03.
- Auction ends:
  - Priority Customer trades 2 contracts at 1.03;
  - Initiating Member is allocated 40% or 40 contracts at 1.03;
  - Remaining allocation is pro-rata among Priority Quote interest with Market Maker A trading 29 contracts (30/60*58) and Market Maker B trading 29 contracts (30/60*58).
    - Note that in this example the Priority Quote interest from Market Maker A and Market Maker B is from quotations published on the Exchange's order book and not from BAM responses received from such Market Makers.

Example No. 8

Summary: Initiating Member specifying Auto-Match feature without specified price, Market Maker with Priority Quotes has multiple price levels of interest, and executions occur at initial NBBO price.

Assumptions:

- NBBO = .97–1.03
- EDGX BBO = .95–1.03(60) with Market Maker A and Market Maker B offering 30 contracts each
- Agency Order to buy 300 contracts stopped at 1.03 with Auto-Match feature is received

BAM Process:

- Auction begins
- During auction:
  - Market Maker A responds to sell 10 contracts at 1.02 (considered as Priority Quote);
  - Market Maker B responds to sell 50 contracts at 1.02 (30 of the 50 contracts are considered as Priority Quote);
  - Market Maker C responds to sell 5 at 1.01; and
  - Market Maker D responds to sell 40 contracts at 1.02.
- Next, during auction:
  - Market Maker A responds with 30 additional contracts at 1.03 (considered as Priority Quote).
- Next, during auction:
  - Market Maker A moves his quote (maintain Priority Quote status) and EDGX BBO becomes .95–1.02 for 10 contracts; and
  - An order from Member Firm 1 arrives offering 10 contracts at 1.02 such that the EDGX BBO becomes .95–1.02 for 20 contracts.
- Auction ends:
  - Market Maker C trades 5 at 1.01;
  - Initiating Member auto-matches and trades 5 at 1.01;
  - Next, interest is then allocated at 1.02 as follows:
    - Market Maker A response (Priority Quote status) trades 10 contracts;
    - Market Maker B response (Priority Quote status) trades 30 contracts;
    - Market Maker A quote trades 10 contracts at 1.02;
    - Market Maker B response (non-Priority Quote status) trades 20 contracts;

- Market Maker D's response (non-Priority Quote status) trades 40 contracts at 1.02;
- Member Firm 1's quote (non-Priority Quote status) trades 10 contracts at 1.02.
- Next, the Initiating Member order matches the full volume trading at 1.02 (because of Auto-Match feature) which is 120 contracts.
- The remaining 50 contracts are traded by the Initiating Member at 1.03 since it will be the final price point (40% carve out; 0.4*300 = 75).

Example No. 9

Summary: Initiating Member utilizing Last Priority.

Assumptions:

- NBBO = .97–1.03
- EDGX BBO = .95–1.03(60) with Market Maker A and Market Maker B offering 30 contracts each
- Agency Order to buy 100 contracts stopped at 1.02 marked with Last Priority is received

BAM Process:

- Auction begins
- During auction:
  - Market Maker C responds to sell 5 at 1.01;
  - Market Maker A responds to sell 5 contracts at 1.02;
  - Market Maker B responds to sell 40 contracts at 1.02; and
  - Market Maker D responds to sell 20 contracts at 1.02.
- Next, during auction:
  - Market Maker A moves his quote (maintains Priority Quote status);
  - EDGX BBO becomes .95–1.02 for 5 contracts; and
  - NBBO becomes .97–1.02.
- Auction ends:
  - Market Maker C trades 5 contracts at 1.01;
  - Market Maker A response with Priority Quote status executes 5 contracts at 1.02;
  - Market Maker B response with Priority Quote status executes 30 contracts;
  - Market Maker A quote with Priority Quote status executes 5 contracts;
  - Non-Priority Quote interest at 1.02 then executes with Market Maker B trading 10 contracts and Market Maker D trading 20 contracts. The Initiating Member then executes the remaining 25 contracts at 1.02 since there is no other interest to satisfy the Agency Order at a price equal to or better than the stop price of 1.02.

Example No. 10

Summary: Initiating Member utilizing Last Priority and no responders.

Assumptions:

- EDGX BBO = .95–1.03(60) with Market Maker A and Market Maker B offering 30 contracts each
- Agency Order to buy 20 contracts stopped at 1.02 marked with Last Priority is received

BAM Process:

- Auction begins
- During auction:
  - Market Maker C quotes .95–1.02 for 10 contracts and EDGX BBO becomes .95–1.02 for 10 contracts; and
  - NBBO becomes .97–1.02.
- Next, during auction:
  - Market Maker A moves his quote (maintains Priority Quote status) and joins the EDGX BBO at .95–1.02 for 10 contracts; and
  - NBBO remains .97–1.02.
- Auction ends:
  - Priority Quote interest trades first: Market Maker A gets allocated 10 contracts of Agency Order.
  - Non-Priority Quote interest trades next: Market Maker C gets allocated 10 contracts.
  - Neither the Initiating Member nor Market Maker B receives any execution in this example.

Example No. 11

Summary: Initiating Member utilizing an ISO Order priced through NBBO.

Assumptions:

- NBBO = .97–1.03
- EDGX BBO = .95–1.04
- Agency Order to buy 50 contracts stopped at 1.04 marked with an ISO flag is received

BAM Process:

- Auction begins
- During auction:
  - Market Maker A responds to sell 20 at 1.02; and
  - Market Maker B responds to sell 20 at 1.02.
- Auction ends:
  - Market Maker A gets allocated 20 contracts of Agency Order at 1.02.
  - Market Maker B gets allocated 20 contracts of Agency Order at 1.02.
  - The Initiating Member gets allocated the remaining 10 contracts at 1.04.

Example No. 12

Summary: Initiating Member utilizing an ISO Order priced through EDGX BBO.

Assumptions:

- NBBO = .97–1.03
- EDGX BBO = .95–1.03
- Agency Order to buy 50 contracts stopped at 1.04 marked with an ISO flag is received

Agency Order is rejected.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of the Act,[28] in general, and with Section 6(b)(5) of the Act,[29] in particular, in that it is designed 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; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposal will result in increased liquidity available at improved prices, with competitive final pricing out of the Initiating Member's complete control. BAM should promote and foster competition and provide more options contracts with the opportunity for price improvement. As a result of the increased opportunities for price improvement, the Exchange believes that participants will use BAM to increase the number of Priority Customer Orders that are provided with the opportunity to receive price improvement over the NBBO.

The Exchange believes that the BAM Auction will encourage participants on EDGX Options to quote or display orders at the NBBO with additional size and thereby result in tighter and deeper markets, resulting in more liquidity on EDGX Options. Specifically, by offering all Users the ability to receive priority in the proposed allocation during the BAM Auction up to the size of their quote, an EDGX User will be encouraged to maintain quotes or orders with additional size outside of the BAM Auction at the best and most aggressive prices. The Exchange believes that this incentive may result in a narrowing of quotes and thus further enhance EDGX's market quality. Within the BAM Auction, EDGX believes that the rules that are proposed will encourage EDGX Users to compete vigorously to provide the opportunity for price improvement in a competitive auction process.

As noted above, the Exchange has proposed to allow BAM Auctions for 50 contracts or more to occur concurrently with other BAM Auctions. Although Auctions for larger Agency Orders will be allowed to overlap, the Exchange does not believe that this raises any issues that are not addressed through the proposal as described above. For example, although overlapping, each Auction will be started in a sequence and with a time that will determine its processing. Thus, even if there are two Auctions that commence and conclude, at nearly the same time, each Auction will have a distinct conclusion at which time the Auction will be allocated. In turn, when the first Auction concludes, unrelated orders that then exist will be considered for participation in the Auction.[30] If unrelated orders are fully executed in such Auction, then there will be no unrelated orders for consideration when the subsequent Auction is processed (unless new unrelated order interest has arrived). If instead there is remaining unrelated order interest after the first Auction has

[28] 15 U.S.C. 78a *et seq.*

[29] 15 U.S.C. 78f(b)(5).

[30] *See* proposed Rule 21.19(b)(3).

been allocated, then such unrelated order interest will be considered for allocation when the subsequent Auction is processed. As another example, each BAM response is required to specifically identify the Auction for which it is targeted [31] and if not fully executed will be cancelled back at the conclusion of the Auction.[32] Thus, BAM responses will be specifically considered only in the specified Auction.

The Exchange does not believe that allowing multiple auctions to overlap for Agency Orders of 50 contracts or more presents any unique issues that differ from functionality already in place on other exchanges. The Exchange notes that other options exchanges offer auctions for orders 50 contracts or greater (generally referred to as ''facilitation auctions'') that are permitted to overlap.[33] In contrast, similar to the Exchange's proposal, other options exchanges do prevent simultaneous auctions to occur for orders less than 50 contracts (generally referred to as ''price improvement auctions'').[34] Instead of proposing two separate auction processes that are functionally the same with only minor differences, such as the restriction on overlapping or queuing auctions—which is present in other options exchanges' price improvement auctions but not in their facilitation auctions—the Exchange is proposing to have a single process that recognizes these specific nuances to avoid introducing new policy issues regarding such topics.

Further, the new functionality may lead to an increase in Exchange volume and should allow the Exchange to better compete against other markets that already offer an electronic solicitation mechanism, while providing an opportunity for price improvement for agency orders. The Exchange believes that its proposal will allow the Exchange to better compete for solicited transactions, while providing an opportunity for price improvement for agency orders and assuring that Priority Customers on the book are protected. The new solicitation mechanism should promote and foster competition and provide more options contracts with the opportunity for price improvement, which should benefit market participants, investors, and traders. The Exchange has proposed a range between no less than one hundred milliseconds and no more than one second for the duration of the BAM Auction; therefore the proposed rule change will provide investors with more timely execution of their options orders than a mechanism that has a one second auction, while ensuring that there is an adequate exposure of orders in EDGX BAM. The Exchange preliminary expects to use a default of 100 milliseconds for all symbols. The time will be announced to Members and available on the Exchange's Web site. The proposed auction response time of no less than one hundred milliseconds and no more than one second should allow investors the opportunity to receive price improvement through BAM while reducing market risk. The Exchange believes a briefer time period reduces the market risk for the Initiating Member, versus an auction with a one second period, as well as for any Member providing orders in response to a broadcast. As such, EDGX believes the proposed rule change would help perfect the mechanism for a free and open national market system, and generally help protect investors' and the public interest. The Exchange believes the proposed rule change is not unfairly discriminatory because the BAM duration would be the same for all Members and symbols. All Members will have an equal opportunity to respond with their best prices during the BAM Auction. Since the Exchange considers all interest present in the System, and not solely BAM responses, for execution against the Agency Order, those participants who are not explicit responders to the Auction will expect executions via BAM as well.

With respect to trading halts, as described herein, in the case of a trading halt on the Exchange in the affected series, the Auction will be cancelled without execution. Cancelling Auctions without execution in this circumstance is consistent with Exchange handling of trading halts in the context of continuous trading on EDGX Options and promotes just and equitable principles of trade and, in general, protects investors and the public interest.[35]

The Exchange further believes that the proposal is consistent with the requirements of Section 11(a) of the Act [36] and Rule 11a2–2(T) [37] thereunder. Section 11(a) prohibits a member of a national securities exchange from effecting transactions on the exchange for its own account, the account of an associated person, or an account in which it or an associated person exercises investment discretion, unless an exception applies (collectively ''Covered Accounts''). Rule 11a2–2(T) under the Act,[38] known as the effect versus execute'' rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2–2(T) permits an exchange member, subject to certain conditions, to effect transactions for Covered Accounts by arranging for an unaffiliated member to execute transactions on the exchange.[39] To comply with Rule 11a2–2(T)'s conditions, a member: (i) Must transmit the order from off the exchange floor; (ii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution; [40] (iii) may not be affiliated with the executing member; and (iv) with respect to an account over which the member has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule. For the reasons set forth below, the Exchange believes that Exchange Members entering orders into BAM would satisfy the requirements of Rule 11a2–2(T).

The Exchange does not operate a physical trading floor, rather the Exchange operates an electronic market. Rule 11a2–2(T)'s first condition is that orders for Covered Accounts be transmitted from off the exchange floor. In the context of automated trading systems, the Commission has found that the off-floor transmission requirement is met if a Covered Account order is transmitted from a remote location directly to an exchange's floor by electronic means.[41] EDGX represents

[31] *See* proposed Rule 21.19(b)(1)(E).

[32] *See* proposed Rule 21.19(b)(5).

[33] *See, e.g.,* ISE Rule 716(d), which governs ISE's facilitation mechanism and does not restrict such auctions to one auction at a time. *See also* Boston Options Exchange (''BOX'') Rule 7270.

[34] *See* ISE Rule 723, Interpretation and Policy .04. *See also* BOX IM–7150–3.

[35] The Exchange notes that trading on the Exchange in any option contract will be halted whenever trading in the underlying security has been paused or halted by the primary listing market and other circumstances. *See* Rule 20.3.

[36] 15 U.S.C. 78k(a)(1).

[37] 17 CFR 240.11a2–2(T).

[38] CFR 240.11a2–2(T).

[39] In enacting this provision, Congress was concerned about members benefiting in their principal transactions from special ''time and place'' advantages associated with floor trading—such as the ability to ''execute decisions faster than public investors.'' The Commission, however, has adopted a number of exceptions to the general statutory prohibition for situations in which the principal transactions contribute to the fairness and orderliness of exchange markets or do not reflect any time and place trading advantages. *See* Securities Exchange Act Release No. 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978); Securities Exchange Act Release No. 14713 (April 28, 1978), 43 FR 18557 (May 1, 1978); Securities Exchange Act Release No. 15533 (January 29, 1979), 44 FR 6093 (Jan. 31, 1979). The 1978 and 1979 Releases cite the House Report at 54–57.

[40] The member may, however, participate in clearing and settling the transaction.

[41] *See, e.g.,* Securities Exchange Act Release Nos. 61419 (January 26, 2010), 75 FR 5157 (February 1,

Continued

that the System and the proposed BAM Auction receive all orders electronically through remote terminals or computer-to-computer interfaces. The Exchange represents that orders for Covered Accounts from Members will be transmitted from a remote location directly to the proposed BAM mechanisms by electronic means.

The second condition of Rule 11a2–2(T) requires that neither a member nor an associated person participate in the execution of its order once the order is transmitted to the floor for execution. The Exchange represents that, upon submission to the BAM Auction, an order will be executed automatically pursuant to the rules set forth for BAM. In particular, execution of an order sent to the mechanism depends not on the Initiating Member entering the order, but rather on what other orders are present and the priority of those orders. Thus, at no time following the submission of an order is a Member able to acquire control or influence over the result or timing of order execution.[42] Once the Agency Order has been transmitted, the Exchange Initiating Member that transmitted the order will not participate in the execution of the Agency Order. Initiating Members submitting Agency Orders will relinquish control to modify their Agency Orders upon transmission to the Exchange's System. Further, no Member, including the Initiating Member, will see a BAM response submitted into BAM and therefore and will not be able to influence or guide the execution of their Agency Orders. Finally, the Last Priority feature will not permit a Member to have any control over an order. The election to Last Priority an order is available prior to the submission of the order and therefore could not be utilized to gain influence or guide the execution of the Agency Order. The information provided with respect to the Last Priority feature by the Initiating Member will not be broadcast and further, the information may not be modified by the Initiating Member during the auction.

Rule 11a2–2(T)'s third condition requires that the order be executed by an exchange member who is unaffiliated with the member initiating the order. The Commission has stated that the requirement is satisfied when automated exchange facilities, such as the BAM Auction are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange.[43] The Exchange represents that the BAM Auction is designed so that no Member has any special or unique trading advantage in the handling of its orders after transmitting its orders to the mechanism.

Rule 11a2–2(T)'s fourth condition requires that, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2–2(T) thereunder.[44] The Exchange recognizes that Members relying on Rule 11a2–2(T) for transactions effected through the BAM Auction must comply with this condition of the Rule and the Exchange will enforce this requirement pursuant to its obligations under Section 6(b)(1) of the Act to enforce compliance with federal securities laws.

The Exchange believes that the instant proposal is consistent with Rule 11a2–2(T), and that therefore the exception should apply in this case.

The Exchange also believes that the proposed rule changes would further the objectives of the Act to protect investors by promoting the intermarket price protection goals of the Options Intermarket Linkage Plan.[45] The Exchange believes its proposal would help ensure inter-market competition across all exchanges and facilitate compliance with best execution practices. The Exchange believes that these objectives are consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 11A of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The competition among the options exchanges is vigorous and this proposal is intended to afford the EDGX Options market the opportunity to compete for order flow by offering an auction mechanism on EDGX similar to that of other exchanges.

With respect to intra-market competition, the Auction will be available to all EDGX Options Members. Moreover, as explained above, the proposal should encourage EDGX Options Members to compete amongst each other by responding with their best price and size for a particular auction. With respect to overall market quality, the Exchange believes that the BAM Auction, as proposed herein, will encourage will encourage participants on EDGX Options to quote or display orders at the NBBO with additional size and thereby result in tighter and deeper markets, resulting in more liquidity on EDGX Options. Specifically, by offering all Users the ability to receive priority in the proposed allocation during the BAM Auction up to the size of their quote, an EDGX User will be encouraged to maintain quotes or orders with additional size outside of the BAM Auction at the best and most aggressive prices. The Exchange believes that this incentive may result in a narrowing of quotes and thus further enhance EDGX's

2010) (SR–BATS–2009–031) (approving BATS options trading); 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SRBSE–2008–48) (approving equity securities listing and trading on BSE); 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR–NASDAQ–2007–004 and SR–NASDAQ–2007–080) (approving NOM options trading); 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10–131) (approving The Nasdaq Stock Market LLC); 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (SR–PCX–00–25) (approving Archipelago Exchange); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (SR–NYSE–90–52 and SR–NYSE–90–53) (approving NYSE's Off-Hours Trading Facility); and 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) (''1979 Release'').

[42] The Exchange notes that a Member may not cancel or modify an order after it has been submitted into BAM.

[43] In considering the operation of automated execution systems operated by an exchange, the Commission noted that, while there is not an independent executing exchange member, the execution of an order is automatic once it has been transmitted into the system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2–2(T). *See* 1979 Release.

[44] *See* 17 CFR 240.11a2–2(T)(a)(2)(iv). In addition, Rule 11a2–2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for Covered Accounts over which such member or associated persons thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member in connection with effecting transactions for the account during the period covered by the statement which amount must be exclusive of all amounts paid to others during that period for services rendered to effect such transactions. See also 1978 (stating ''[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests'').

[45] *See* Rule 27.3 regarding Locked and Crossed Markets.

market quality. Within the BAM Auction, EDGX believes that the rules that are proposed will encourage EDGX Users to compete vigorously to provide the opportunity for price improvement in a competitive auction process.

The Exchange's proposal is a competitive response to similar provisions in the price improvement auction rules of other options exchanges.[46] The Exchange believes this proposed rule change is necessary to permit fair competition among the options exchanges and to establish more uniform price improvement auction rules on the various options exchanges. The Exchange anticipates that this auction proposal will create new opportunities for EDGX to attract new business and compete on equal footing with those options exchanges with auctions and for this reason the proposal does not create an undue burden on inter-market competition. Rather, the Exchange believes that the proposed rule would bolster inter-market competition by promoting fair competition among individual markets, while at the same time assuring that market participants receive the benefits of markets that are linked together, through facilities and rules, in a unified system, which promotes interaction among the orders of buyers and sellers. The Exchange believes its proposal would help ensure inter-market competition across all exchanges and facilitate compliance with best execution practices. In addition, the Exchange believes that the proposed rule change would help promote fair and orderly markets by helping ensure compliance with Options Order Protection and Locked and Crossed Market Rules.[47] Thus, the Exchange does not believe the proposal creates any significant impact on competition.

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 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–BatsEDGX–2016–41 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–BatsEDGX–2016–41. 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–BatsEDGX–2016–41 and should be submitted on or before October 26, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[48]

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–24010 Filed 10–4–16; 8:45 am]

BILLING CODE 8011–01–P

[46] Today, the following options markets offer auctions: CBOE, ISE, BOX, MIAX, PHLX and BX Options. *See* CBOE Rule 6.74A, ISE Rule 723, BOX Rule 7150, MIAX Rule 5.15, PHLX Rule 1080(n), and BX Options Chapter VI, Section 9.

[47] *See* Chapter XXVII of the Exchange's Rules.

[48] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[License No. 09/09–0479]

Avante Mezzanine Partners SBIC II, L.P.; Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest

Notice is hereby given that Avante Mezzanine Partners SBIC II, L.P., 11150 Santa Monica Boulevard, Suite 1470, Los Angeles, CA 90025, a Federal Licensee under the Small Business Investment Act of 1958, as amended (''the Act''), in connection with the financing of a small concern, has sought an exemption under Section 312 of the Act and Section 107.730, Financings which constitute Conflicts of Interest of the Small Business Administration (''SBA'') Rules and Regulations (13 CFR 107.730). Avante Mezzanine Partners SBIC II, L.P. proposes to provide debt and equity financings to Global ID Group, Inc., 500 N. 4th Street, Suite 204, Fairfield, Iowa 52556.

The financing is brought within the purview of § 107.730(a) of the Regulations because Avante Mezzanine Partners SBIC, L.P (''Avante'') and Avante Mezzanine Partners SBIC II, L.P. are Associates. Avante owns more than ten percent of Global ID Group, Inc. and therefore this transaction is considered *Financing an Associate* requiring prior SBA approval. This transaction will also discharge an obligation of Avante.

Notice is hereby given that any interested person may submit written comments on this transaction within fifteen days of the date of this publication to the Associate Administrator, Office of Investment and Innovation, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416.

Mark L. Walsh,

Associate Administrator for Office of Investment and Innovation.

[FR Doc. 2016–24035 Filed 10–4–16; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

Interest Rates

The Small Business Administration publishes an interest rate called the optional ''peg'' rate (13 CFR 120.214) on a quarterly basis. This rate is a weighted average cost of money to the government for maturities similar to the average SBA direct loan. This rate may be used as a base rate for guaranteed fluctuating interest rate SBA loans. This rate will be 1.75 percent for the October–December quarter of FY 2017.

Pursuant to 13 CFR 120.921(b), the maximum legal interest rate for any third party lender's commercial loan which funds any portion of the cost of a 504 project (see 13 CFR 120.801) shall be 6% over the New York Prime rate or, if that exceeds the maximum interest rate permitted by the constitution or laws of a given State, the maximum interest rate will be the rate permitted by the constitution or laws of the given State.

Linda T. Reilly,

Acting Director, Office of Financial Assistance.

[FR Doc. 2016–24034 Filed 10–4–16; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice: 9745]

Notice of Public Meeting of the President's Emergency Plan for AIDS Relief (PEPFAR) Scientific Advisory Board

Summary: In accordance with the Federal Advisory Committee Act (FACA), the PEPFAR Scientific Advisory Board (hereinafter referred to as ''the Board'') will meet on Tuesday, November 1, 2016 at 1800 G St. NW., Suite 10300, Washington DC 20006. The meeting will last from 8:30 a.m. until approximately 5:30 p.m. and is open to the public.

The meeting will be hosted by the Office of the U.S. Global AIDS Coordinator and Health Diplomacy, and led by Ambassador Deborah Birx, who leads implementation of the President's Emergency Plan for AIDS Relief (PEPFAR), and the Board Chair, Dr. Carlos del Rio.

The Board serves the Global AIDS Coordinator in a solely advisory capacity concerning scientific, implementation, and policy issues related to the global response to HIV/AIDS. These issues will be of concern as they influence the priorities and direction of PEPFAR evaluation and research, the content of national and international strategies and implementation, and the role of PEPFAR in international discourse regarding an appropriate and resourced response. Topics for the meeting will include follow-up discussions of previous Board recommendations on financing and economics, and tuberculosis-HIV co-infection; updates on PEPFAR 3.0 programmatic activities in a number of areas including pre-exposure prophylaxis in pregnant and breastfeeding women; HPV testing in people living with HIV; voluntary medical male circumcision; and financing, data usage and increasing civil society engagement in PEPFAR processes and decisions.

The public may attend this meeting as seating capacity allows. Admittance to the meeting will be by means of a pre-arranged clearance list. In order to be placed on the list and, if applicable, to request reasonable accommodation, please register online via the following: *https://goo.gl/forms/0IonzRZq4lMcxwYB2* no later than Friday, October 21. While the meeting is open to public attendance, the Board will determine procedures for public participation. Requests for reasonable accommodation that are made after 5 p.m. on October 21 might not be possible to fulfill.

For further information about the meeting, please contact Dr. Ebony Coleman, Designated Federal Officer for the Board, Office of the U.S. Global AIDS Coordinator and Health Diplomacy at *ColemanEM@state.gov.*

Dated: September 15, 2016.

Ebony Coleman,

Office of the U.S. Global AIDS Coordinator and Health Diplomacy, Department of State.

[FR Doc. 2016–24095 Filed 10–4–16; 8:45 am]

BILLING CODE 4710–10–P

SUSQUEHANNA RIVER BASIN COMMISSION

Public Hearing

AGENCY: Susquehanna River Basin Commission.

ACTION: Notice.

SUMMARY: The Susquehanna River Basin Commission will hold a public hearing on November 3, 2016, in Harrisburg, Pennsylvania. At this public hearing, the Commission will hear testimony on the projects listed in the **SUPPLEMENTARY INFORMATION** section of this notice. Such projects are intended to be scheduled for Commission action at its next business meeting, tentatively scheduled for December 8, 2016, which will be noticed separately. The public should take note that this public hearing will be the only opportunity to offer oral comment to the Commission for the listed projects. The deadline for the submission of written comments is November 14, 2016.

DATES: The public hearing will convene on November 3, 2016, at 2:00 p.m. The public hearing will end at 5:00 p.m. or at the conclusion of public testimony, whichever is sooner. The deadline for the submission of written comments is November 14, 2016.

ADDRESSES: The public hearing will be conducted at the Pennsylvania State Capitol, Room 8E–B, East Wing, Commonwealth Avenue, Harrisburg, Pa.

FOR FURTHER INFORMATION CONTACT: Jason Oyler, General Counsel, telephone: (717) 238–0423, ext. 1312; fax: (717) 238–2436.

Information concerning the applications for these projects is available at the SRBC Water Resource Portal at *www.srbc.net/wrp.* Additional supporting documents are available to inspect and copy in accordance with the Commission's Access to Records Policy at *www.srbc.net/pubinfo/docs/2009–02_Access_to_Records_Policy_20140115.pdf.*

SUPPLEMENTARY INFORMATION: The public hearing will cover the following projects:

Projects Scheduled for Action

1. *Project Sponsor and Facility:* Cabot Oil & Gas Corporation (Bowman Creek), Eaton Township, Wyoming County, Pa. Application for renewal of surface water withdrawal of up to 0.290 mgd (peak day) (Docket No. 20121201).

2. *Project Sponsor and Facility:* Cabot Oil & Gas Corporation (Susquehanna River), Susquehanna Depot Borough, Susquehanna County, Pa. Application for renewal with modification of surface water withdrawal of up to 1.500 mgd (peak day) (Docket No. 20120903).

3. *Project Sponsor and Facility:* Chester Water Authority, East and West Nottingham Townships, Chester County, Pa. Application for an interconnection with the Town of Rising Sun of up to 1.800 mgd (peak day).

4. *Project Sponsor and Facility:* Conyngham Borough Authority, Sugarloaf Township, Luzerne County, Pa. Application for groundwater withdrawal of up to 0.120 mgd (30-day average) from Well 6.

5. *Project Sponsor:* Exelon Generation Company, LLC. Project Facility: Muddy Run Pumped Storage Project, Drumore and Martic Townships, Lancaster County, Pa. Application for an existing hydroelectric facility.

6. *Project Sponsor:* Future Power PA, LLC. Project Facility: Good Spring NGCC, Porter Township, Schuylkill County, Pa. Application for consumptive water use of up to 0.063 mgd (peak day).

7. *Project Sponsor:* Future Power PA, LLC. Project Facility: Good Spring NGCC, Porter Township, Schuylkill County, Pa. Application for groundwater withdrawal of up to 0.126 mgd (30-day average) from Well RW–1.

8. *Project Sponsor:* Future Power PA, LLC. Project Facility: Good Spring NGCC, Porter Township, Schuylkill County, Pa. Application for groundwater withdrawal of up to 0.126 mgd (30-day average) from Well RW–2.

9. *Project Sponsor and Facility:* Gilberton Power Company, West Mahanoy Township, Schuylkill County, Pa. Application for renewal of consumptive water use of up to 1.510 mgd (peak day) (Docket No. 19851202).

10. *Project Sponsor and Facility:* Gilberton Power Company, West Mahanoy Township, Schuylkill County, Pa. Application for groundwater withdrawal of up to 1.870 mgd (30-day average) from the Gilberton Mine Pool.

11. *Project Sponsor and Facility:* Keystone Clearwater Solutions, LLC (Moshannon Creek), Snow Shoe Township, Centre County, Pa. Application for renewal of surface water withdrawal of up to 0.999 mgd (peak day) (Docket No. 20120910).

12. *Project Sponsor:* Lycoming County Water and Sewer Authority. Project Facility: Halls Station System, Muncy Township, Lycoming County, Pa. Application for groundwater withdrawal of up to 0.158 mgd (30-day average) from Well PW–1.

13. *Project Sponsor and Facility:* Moxie Freedom LLC, Salem Township, Luzerne County, Pa. Minor modification to add a new source (Production Well 2) to existing consumptive use approval (no increase requested in consumptive use quantity) (Docket No. 20150907).

14. *Project Sponsor and Facility:* Moxie Freedom LLC, Salem Township, Luzerne County, Pa. Application for groundwater withdrawal of up to 0.062 mgd (30-day average) from Production Well 2.

15. *Project Sponsor and Facility:* Town of Nichols, Tioga County, N.Y. Application for groundwater withdrawal of up to 0.250 mgd (30-day average) from Well PW–1.

16. *Project Sponsor and Facility:* Town of Nichols, Tioga County, N.Y. Application for groundwater withdrawal of up to 0.250 mgd (30-day average) from Well PW–2.

17. *Project Sponsor and Facility:* Town of Rising Sun, Rising Sun District, Cecil County, Md. Application for an interconnection with the Chester Water Authority of up to 1.800 mgd (peak day).

18. *Project Sponsor and Facility:* Sunoco Pipeline, L.P. (Conodoguinet Creek), North Middleton Township, Cumberland County, Pa. Application for surface water withdrawal of up to 2.880 mgd (peak day).

19. *Project Sponsor and Facility:* Sunoco Pipeline, L.P. (Frankstown Branch Juniata River), Frankstown Township, Blair County, Pa. Application for surface water withdrawal of up to 2.880 mgd (peak day).

20. *Project Sponsor and Facility:* Sunoco Pipeline, L.P. (Susquehanna River), Highspire Borough and Lower Swatara Township, Dauphin County, Pa. Application for surface water withdrawal of up to 2.880 mgd (peak day).

21. *Project Sponsor and Facility:* Sunoco Pipeline, L.P. (Swatara Creek), Londonderry Township, Dauphin County, Pa. Application for surface water withdrawal of up to 2.880 mgd (peak day).

22. *Project Sponsor and Facility:* Sunoco Pipeline, L.P. (Tuscarora Creek), Lack Township, Juniata County, Pa. Application for surface water withdrawal of up to 2.880 mgd (peak day).

23. *Project Sponsor and Facility:* SWEPI LP (Cowanesque River), Deerfield Township, Tioga County, Pa. Application for surface water withdrawal of up to 2.000 mgd (peak day).

24. *Project Sponsor and Facility:* Transcontinental Gas Pipe Line Company, LLC. Project: Atlantic Sunrise (Fishing Creek), Hemlock Township, Columbia County, Pa. Application for surface water withdrawal of up to 2.880 mgd (peak day).

25. *Project Sponsor and Facility:* Transcontinental Gas Pipe Line Company, LLC. Project: Atlantic Sunrise (Fishing Creek), Hemlock Township, Columbia County, Pa. Application for consumptive water use of up to 0.100 mgd (peak day).

Projects Scheduled for Action Involving a Diversion

1. *Project Sponsor and Facility:* Gilberton Power Company, West Mahanoy Township, Schuylkill County, Pa. Application for an into-basin diversion from the Delaware River Basin of up to 0.099 mgd (peak day) from Wells AN–P03 and AN–P04.

2. *Project Sponsor and Facility:* JKLM Energy, LLC, Roulette Township, Potter County, Pa. Application for an into-basin diversion from the Ohio River Basin of up to 1.100 mgd (peak day) from the Goodwin and Son's Sand and Gravel Quarry.

Opportunity To Appear and Comment

Interested parties may appear at the hearing to offer comments to the Commission on any project listed above. The presiding officer reserves the right to limit oral statements in the interest of time and to otherwise control the course of the hearing. Rules of conduct will be posted on the Commission's Web site, *www.srbc.net,* prior to the hearing for review. The presiding officer reserves the right to modify or supplement such rules at the hearing. Written comments on any project listed above may also be mailed to Mr. Jason Oyler, General Counsel, Susquehanna River Basin Commission, 4423 North Front Street, Harrisburg, Pa. 17110–1788, or submitted electronically through *www.srbc.net/pubinfo/publicparticipation.htm.* Comments mailed or electronically submitted must be received by the Commission on or before November 14, 2016, to be considered.

Authority: Pub. L. 91–575, 84 Stat. 1509 *et seq.,* 18 CFR parts 806, 807, and 808.

Dated: September 29, 2016.

Stephanie L. Richardson,

Secretary to the Commission.

[FR Doc. 2016–24032 Filed 10–4–16; 8:45 am]

BILLING CODE 7040–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Forty Fourth RTCA SC–224 Standards for Airport Security Access Control Systems Plenary

AGENCY: Federal Aviation Administration (FAA), U.S. Department of Transportation (DOT).

ACTION: Forty Fourth RTCA SC–224 Standards for Airport Security Access Control Systems Plenary.

SUMMARY: The FAA is issuing this notice to advise the public of a meeting of Forty Fourth RTCA SC–224 Standards for Airport Security Access Control Systems Plenary.

DATES: The meeting will be held November 03, 2016 10:00 a.m.–01:00 p.m.

ADDRESSES: The meeting will be held at: RTCA Headquarters, 1150 18th Street NW., Suite 910, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Karan Hofmann at *khofmann@rtca.org* or 202–330–0680, or The RTCA

Secretariat, 1150 18th Street NW., Suite 910, Washington, DC, 20036, or by telephone at (202) 833–9339, fax at (202) 833–9434, or Web site at *http://www.rtca.org.*

SUPPLEMENTARY INFORMATION: Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463, 5 U.S.C., App.), notice is hereby given for a meeting of the Forty Fourth RTCA SC–224 Standards for Airport Security Access Control Systems Plenary The agenda will include the following:

Thursday, November 3, 2016—10 a.m. to 1 p.m.

1. Welcome/Introductions/ Administrative Remarks
2. Review/Approve Previous Meeting Summary
3. Report from the TSA
4. Discussion on Document Distribution
5. Report on TSA Security Construction Guidelines progress
6. Review of DO–230H Sections
7. Action Items for Next Meeting
8. Time and Place of Next Meeting
9. Any Other Business
10. Adjourn

Attendance is open to the interested public but limited to space availability. With the approval of the chairman, members of the public may present oral statements at the meeting. Persons wishing to present statements or obtain information should contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section. Members of the public may present a written statement to the committee at any time.

Issued in Washington, DC, on September 29, 2016.

Mohannad Dawoud,

Management & Program Analyst, Partnership Contracts Branch, ANG–A17, NextGen, Procurement Services Division, Federal Aviation Administration.

[FR Doc. 2016–24011 Filed 10–4–16; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2016–0275]

60-Day Notice of New Information Collection: Commercial Driver's License (CDL) Skills Testing Delays

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 and invites public comment. This ICR is to collect data on the delays, by State, that applicants face when scheduling a CDL skills test. This information collection and subsequent data analysis is required by section 5506 of the Fixing America's Surface Transportation Act, 2015 (FAST Act).

DATES: We must receive your comments on or before December 5, 2016.

ADDRESSES: You may submit comments identified by Federal Docket Management System (FDMS) Docket Number FMCSA–2016–0275 using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *Mail:* Docket Operations; 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:* U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building, Ground Floor, Room W12–140, Washington, DC, 20590–0001 between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency name and docket number. For detailed instructions on submitting comments and additional information on the exemption process, see the Public Participation heading below. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov,* and follow the online instructions for accessing the dockets, or go to the street address listed above.

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

Public Participation: The Federal eRulemaking Portal is available 24 hours each day, 365 days each year. You can obtain electronic submission and retrieval help and guidelines under the ''help'' section of the Federal eRulemaking Portal Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard, or print the acknowledgement page that appears after submitting comments online. Comments received after the comment closing date will be included in the docket and will be considered to the extent practicable.

FOR FURTHER INFORMATION CONTACT: Nicole Michel, Office of Analysis, Research, and Technology/Research Division, Department of Transportation, FMCSA, West Building 6th Floor, 1200 New Jersey Avenue SE., Washington, DC 20590. Telephone: 202–366–4354; email *nicole.michel@dot.gov*.

SUPPLEMENTARY INFORMATION:

Background: Section 5506 of the FAST Act requires FMCSA to produce a study on CDL skills test delays on an annual basis. The requirements of the study are to submit a report describing:

''(A) the average wait time from the date an applicant requests to take a skills test to the date the applicant has the opportunity to complete such test;

(B) the average wait time from the date an applicant, upon failure of a skills test, requests a retest to the date the applicant has the opportunity to complete such retest;

(C) the actual number of qualified commercial driver's license examiners available to test applicants; and

(D) the number of testing sites available through the State department of motor vehicles and whether this number has increased or decreased from the previous year.''

The report is also required to describe ''specific steps the Administrator is taking to address skills testing delays in States that have average skills test or retest wait times of more than 7 days.'' If this information collection does not occur, FMCSA will not be able to conduct a study on CDL skills test delays, as there is currently no repository of information on skills tests and the required data is not available for all States at this time. If information collection occurs on a less-than-annual basis, FMCSA will not be able to make observations on yearly trends or analyze differences in each State on a year-to-year basis.

FMCSA has met with several stakeholders, including the American Association of Motor Vehicle Administrators, the Commercial Vehicle Training Association, and State Driver Licensing Agencies to ensure that the information being collected in this survey has not already been collected, is not currently available to FMCSA, and

is not in the process of being collected. Extensive background research was conducted to ensure the study was not duplicative. A previous study, done by the Government Accountability Office (GAO) in 2015, asked for similar information but did not produce specific enough data to be used in this study.

The survey will be sent out via email, with the option for online completion using SurveyMonkey®. Each State can respond via email or the online survey depending on which method is more convenient for the respondent. The welcome letter will indicate that FMCSA prefers responses via the online survey tool.

The information collected will be published annually in a report to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives. The first report is due to Congress no later than June 1, 2017. Subsequent reports will be published on an annual basis thereafter.

Title: Survey on CDL Skills Testing Delays.

OMB Control Number: To be determined.

Type of Request: New collection.

Respondents: State CDL Coordinators (one from each of the 50 States, and one from Washington, DC).

Estimated Number of Respondents: 51.

Estimated Time per Response: 2.2 hours (132 minutes).

Expiration Date: N/A. This is a new ICR.

Frequency of Response: Annually.

Estimated Total Annual Burden: The annual burden is estimated to be no more than 2.2 hours (132 minutes) per respondent, which equates to 112.2 hours over the universe of 51 respondents. This estimate contains a maximum of 2 hours to gather information from State information systems, and an estimated maximum of 12 minutes to respond to the survey. While States that already track and report similar information may need much less than 2 hours to gather information, discussions with subject matter experts led to an agreement that 2 hours was a reasonable maximum time limit to use to estimate the maximum annual burden expected.

The estimate time for survey completion was calculated using Versta Research's methodology for calculating an estimate of survey length, where each question is given a number of points based on the estimated burden required to respond to the question (for example, simple multiple choice questions are 1 point, whereas short answer questions are 3 points per expected short phrase). The total number of points for all questions is then divided by eight (the number of simple questions a user can respond to online in 1 minute) to determine the estimate required length for finishing the survey.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the performance of FMCSA's functions; (2) the accuracy of the estimated burden; (3) ways for 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 of 49 CFR 1.87 on:

Dated: September 29, 2016.

Kelly Regal,

Associate Administrator for Office of Research and Information Technology.

[FR Doc. 2016–24177 Filed 10–4–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2015–0149]

Future Enhancements to the Safety Measurement System (SMS)

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), U.S. Department of Transportation (U.S. DOT).

ACTION: Notice; response to public comments; request for public comments.

SUMMARY: FMCSA proposes enhancements to information on the public Safety Measurement System (SMS) Web site and responds to comments received in response to FMCSA's **Federal Register** Notice, ''Proposal for Future Enhancements to the Motor Carrier Safety Measurement System (SMS),'' published on June 29, 2015. These enhancements are a continuation of the Agency's efforts to provide law enforcement, the motor carrier industry, and motor carriers with more informative safety data. This notice explains the Agency's proposed enhancements to the public SMS Web site, including two additional changes not originally proposed, which were identified during the development of the SMS Preview. FMCSA has provided information about the proposed enhancements to the National Academies of Sciences to consider in the Correlation Study required by Section 5221 of the Fixing America's Surface Transportation (FAST) Act. The proposed enhancements will be available for preview, at: *https://csa.fmcsa.dot.gov/SMSPreview/* on October 4, 2016. The Agency seeks comments on these changes based on the preview. The Agency will not implement the changes until after the Agency satisfies the requirements of Section 5223 of the FAST Act.

DATES: Comments must be received by December 3, 2016. Question and answer (Q&A) sessions for the public and industry are scheduled for the following dates and times:

1. Wednesday, October 12, 2016, 10:00–11:30 a.m. Eastern Time (ET)
2. Thursday, October 13, 2016, 2:00–3:30 p.m. ET
3. Tuesday, October 18, 2016, 3:00–4:30 p.m. ET
4. Thursday, October 20, 2016, 11:00 a.m.–12:30 p.m. ET

For more information on these sessions, see Section V.

ADDRESSES: You may submit comments bearing the Federal Docket Management System Docket ID (FMCSA–2015–0149) using any of the following methods:

Federal eRulemaking Portal: Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Mail: Docket Management Facility; U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

Hand Delivery or Courier: West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., ET, Monday through Friday, except Federal holidays.

Fax: 1–202–493–2251.

Each submission must include the Agency name and the docket number for this notice. Note that DOT posts all comments received without change to *www.regulations.gov,* including any personal information included in a comment. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments, go to *www.regulations.gov* at any time or visit Room W12–140 on the ground level of the West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The online Federal document

management system is available 24 hours each day, 365 days each year. If you want acknowledgment that the Agency received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

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

FOR FURTHER INFORMATION CONTACT: For information concerning this notice, contact Mr. David Yessen, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590, telephone 609–275–2606 or by email at *david.yessen@dot.gov.* If you have questions on viewing or submitting material to the docket, contact Docket Services at 202–366–9826.

SUPPLEMENTARY INFORMATION:

I. Public Participation and Request for Comments

FMCSA encourages you to participate by submitting comments and related materials.

A. Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2015–0149), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these methods. 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 the Agency can contact you if it has questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov* and put the docket number, ''FMCSA–2015–0149'' in the ''Keyword'' box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box in the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

FMCSA will consider all comments and materials received during the comment period and may change the approach discussed in this notice based on your comments.

B. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov* and insert the docket number, ''FMCSA–2015–0149'' in the ''Keyword'' box and click ''Search.'' Next, click the ''Open Docket Folder'' button and choose the document listed to review. If you do not have access to the internet, you may view the docket by visiting the Docket Management Facility in Room W12–140 on the ground floor of the DOT West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

II. Background

On June 29, 2015 (80 FR 37037), FMCSA proposed the following SMS enhancements and requested initial comments on them in advance of providing motor carriers to preview how their safety performance data would be presented on the SMS Web site.

1. Changing some of the SMS Intervention Thresholds to better reflect the Behavior Analysis and Safety Improvement Categories' (BASICs) correlation to crash risk.

2. Two changes to the Hazardous Materials (HM) Compliance BASIC:

a. Segmenting the HM Compliance BASIC by Cargo Tank (CT) and non-CT carriers; and

b. Releasing motor carrier percentile rankings under the HM Compliance BASIC to the public.

3. Reclassifying violations for operating while Out of Service (OOS) under the Unsafe Driving BASIC rather than the BASIC of the underlying OOS violation.

4. Increasing the maximum Vehicle Miles Travelled (VMT) used in the Utilization Factor to more accurately reflect the operations of high-utilization carriers.

The Agency's analysis and explanations were provided in the June 29, 2015 notice. Stakeholders had 30 days to submit comments. The comment period ended on July 29, 2015.

After receiving and analyzing the comments in response to this preview, FMCSA will provide the results to the National Academies of Sciences to consider during the Correlation Study required by Sections 5221 and 5223 of the FAST Act, related to SMS and public display. The study required by Section 5221 is required to be within 18 months of the enactment of the Act.

III. Summary of Public Comments and Response

FMCSA received 50 docket comments in response to the June 29, 2015 notice. However, only 30 of the submissions contained comments specifically on the changes proposed in that notice. The commenters included motor carriers, drivers, industry associations, and safety advocates. Relevant input and feedback were received from the Advocates for Highway and Auto Safety (Advocates), American Association for Justice (AAJ), American Bus Association (ABA), American Trucking Associations, Inc. (ATA), Con-way Freight, FedEx Corporation (FedEx), Institute of Makers of Explosives (IME), National Motor Freight Traffic Association, Inc. (NMFTA), National Propane Gas Association (NPGA), National Transportation Safety Board (NTSB), Owner-Operator Independent Drivers Association (OOIDA), Schneider National, Inc. (Schneider), Snack Food Association (SFA), Transportation Intermediaries Association (TIA), Werner Enterprises, Inc. (Werner), YRC Worldwide Inc., and individuals who did not identify their organizations. Many stakeholders provided comments on multiple proposed enhancements and topics. Comments outside the scope of the June proposal are not discussed in this notice.

In addition, many stakeholders requested additional analysis on the proposed enhancements to better inform their comments. Detailed analysis on the proposed enhancements from the June notice, as well as the additional enhancements proposed in this notice, are available in the Foundational Document at: *https://csa.fmcsa.dot.gov/Documents/SMS-Preview-Foundational-Document.pdf.*

Below is a summary of the comments received that address the proposed changes and the Agency's responses:

1. Changing Some of the SMS Intervention Thresholds To Better Reflect the BASICs' Correlation To Crash Risk

Arleen Wells commented that the Vehicle Maintenance BASIC Intervention Threshold should not go higher, but raising the percentage for the Controlled Substances/Alcohol BASIC Intervention Threshold was an

''excellent idea.'' George Hopkins felt that changing the Vehicle Maintenance threshold is not productive, as many of the violations are ''not going to result in a crash.'' Another anonymous commenter expressed concern that the proposed Vehicle Maintenance BASIC Intervention Threshold change would hurt flatbed carriers.

OOIDA questioned the Agency's logic for the Vehicle Maintenance Intervention Threshold pointing out that ''The inclusion of an additional 5% of motor carriers with lower Vehicle BASIC scores causes the average number of accidents per power unit above the new threshold to increase 7%. These numbers more than illustrate the randomness and ineffectiveness of FMCSA's reliance on correlation rather than causation.''

However, Con-way Freight supported the adjustments to the BASIC Intervention Thresholds to better prioritize carriers. SFA ''commend[ed] the Agency for taking these preliminary moves to more closely correlate its enforcement interventions to actual crash risk.'' ATA, TIA, and Schneider supported adjusting the SMS Intervention Thresholds. TIA ''applaud[ed] the proposed enhancements to the Safety Measurement System (SMS), specifically, better adjusting some of the SMS interventions.'' ATA recommended that the Agency adjust the thresholds further to yield even better results. NTSB voiced concern about whether the Agency has sufficient resources to reach the 41,000 carriers that will be at or above the proposed Intervention Thresholds.

Regarding the Controlled Substances/Alcohol Intervention Threshold change, an anonymous commenter advised, ''I am saddened by the proposal to raise the threshold for controlled substances. I believe that it sends the wrong message to the public and reflects poorly on the industry.'' AAJ requested that the Controlled Substances/Alcohol BASIC remain unchanged, emphasizing that the change ''ignores the real and serious risks of impaired driving.'' AAJ cited a recent National Highway Traffic Safety Administration (NHTSA) Drug and Alcohol Crash Risk Study, which found that drivers with an alcohol level of 0.08% were four times more likely to crash than sober drivers and that marijuana users were about 25% more likely to be involved in a crash than drivers with no evidence of marijuana use.[1] Advocates did not support the proposed change to the Controlled Substances/Alcohol BASIC pointing out that ''Raising the intervention levels to 90% would then only identify the bottom 10% of carriers, even though all carriers above the 50th percentile are below average.''

FMCSA issued an amendment to the enforcement policy for its Hazardous Materials Safety Permit (HMSP) program prior to the release of the June notice on the proposed SMS enhancements. This amendment uses the SMS results under the current Intervention Thresholds to monitor carriers that have non-temporary HMSPs and prioritize them for investigations focused on HM compliance. IME requested that the Agency clarify whether the proposed Intervention Thresholds will replace the current thresholds outlined in this amendment.

FMCSA Response

FMCSA disagrees with OOIDA's assertion that the change to the Vehicle Maintenance BASIC Intervention Threshold does not have a correlation to crash risk. The baseline crash rate of 5.12 crashes per 100 Power Units (PUs) is not limited to the Vehicle Maintenance BASIC. Rather, it applies to any of the seven BASICs that are at or above the current Intervention Thresholds. Therefore, the 7% increase in crash rate includes lowering the Vehicle Maintenance BASIC threshold from 80% to 75%, as well as raising the Intervention Thresholds for the Driver Fitness, HM Compliance, and Controlled Substances/Alcohol BASICs from 80% to 90%. In addition, FMCSA's SMS Effectiveness Test (ET) results show that lowering the Intervention Threshold for the Vehicle Maintenance BASIC will help identify more carriers with higher correlations to crash rate.[2] Carriers at or above the current threshold for this BASIC have a crash rate of 5.78 crashes per 100 PUs. Lowering the threshold for this BASIC to 75% will include those carriers, as well as a new set of carriers with a crash rate of 5.61 crashes per 100 PUs. Both of these crash rates are much higher than the national average of 3.43 crashes per 100 PUs.

As for the anonymous commenter's concern about the flatbed bias, the Agency examined this bias relating to cargo securement violations in the last set of methodology enhancements. To address this bias, the Agency replaced the Cargo-Related BASIC with the HM Compliance BASIC. More information on this enhancement is available in the notice for the previous methodology changes (77 FR 19298, March 27, 2012) and is also in docket FMCSA–2012–0074.

FMCSA values NTSB's concern about the Agency's resources; however, this change to the Intervention Thresholds will identify a similar number of carriers for interventions as the current SMS methodology. Interventions include warning letters, Notices of Claim, Notices of Violation, and investigations.

FMCSA acknowledges the concerns raised by AAJ, Advocates, and the anonymous commenter about the serious risks associated with impaired driving due to use of controlled substances and alcohol. In response to these concerns, the Agency conducted additional analysis to determine the impact of removing the subset of carriers that would no longer be prioritized under the proposed threshold for the Controlled Substances/Alcohol BASIC of 90%. Using the SMS ET, the Agency found that carriers with percentiles in the 80% to 90% range have a crash rate of 1.24 crashes per 100 PUs, which is about one third the crash rate of the national average of 3.43 crashes per 100 PUs. Based on these results, the Agency believes that there is no strong evidence to continue identifying this subset of carriers for interventions. Raising the Intervention Threshold for the Controlled Substances/Alcohol BASIC will help to focus the Agency's resources on those carriers with the greatest safety risk. However, the Agency will continue to assess this BASIC and review comments and supplemental data to determine the best path forward.

Based on IME's request for clarification, the Agency notes that if the proposed enhancements to the BASIC Intervention Thresholds are implemented, they will also impact the amendment to the HMSP program's enforcement policy that became effective August 18, 2015 (80 FR 35253, June 19, 2015). Carriers are prioritized for these investigations if they are at or above the Intervention Thresholds for the HM Compliance BASIC or any other two BASICs over a consecutive two-month period. Under this proposed enhancement, carriers will be

[1] Compton, R.P. & Berning, A. (2015, February). *Drug and alcohol crash risk.* (Traffic Safety Facts Research Note. DOT HS 812 117). Washington, DC: National Highway Traffic Safety Administration.

[2] *The Carrier Safety Measurement System (CSMS) Effectiveness Test by Behavior Analysis and Safety Improvement Categories (BASICs),* January 2014, FMCSA, pg. 42. The full report is available at: *http://csa.fmcsa.dot.gov/Documents/CSMS_Effectiveness_Test_Final_Report.pdf.*

prioritized based on the proposed thresholds outlined in Table 1 below.

TABLE 1—COMPARISON OF CURRENT AND PROPOSED INTERVENTION THRESHOLDS

BASIC	Current Intervention Thresholds			Proposed Intervention Thresholds		
	Passenger carrier (%)	HM carrier (%)	General carrier (%)	Passenger carrier (%)	HM carrier (%)	General carrier (%)
Unsafe Driving, Crash Indicator, Hours-of-Service (HOS) Compliance	50	60	65	50	60	65
Vehicle Maintenance	65	75	80	60	70	75
Controlled Substances/Alcohol, Driver Fitness	65	75	80	75	85	90
HM Compliance	N/A	80	N/A	N/A	90	N/A

2. Two Changes to the HM Compliance BASIC

a. Segmenting the HM Compliance BASIC by CT and non-CT carriers; and

b. Releasing motor carrier percentile rankings under the HM Compliance BASIC to the public.

David Vargyas, Con-way Freight, and ATA supported the segmentation of CT and non-CT carriers. ATA noted that ''Under the current methodology, non-CT carriers often have higher scores not because they are less safe, but because they have a greater potential for HM compliance violations than CT carriers.'' ATA noted that the preview period will allow motor carriers to see how this proposed change will actually impact them. In addition, several commenters requested additional information on how CT and non-CT segments are defined. Advocates requested that the Agency provide analysis to support its claim that this change will improve the HM Compliance BASIC's ability to prioritize carriers with HM compliance problems for interventions.

Con-way Freight did not support making the HM Compliance BASIC publically available, noting that ''The root cause of the release can often be attributed to a violation in another BASIC, such as Unsafe Driving, which has a more significant correlation to crash risk.'' IME also opposed making the HM Compliance BASIC percentiles available to the public. However, IME did not provide any new data to support this position. FedEx stated that ''there other existing flaws with the HM Compliance BASIC that make the BASIC less than accurate and which result in biases favoring certain motor carriers over others.'' ATA ''strenuously objects'' to making the BASIC publically available and noted that ''scores in this category are a reflection of compliance with HM regulations, many of them relating to paperwork and placarding, not individual motor carrier crash risk.''

AAJ supported making the HM Compliance BASIC percentiles publically available, noting that ''keeping this information accessible to the motor carrier industry, consumers, and other safety stakeholders will not only continue to assist people seeking to work with safe carriers, but will help keep carriers with high crash risks off of the road.''

FMCSA Response

The Foundational Document provides additional information on how CT and non-CT segments are defined. It also includes detailed analysis on this proposed enhancement and its safety impact and can be found at: *https://csa.fmcsa.dot.gov/Documents/SMS-Preview-Foundational-Document.pdf.*

The preview will reflect segmentation within the HM Compliance BASIC by CT and non-CT carriers and is only available to carriers and enforcement personnel, not the public. The Agency will consider the feedback on this issue and will ensure that the display of the HM Compliance BASIC is in accordance with the FAST Act requirements.

3. Reclassifying Violations for Operating While OOS Under the Unsafe Driving BASIC Rather Than the BASIC of the Underlying OOS Violation

Commenters including IME, ATA, Schneider, and ABA approved of moving operating while OOS violations to the Unsafe Driving BASIC. These stakeholders maintained that this change will more accurately reflect the role that unsafe driving behavior plays in the violation of an OOS Order. However, ATA noted that FMCSA's notice indicated that adding these violations to the Unsafe Driving BASIC did not change the average crash rate. Therefore, ATA concluded that this change did not improve the BASIC's ability to identify unsafe carriers. Advocates also expressed tentative agreement, noting that the Agency provided no data or evidence illustrating the impact on the Unsafe Driving and other BASICs.

FMCSA Response

FMCSA acknowledges that moving OOS violations to the Unsafe Driving BASIC will have minimal impact on this BASIC's ability to identify carriers for interventions. However, the Agency believes that consolidating these violations in one BASIC will help motor carriers and enforcement more effectively identify and correct safety problems related to the violation of an OOS Order.

FMCSA proposes that this change be implemented retroactively, *i.e.,* any such violations from the past 24 months on a carrier's SMS profile will be moved into the Unsafe Driving BASIC, unless comments during the preview period present evidence to change the Agency's position.

4. Increasing the Maximum VMT Used in the Utilization Factor To More Accurately Reflect the Operations of High-Utilization Carriers

Comments in support of expanding the range over which the Utilization Factor applied from 200,000 to 250,000 VMT per average PU were submitted by John Whisnant, ATA, NMFTA, Schneider, NPGA, and ABA. NMFTA noted that ''The increase should improve the correlation between the Unsafe Driving and Crash Indicator percentiles and actual crash risk for these very high utilization-carriers.'' Advocates tentatively supported this change but requested that the Agency provide more data.

OOIDA pointed out that this enhancement helps large carriers the most and that such enhancements are unavailable to small carriers. Werner felt the notice ''lack[ed] explanation and data to support the statement, 'industry stakeholders noted that the current Utilization Factor is not accurate for

some companies with extremely high utilization' '' and felt more information was needed to comment on this proposal.

FMCSA Response

In regard to OOIDA's concern, this proposed enhancement to the Utilization Factor will benefit all high-utilization carriers regardless of their size, as the Utilization Factor is based on the VMT to average PU ratio, not the number of PUs. This approach allows the SMS to account for carriers of different sizes and hold them to a similar standard. As a result, large carriers and small carriers with high VMT per average PU ratios can receive adjustments that reflect their increased exposure.

IV. Additional Enhancements

In addition to the proposed enhancements outlined above, FMCSA proposes two additional changes based on issues identified and analysis conducted during the development of the preview. Detailed analysis on these changes is available in the Foundational Document at: *https://csa.fmcsa.dot.gov/Documents/SMS-Preview-Foundational-Document.pdf.* Carriers and other interested stakeholders can review these changes during the preview and provide any additional comments or analysis for the Agency to consider in its final decision.

1. Data Sufficiency Standards for the Crash Indicator BASIC

In response to comments received to the **Federal Register** Notice of January 23, 2015, which announced the results of FMCSA's study on the feasibility of using a motor carrier's role in crashes in the assessment of the company's safety (80 FR 3719), the Agency conducted additional analyses. One of the areas reconsidered was the minimum number of crashes used to establish the data sufficiency standard in the Crash Indicator BASIC. Currently, the Agency assigns a percentile to carriers in the Crash Indicator BASIC if they have at least two reportable crashes in the last two years. The Agency proposes increasing the minimum number of crashes required for a percentile from two to three. According to the analysis conducted by FMCSA, the overall crash rate of the Crash Indicator BASIC remains about the same as the current Crash Indicator BASIC (6.33 vs. 6.34 crashes per 100 PUs). While the number of crashes covered under this scenario is lower than the number of crashes for the current Crash Indicator BASIC (14,838 vs. 15,638 crashes) the results suggest that the proposed change identifies a similar group of carriers with high crash rates as the current Crash Indicator BASIC. While this change does not substantively impact the effectiveness of the Crash Indicator BASIC, the greater data sufficiency standard of this BASIC would yield greater confidence that this BASIC is identifying carriers with established patterns of crashes thereby enabling the Agency to further focus its investigative resources on carriers with more crash involvement.

2. Carriers With Recent Violations

Currently, FMCSA assigns percentiles to carriers in the HOS Compliance, Vehicle Maintenance, HM Compliance, and Driver Fitness BASICs if they meet the following criteria: The most recent inspection in the previous 24 months resulted in a violation. Recently, FMCSA reviewed its data sufficiency standards to make them more effective at prioritizing carriers that pose the greatest safety risk. Based on this assessment, the Agency proposes assigning BASIC percentiles only to carriers that have had an inspection with a violation in the past year. This change will increase the Agency's focus on carriers with recent violations and remove carriers with no violations in the past year from prioritization.

This change will reduce the number of carriers with a BASIC at or above the Intervention Threshold. Based on recent SMS results, 1,243 carriers will no longer have a BASIC at or above the threshold as a result of this change. After analyzing this subset of carriers using the SMS ET, the Agency found that these carriers have a crash rate that is 4.8 times lower than the national average (0.71 compared to the national average of 3.43 crashes per 100 PUs). Therefore, removing these carriers from prioritization will allow the Agency to focus its intervention efforts on a set of carriers with a much higher crash rate of 5.20 crashes per 100 PUs.

V. Preview of Proposed SMS Enhancements

The preview will be available October 4, 2016, on the Compliance Safety Accountability (CSA) Web site at: *https://csa.fmcsa.dot.gov/SMSPreview/.* Motor carriers will be able to log in through the CSA Web site or the Portal to see how the proposed enhancements may impact their SMS results. The public will also be able to view the enhancements using example carriers. To support the preview, FMCSA will hold a series of Q&A sessions for the industry and the public, where participants will be able to ask questions about the proposed changes and receive real-time responses. Before the Q&A sessions, participants can view a video presentation outlining the proposed enhancements and how to use the preview site and review slides and a transcript of that presentation. All of these reference materials are available in the SMS Preview Help Center at: *https://csa.fmcsa.dot.gov/SMSPreview/HelpCenter/Index.aspx.* Each session will end once all questions have been answered. All sessions will have closed captioning. The sessions are scheduled for the following dates and times:

1. Wednesday, October 12, 2016, 10:00–11:30 a.m. Eastern Time (ET)
2. Thursday, October 13, 2016, 2:00–3:30 p.m. ET
3. Tuesday, October 18, 2016, 3:00–4:30 p.m. ET
4. Thursday, October 20, 2016, 11:00 a.m.–12:30 p.m. ET

FMCSA encourages all stakeholders to participate in these Q&A sessions and submit questions ahead of time via the CSA Feedback form at: *https://csa.fmcsa.dot.gov/CSA_feedback.aspx?defaulttag=SMSPREVIEWQA.* Interested parties should register for one of these sessions through FMCSA's National Training Center at: *https://connectdotcqpub1.connectsolutions.com/content/connect/c1/7/en/events/catalog.html?folder-id=1124233886.*

VI. Request for Comments

FMCSA requests additional comments on the proposed SMS enhancements outlined above. Commenters are requested to provide supporting data wherever appropriate.

Issued on: September 30, 2016.

T.F. Scott Darling, III,

Administrator.

[FR Doc. 2016–24114 Filed 10–4–16; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Meeting Notice—U.S. Maritime Transportation System National Advisory Committee

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice of advisory committee public meeting.

SUMMARY: The Maritime Administration (MARAD) announces a public meeting of the U.S. Maritime Transportation System National Advisory Committee (MTSNAC) to discuss advice and recommendations for the U.S. Department of Transportation on issues related to the maritime transportation

system. The MTSNAC will consider new bylaws, form subcommittees and working groups, and develop work plans and recommendations.

DATES: The meeting will be held on Tuesday, October 18, 2016 from 8:00 a.m. to 5:00 p.m. and Wednesday, October 19, 2016 from 8:00 a.m. to 12:00 p.m. Eastern Daylight Saving Time (EDT).

ADDRESSES: The meeting will be held at the St. Louis City Center Hotel, 400 South 14th Street, St. Louis, MO 63103.

FOR FURTHER INFORMATION CONTACT: Eric Shen, Co-Designated Federal Officer at: (202) 308–8968, or Capt. Jeffrey Flumignan, Co-Designated Federal Official at (212) 668–2064 or via email: *MTSNAC@dot.gov* or visit the MTSNAC Web site at *http://www.marad.dot.gov/ports/marine-transportation-system-mts/marine-transportation-system-national-advisory-committee-mtsnac/.*

SUPPLEMENTARY INFORMATION: The MTSNAC is a Federal advisory committee that advises the U.S. Department of Transportation and MARAD on issues related to the marine transportation system. The MTSNAC was originally established in 1999 and mandated in 2007 by the Energy Independence and Security Act of 2007. The MTSNAC operates in accordance with the provisions of the Federal Advisory Committee Act (FACA).

Agenda

The agenda will include: (1) Welcome, opening remarks and introductions; (2) consideration of new bylaws, (3) formation of subcommittees or work groups; (4) development of work plans and proposed recommendations; and (5) public comment. The meeting agenda will be posted on the MTSNAC Web site at *http://www.marad.dot.gov/ports/marine-transportation-system-mts/marine-transportation-system-national-advisory-committee-mtsnac/* .

The Maritime Administration has requested that the MTSNAC consider the following issues for potential recommendations:

a. How MARAD, state and local governments, and industry could address impediments hindering effective use of short sea transportation, including the expansion of America's Marine Highways;

b. approaches to expand the use of the Marine Transportation System for freight and passengers;

c. methods to grow the capacity of U.S. international gateway ports to accommodate larger vessels;

d. potential improvements to waterborne transport that would reduce congestion and increase mobility throughout the domestic transportation system;

e. actions designed to strengthen maritime capabilities essential to economic and national security;

f. ways to modernize the maritime workforce and inspire and educate the next generation of mariners;

g. actions designed to encourage the continued development of maritime innovation and;

h. any other actions MARAD could take to meet its mission to foster, promote, and develop the maritime industry of the United States.

Public Participation

The meeting will be open to the public. Members of the public who wish to attend in person must RSVP to *MTSNAC@dot.gov* with your name and affiliation no later than 5:00 p.m. EDT on October 7, 2016, in order to facilitate entry. Seating will be extremely limited and available on a first-come-first-serve basis.

Services for Individuals with Disabilities: The public meeting is physically accessible to people with disabilities. Individuals requiring accommodations, such as sign language interpretation or other ancillary aids are asked to notify Eric Shen at: (202) 308–8968, or Jeffrey Flumignan at (212) 668–2064 or *MTSNAC@dot.gov* five (5) business days before the meeting.

Public Comments: A public comment period will commence at 9:00 a.m. on Wednesday, October 19, 2016. To provide time for as many people to speak as possible, speaking time for each individual will be limited to three minutes. Members of the public who would like to speak are asked to contact the Designated Federal Officers via email: *MTSNAC@dot.gov.* Commenters will be placed on the agenda in the order in which notifications are received. If time allows, additional comments will be permitted. Copies of oral comments must be submitted in writing at the meeting or preferably emailed to *MTSNAC@dot.gov.* Additional written comments are welcome and must be filed as indicated below.

Written comments: Persons who wish to submit written comments for consideration by the Committee must email *MTSNAC@dot.gov,* or send them to MTSNAC Designated Federal Officers via email: *MTSNAC@dot.gov,* Maritime Transportation System National Advisory Committee, 1200 New Jersey Avenue SE. W21–307, Washington, DC 20590 no later than 5:00 p.m. EDT on October 7, 2016 to provide sufficient time for review.

Authority: 49 CFR part 1.93(a); 5 U.S.C. 552b; 41 CFR parts 102–3; 5 U.S.C. app. Sections 1–16

By Order of the Maritime Administrator.

Dated: September 29, 2016.

T. Mitchell Hudson, Jr.,

Secretary, Maritime Administration.

[FR Doc. 2016–23989 Filed 10–4–16; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Sanctions Actions Pursuant to Executive Orders 13660, 13661, 13662, and 13685

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (OFAC) is publishing the names of 121 persons whose property and interests in property are blocked pursuant to one or more of the following authorities: Executive Order (E.O.) 13660, E.O. 13661, and E.O. 13685, or who are subject to the prohibitions of one or more directives under E.O. 13662.

DATES: OFAC's actions described in this notice were effective on December 22, 2015, as further specified below.

FOR FURTHER INFORMATION CONTACT: Associate Director for Global Targeting, tel.: 202/622–2420, Associate Director for Sanctions Policy and Implementation, tel.: 202/622–2480, Office of Foreign Assets Control, or Chief Counsel (Foreign Assets Control), tel.: 202/622–2410, Office of the General Counsel, Department of the Treasury (not toll free numbers).

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's Web site (*www.treas.gov/ofac*). A complete listing of persons determined to be subject to one or more directives under E.O. 13662, as discussed in detail in this Notice, can be found in the Sectoral Sanctions Identifications List at *http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/ssi_list.aspx.* Certain general information pertaining to OFAC's sanctions programs is also available via facsimile through a 24-hour fax-on-demand service, tel.: 202/622–0077.

Notice of OFAC Actions

On December 22, 2015, OFAC blocked the property and interests in property of the following eight persons pursuant to E.O. 13660, ''Blocking Property of Certain Persons Contributing to the Situation in Ukraine'':

Individuals

1. ZAKHARCHENKO, Vitaliy Yuriyovych; DOB 20 Jan 1963; POB Kostiantynivka, Donetsk Region, Ukraine (individual) [UKRAINE–EO13660] (Linked To: YANUKOVYCH, Viktor Fedorovych).

2. TABACHNYK, Dmytro Volodymyrovych (a.k.a. TABACHNIK, Dmitry; a.k.a. TABACHNYK, Dmytriy); DOB 28 Nov 1963 (individual) [UKRAINE–EO13660].

3. NIKITIN, Vasiliy Aleksandrovich (Cyrillic: НИКИТИН, Василий Александрович) (a.k.a. NIKITIN, Vasily; a.k.a. NIKITIN, Vasyl); DOB 25 Nov 1971 (individual) [UKRAINE–EO13660].

4. DEYNEGO, Vladyslav Nykolayevych (a.k.a. DEYNEGO, Vladislav Nykolayevich); DOB 12 Mar 1964 (individual) [UKRAINE–EO13660].

5. KOZYAKOV, Serhiy (a.k.a. KOZYAKOV, Sergey; a.k.a. KOZYAKOV, Sergey Yurievich); DOB 29 Sep 1982 (individual) [UKRAINE–EO13660].

6. KOFMAN, Aleksandr Igorevich (a.k.a. KOFMAN, Oleksandr); DOB 30 Aug 1977 (individual) [UKRAINE–EO13660].

7. TSYPLAKOV, Sergey Gennadevich (a.k.a. TSYPLAKOV, Gennady); DOB 01 May 1983 (individual) [UKRAINE–EO13660].

8. RODKIN, Andrei Nikolaevich (a.k.a. RODKIN, Andrei (Cyrillic: РОДКИН, Андрей); a.k.a. RODKIN, Andrey); DOB 23 Sep 1976 (individual) [UKRAINE–EO13660].

On December 22, 2015, OFAC blocked the property and interests in property of the following nine persons pursuant to E.O. 13661, ''Blocking Property of Additional Persons Contributing to the Situation in Ukraine'':

Individuals

1. CHERNYKH, Tatiana V (a.k.a. CHERNYKH, Tatiana); DOB 25 Sep 1972; nationality Russia; Passport 712491743 (Russia) expires 17 Nov 2020; Foreign Relations Manager at Izhevsky Mekhanichesky Zavod JSC (individual) [UKRAINE–EO13661] (Linked To: IZHEVSKY MEKHANICHESKY ZAVOD JSC).

2. IOFFE, Eduard A (a.k.a. IOFFE, Eduard); DOB 07 Jun 1970; nationality Russia; Passport 713023636 (Russia) expires 20 Jan 2021; Deputy General Director for Commercial Affairs at Kalashnikov Concern and Izhevsky Mekhanichesky Zavod JSC (individual) [UKRAINE–EO13661] (Linked To: KALASHNIKOV CONCERN; Linked To: IZHEVSKY MEKHANICHESKY ZAVOD JSC).

3. KARAMYAN, Vakhtang (a.k.a. KARAMIAN, Vakhtang); DOB 19 Apr 1991; nationality Russia; Passport 727409284 (Russia) expires 28 Mar 2023; Middle East Business Development Director at Kalashnikov Concern (individual) [UKRAINE–EO13661] (Linked To: KALASHNIKOV CONCERN).

4. OLSSON, Sven Anders, Karl X Gustafs Gata 51, Helsingborg 252 40, Sweden; DOB 21943 (individual) [UKRAINE–EO13661]. Sven Olsson has acted or purported to act for or on behalf of, directly or indirectly, and has materially assisted, sponsored, or provided financial, material, or technological support for, goods or services to or in support of, Gennady Timchenko and the Volga Group, persons whose property and interest in proprety are blocked pursuant to Executive Order 13661.

Entities

1. FENTEX PROPERTIES LTD., Tortola, Virgin Islands, British [UKRAINE–EO13661]. Fentex Properties Ltd. is owned by Gennady Timchenko, a person whose property and interests in property are blocked pursuant to Executive Order 13661.

2. LERMA TRADING S.A., Calle 53a Este, Panama [UKRAINE–EO13661]. Lerma Trading S.A. is owned or controlled by Gennady Timchenko, a person whose property and interests in property are blocked pursuant to Executive Order 13661.

3. LTS HOLDING LIMITED (f.k.a. IPP–INTERNATIONAL PETROLEUM PRODUCTS LTD.), Rue du Conseil-General 20, Geneva 1204, Switzerland; Tortola, Virgin Islands, British [UKRAINE–EO13661]. LTS Holding Limited is owned or controlled by or has acted or purported to act for or on behalf of, directly or indirectly, and has materially assisted, sponsored, or provided financial, material, or technological support for, goods or services to or in support of, Gennady Timchenko, a person whose property and interest in proprety are blocked pursuant to Executive Order 13661.

4. MAPLES SA, Boulevard Royal 25/B 2449, Luxembourg [UKRAINE–EO13661]. Maples SA is owned or controlled by or has acted or purported to act for or on behalf of, directly or indirectly, and has materially assisted, sponsored, or provided financial, material, or technological support for, goods or services to or in support of, Gennady Timchenko, a person whose property and interest in proprety are blocked pursuant to Executive Order 13661.

5. WHITE SEAL HOLDINGS LIMITED, 115 Spyrou Kyprianou Avenue, Limassol 3077, Cyprus [UKRAINE–EO13661]. White Seal Holdings Limited has acted or purported to act for or on behalf of, directly or indirectly, and has materially assisted, sponsored, or provided financial, material, or technological support for, goods or services to or in support of, Gennady Timchenko and the Volga Group, persons whose property and interest in proprety are blocked pursuant to Executive Order 13661.

On December 22, 2015, OFAC blocked the property and interests in property of the following twelve persons pursuant to E.O. 13685, ''Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to the Crimea Region of Ukraine'':

Entities

1. STATE CONCERN NATIONAL PRODUCTION AND AGRICULTURAL ASSOCIATION MASSANDRA (a.k.a. MASSANDRA NATIONAL INDUSTRIAL AGRARIAN ASSOCIATON OF WINE INDUSTRY; a.k.a. MASSANDRA STATE CONCERN, NATIONAL PRODUCTION AND AGRARIAN UNION, OJSC; a.k.a. NACIONALNOYE PROIZ–VODSTVENNO AGRARNOYE OBYEDINENYE MASSANDRA; a.k.a. STATE CONCERN NATIONAL ASSOCIATION OF PRODUCERS MASSANDRA), 6, str. Mira, Massandra, Yalta 98600, Ukraine; 6, Mira str., Massandra, Yalta, Crimea 98650, Ukraine; Mira str, h. 6, Massandra, Yalta, Crimea 98600, Ukraine; 6, Myra st., Massandra, Crimea 98650, Ukraine; Web site *http://www.massandra.net.ua/;* Email Address *impex@massandra.ua;* Registration ID 00411890 (Ukraine) [UKRAINE–EO13685].

2. CRIMEAN ENTERPRISE AZOV DISTILLERY PLANT (a.k.a. AZOVSKY LIKEROGORILCHANY ZAVOD, KRYMSKE RESPUBLIKANSKE PIDPRYEMSTVO; a.k.a. AZOVSKY LIKEROVO–DOCHNY ZAVOD; a.k.a. CRIMEAN REPUBLICAN ENTERPRISE AZOV DISTILLERY; a.k.a. CRIMEAN REPUBLICAN ENTERPRISE AZOVSKY LIKEROVODOCHNY ZAVOD; a.k.a. KRYMSKE RESPUBLIKANSKE PIDPRYEMSTVO AZOVSKY LIKEROGORILCHANY ZAVOD), Bud. 40 vul. Zaliznychna, Smt Azovske, Dzhankoisky R–N, Crimea 96178, Ukraine; 40 Railway St., Azov, Dzhankoy District 96178, Ukraine; 40 Zeleznodorozhnaya str., Azov, Jankoysky District 96178, Ukraine; Registration ID 01271681 (Ukraine) [UKRAINE–EO13685].

3. STATE ENTERPRISE UNIVERSAL–AVIA (a.k.a. CRIMEAN STATE AVIATION ENTERPRISE UNIVERSAL–AVIA; a.k.a. GOSUDARSTVENNOE UNITARNOE PREDPRIYATIE RESPUBLIKI KRYM UNIVERSAL; a.k.a. GOSUDARSTVENNOE UNITARNOE PREDPRIYATIE RESPUBLIKI KRYM UNIVERSAL–AVIA; a.k.a. GOSUDARSTVENOYE PREDPRIYATIYE UNIVERSAL–AVIA; a.k.a. UNIVERSAL–AVIA, CRIMEA STATE AVIATION ENTERPRISE; a.k.a. UNIVERSAL–AVIA, GUP RK), 5, Aeroflotskaya Street, Simferopol, Crimea 95024, Ukraine; Registration ID 1159102026742; Tax ID No. 9102159300; Government Gazette Number 00830954 [UKRAINE–EO13685].

4. OTKRYTOE AKTSIONERNOE OBSHCHESTVO VNESHNEEKONOMICHESKOE OBEDINENIE TEKHNOPROMEKSPORT (a.k.a. JOINT STOCK COMPANY FOREIGN ECONOMIC ASSOCIATION TECHNOPROMEXPORT; a.k.a. JOINT STOCK COMPANY FOREIGN ECONOMIC ASSOCIATION TEKHNOPROMEXPORT; a.k.a. JSC TEKHNOPROMEXPORT; a.k.a. JSC VO TEKHNOPROMEXPORT; a.k.a. OJSC TECHNOPROMEXPORT; a.k.a. OPEN JOINT STOCK COMPANY FOREIGN ECONOMIC ASSOCIATION TEKHNOPROMEXPORT; a.k.a. VO TEKHNOPROMEKSPORT, OAO; a.k.a. ''JSC TPE''), d. 15 str. 2 ul. Novy Arbat, Moscow 119019, Russia; Email Address *inform@tpe.ru;* Registration ID 1067746244026 (Russia); Tax ID No. 7705713236 (Russia); Government Gazette Number 02839043 (Russia) [UKRAINE–EO13685].

5. AKTSIONERNOE OBSCHESTVO 'YALTINSKAYA KINODSTUDIYA' (a.k.a.

CJSC YALTA–FILM; a.k.a. FILM STUDIO YALTA–FILM; a.k.a. JOINT STOCK COMPANY YALTA FILM STUDIO; a.k.a. JSC YALTA FILM STUDIO; a.k.a. KINOSTUDIYA YALTA–FILM; a.k.a. OAO YALTINSKAYA KINOSTUDIYA; a.k.a. YALTA FILM STUDIO; a.k.a. YALTA FILM STUDIOS), Ulitsa Mukhina, Building 3, Yalta, Crimea 298063, Ukraine; Sevastopolskaya 4, Yalta, Crimea, Ukraine; Registration ID 30993572 [UKRAINE–EO13685].

6. JOINT STOCK COMPANY GENBANK (a.k.a. AKTSIONERNOE OBSHCHESTVO GENBANK (Cyrillic: АКЦИОНЕРНОЕ ОБЩЕСТВО ГЕНБАНК); a.k.a. CLOSED JOINT STOCK COMPANY GENBANK; a.k.a. GENBANK, AO (Cyrillic: ГЕНБАНК, АО); a.k.a. JSC GENBANK), Ozerkovskaya Naberezhnaya 12, Moscow 115184, Russia; Ulitsa Sevastopolskaya 13, Simferopol 295011, Ukraine; SWIFT/BIC GEOORUMM; Web site *www.genbank.ru;* Email Address *info@genbank.ru;* Registration ID 1137711000074 (Russia) [UKRAINE–EO13685].

7. JOINT STOCK COMPANY SEVASTOPOLSKY MORSKOY BANK (a.k.a. AKTSIONERNOE OBSHCHESTVO SEVASTOPOLSKIY MORSKOY BANK; a.k.a. AO SEVASTOPOLSKIY MORSKOY BANK; a.k.a. JSC SEVASTOPOLSKY MORSKOY BANK), 18a Brestska Street, Sevastopol, Crimea 99001, Ukraine; 18/A Ulitsa Brestskaya, Sevastopol, Crimea 299001, Ukraine; SWIFT/BIC MORKUAUK; Web site *www.morskoybank.com;* Email Address *root@morskoybank.com;* Registration ID 1149204013397 [UKRAINE–EO13685].

8. OPEN JOINT STOCK COMPANY COMMERCIAL BANK VERKHNEVOLZHSKY (a.k.a. COMMERCIAL JOINT–STOCK BANK VERHNEVOLGSKY; a.k.a. OAO KB VERKHNEVOLZHSKIY; a.k.a. OJSC CB VERKHNEVOLZHSKY; a.k.a. OTKRYTOE AKTSIONERNOE OBSHCHESTVO KOMMERCHESKIY BANK VERKHNEVOLZHSKIY; a.k.a. PUBLIC COMMERCIAL JOINT–STOCK BANK VERHNEVOLZHSKY), Ulitsa Bratyev Orlovykh 1a, Rybinsk, Yaroslavskaya Oblast 152903, Russia; Ulitsa Suvorova 39A, Sevastopol, Crimea 299011, Ukraine; Pereulok Pionerskiy 5, Simferopol, Crimea 295011, Ukraine; SWIFT/BIC VECARU21; alt. SWIFT/BIC VVBKRU2Y; Web site *www.vvbank.ru;* Email Address *vbank@yaroslavl.ru;* Registration ID 1027600000185 (Russia) [UKRAINE–EO13685].

9. OPEN JOINT STOCK COMPANY KRASNODAR REGIONAL INVESTMENT BANK (a.k.a. OAO KRAYINVESTBANK (Cyrillic: ОАО КРАЙИНВЕСТБАНК); a.k.a. OJSC KRAYINVESTBANK; a.k.a. OTKRYTOE AKTSIONERNOE OBSHCHESTVO KRASNODARSKIY KRAEVOY INVESTITSIONNIY BANK (Cyrillic: ОТКРЫТОЕ АКЦИОНЕРНОЕ ОБЩЕСТВО КРАСНОДАРСКИЙ КРАЕВОЙ ИНВЕСТИЦИОННЫЙ БАНК)), Ulitsa Mira 34, Krasnodar 350063, Russia; Ulitsa Bolshaya Morskaya 23, Sevastopol, Crimea 299011, Ukraine; Ulitsa Dolgorukovskaya/Zhukovskogo/A. Nevskogo 1/1/6, Simferopol, Crimea 295000, Ukraine; SWIFT/BIC KRRIRU22; Web site *www.kibank.ru;* Email Address *mail@kibank.ru;* Registration ID 1022300000029 (Russia); All offices worldwide [UKRAINE–EO13685].

10. STATE ENTERPRISE FACTORY OF SPARKLING WINE NOVY SVET (a.k.a. DERZHAVNE PIDPRYEMSTVO ZAVOD SHAMPANSKYKH VYN NOVY SVIT; a.k.a. GOSUDARSTVENOYE PREDPRIYATIYE ZAVOD SHAMPANSKYKH VIN NOVY SVET; a.k.a. NOVY SVET WINERY; a.k.a. NOVY SVET WINERY STATE ENTERPRISE; a.k.a. STATE ENTERPRISE FACTORY OF SPARKLING WINES NEW WORLD; a.k.a. ZAVOD SHAMPANSKYKH VYN NOVY SVIT, DP), 1 Shaliapin Street, Novy Svet Village, Sudak, Crimea 98032, Ukraine; Bud. 1 vul. Shalyapina Smt, Novy Svit, Sudak, Crimea 98032, Ukraine; 1 Shalyapina str. Novy Svet, Sudak 98032, Ukraine; Web site *http://nsvet.com.ua/en/contacts;* Email Address *boss@nsvet.com.ua;* Registration ID 00412665 (Ukraine) [UKRAINE–EO13685].

11. STATE ENTERPRISE MAGARACH OF THE NATIONAL INSTITUTE OF WINE (a.k.a. AGROFIRMA MAGARACH NATSIONALNOGO INSTYTUTU VYNOGRADU I VYNA MAGARACH, DP; a.k.a. DERZHAVNE PIDPRYEMSTVO AGROFIRMA MAGARACH NATSIONALNOGO INSTYTUTU VYNOGRADU I VYNA MAGARACH; a.k.a. GOSUDARSTVENOYE PREDPRIYATIYE AGRO–FIRMA MAGARACH NACIONALNOGO INSTITUTA VINOGRADA I VINA MAGARACH; a.k.a. MAGARACH AGRICULTURAL COMPANY OF NATIONAL INSTITUTE OF WINE AND GRAPES MAGARACH; a.k.a. STATE ENTERPRISE AGRICULTURAL COMPANY MAGARACH NATIONAL INSTITUTE OF VINE AND WINE MAGARACH), Bud. 9 vul. Chapaeva, S.Viline, Bakhchysaraisky R–N, Crimea 98433, Ukraine; 9 Chapayeva str., Vilino, Bakhchisaray Region, Crimea 98433, Ukraine; 9 Chapayeva str., Vilino, Bakhchisarayski district 98433, Ukraine; 9, Chapaeva Str., Vilino, Bakhchisaray Region, Crimea 98433, Ukraine; Web site *http://magarach-institut.ru/;* Email Address *magar@ukr.net;* Registration ID 11231070006000476 (Ukraine); Government Gazette Number 31332064 (Ukraine) [UKRAINE–EO13685].

12. RESORT NIZHNYAYA OREANDA (f.k.a. FEDERALNOE GOSUDARSTVENNOE BYUDZHETNOE UCHREZHDENIE SANATORI NIZHNYAYA OREANDA UPRAVLENIYA; a.k.a. FEDERALNOE GOSUDARSTVENNOE BYUDZHETNOE UCHREZHDENIE SANATORI NIZHNYAYA OREANDA UPRAVLENIYA DELAMI PREZIDENTA ROSSISKOI FE; a.k.a. FGBU SANATORI NIZHNYAYA OREANDA; a.k.a. SANATORIUM NIZHNYAYA OREANDA), Pgt Oreanda, Dom 12, Yalta, Crimea 298658, Ukraine; Resort Nizhnyaya Oreanda, Oreanda, Yalta 08655, Crimea; Oreanda–12, Yalta 298658, Crimea; Web site *http://www.oreanda.biz;* Email Address *info@oreanda.biz;* Registration ID 1149102054221; Tax ID No. 9103006321; Government Gazette Number 00705605 [UKRAINE–EO13685].

In addition, on December 22, 2015, OFAC identified the following five persons as entities in which Stroygazmontazh, Transoil, Avia Group, LLC, or SMP Bank, persons whose property and interests in property are blocked pursuant to E.O. 13661, owns, directly or indirectly, a 50 percent or greater interest:

Entities

1. OAO VOLGOGRADNEFTEMASH (f.k.a. DOCHERNEE AKTSIONERNOE OBSHCHESTVO OTKRYTOGO TIPA VOLGOGRADNEFTEMASH ROSSIISKOGO AKTSIONERNOGO OBSHCHESTVA GAZPROM; a.k.a. JSC VOLGOGRADNEFTEMASH; a.k.a. OTKRYTOE AKTSIONERNOE OBSHCHESTVO VOLGOGRADNEFTEMASH (Cyrillic: Ocy;ТКРЫТОЕ АКЦИОНЕРНОЕ ОБЩЕСТВО ВОЛГОГРАДНЕФТЕМАШ)), 45 Ulitsa Elektrolesovskaya, Volgograd, Volgogradskaya Oblast 400011, Russia [UKRAINE–EO13661] (Linked To: STROYGAZMONTAZH).

2. TRANSSERVICE LLC (a.k.a. LIMITED LIABILITY COMPANY TRANSSERVIS; a.k.a. OBSCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU TRANSSERVIS (Cyrillic: ОБЩЕСТВО С ОГРАНИЧЕННОЙ ОТВЕТСТВЕННОСТЬЮ ТРАНССЕРВИС); a.k.a. OOO TRANSSERVIS (Cyrillic: ООО ТРАНССЕРВИС)), 35 Prospekt Gubkina, Omsk, Omskaya Oblast 664035, Russia [UKRAINE–EO13661] (Linked To: TRANSOIL).

3. AVIA GROUP TERMINAL LIMITED LIABILITY COMPANY (a.k.a. AG TERMINAL OOO; a.k.a. LLC AG TERMINAL; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU AVIA GRUPP TERMINAL (Cyrillic: ОБЩЕСТВО С ОГРАНИЧЕННОЙ ОТВЕТСТВЕННОСТЬЮ АВИА ГРУПП ТЕРМИНАЛ)), Ter. Aeroport Sheremetyevo, Khimki, Moscovskaya Oblast 141400, Russia [UKRAINE–EO13661] (Linked To: AVIA GROUP LLC).

4. INRESBANK OOO (a.k.a. INRESBANK LTD; a.k.a. INVESTITSIONNY RESPUBLIKANSKI BANK OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU; a.k.a. INVESTMENT REPUBLIC BANK LLC; f.k.a. OOO KBK BANK), Ulitsa Bolshaya Semenovskaya, D. 32, Str. 1, Moscow 107023, Russia [UKRAINE–EO13661] (Linked To: SMP BANK).

5. PAO MOSOBLBANK (a.k.a. AKB MOSOBLBANK OAO; a.k.a. AKTSIONERNY KOMMERCHESKI BANK MOSKOVSKI OBLASTNOI BANK OTKRYTOE AKTSIONERNOE OBSHCHESTVO; a.k.a. PUBLIC JOINT STOCK COMPANY MOSCOW REGIONAL BANK), Ulitsa Semenovskaya B, D. 32, Str. 1, Moscow 107023, Russia [UKRAINE–EO13661] (Linked To: SMP BANK).

As entities owned, directly or indirectly, 50 percent or more by Stroygazmontazh, Transoil, Avia Group, LLC, or SMP Bank, these entities are subject to the same prohibitions as Stroygazmontazh, Transoil, Avia Group, LLC, or SMP Bank.

On December 22, 2015, OFAC identified as subject to the prohibitions of Directive 1 (as amended) of

September 12, 2014, the following 46 persons, pursuant to E.O. 13662, ''Blocking Property of Additional Persons Contributing to the Situation in Ukraine'' and 31 CFR 589.406, 589.802, and following the Secretary of the Treasury's determination pursuant to section 1(a)(i) of E.O. 13662 with respect to the financial services sector of the Russian Federation economy:

Entities

1. BPS–SBERBANK (a.k.a. BPS–SBERBANK OAO; a.k.a. OJSC BPS–SBERBANK), 6 Mulyavin Boulevard, Minsk 220005, Belarus; SWIFT/BIC BPSBBY2X; Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

2. CETELEM BANK LIMITED LIABILITY COMPANY (a.k.a. CETELEM BANK LLC; f.k.a. KOMMERCHESKI BANK UKRSIBBANK OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU; a.k.a. SETELEM BANK OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU; a.k.a. SETELEM BANK OOO), 26 ul. Pravdy, Moscow 125040, Russia; SWIFT/BIC CETBRUMM; Web site *www.cetelem.ru;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1027739664260 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

3. JSC SBERBANK OF RUSSIA (a.k.a. PUBLICHNE AKTSIONERNE TOVARYSTVO DOCHIRNII BANK SBERBANKU ROSII; a.k.a. SBERBANK OF RUSSIA JSC; f.k.a. SBERBANK OF RUSSIA SUBSIDIARY BANK PRIVATE JOINT STOCK COMPANY; a.k.a. SBERBANK OF RUSSIA SUBSIDIARY BANK PUBLIC JOINT STOCK COMPANY; a.k.a. SUBSIDIARY BANK SBERBANK OF RUSSIA PUBLIC JOINT–STOCK COMPANY), 46, Volodymyrska street, Kyiv 01601, Ukraine; SWIFT/BIC SABRUAUK; Web site *www.sberbank.ua;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 25959784 (Ukraine); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

4. OOO PS YANDEX.MONEY (a.k.a. LLC PS YANDEX.MONEY; a.k.a. PS YANDEKS.DENGI OOO), 16 Lva Tolstogo ul., Moscow 119021, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1077746365113 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives.* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

5. SB INTERNATIONAL SARL, Avenue J.F. Kennedy 46a, 1855 Luxembourg, Luxembourg; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID B161089 (Luxembourg); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

6. SB SBERBANK JSC (a.k.a. SUBSIDIARY BANK SBERBANK OF RUSSIA JOINT STOCK COMPANY), 13/1 Al Farabi Ave., Almaty 050059, Kazakhstan; 30/26, Gogol/Kaldayakov Street, Almaty 050010, Kazakhstan; SWIFT/BIC SABRKZKA; Web site *www.sberbank.kz;* Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

7. SBERBANK (SWITZERLAND) AG, Gartenstrasse 24, 8002 Zurich, Switzerland; PO Box 2136, Zurich 8027, Switzerland; Freigutstrasse 16, 8027 Zurich, Switzerland; SWIFT/BIC SLBZCHZZ; Web site *www.slb-bank.ch;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID CH–020.3.908.277–7 (Switzerland); alt. Registration ID CHE–106.291.569 (Switzerland); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives.* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

8. SBERBANK CAPITAL LLC (a.k.a. LLC SBERBANK CAPITAL; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU SBERBANK KAPITAL; a.k.a. SBERBANK CAPITAL LIMITED LIABILITY COMPANY; a.k.a. SBERBANK KAPITAL, OOO), d.19 ul. Vavilova, Moscow 117997, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1087746887678 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

9. SBERBANK EUROPE AG, Schwarzenbergplatz 3, Wien 1010, Austria; SWIFT/BIC SABRATWW; Web site *www.sberbank.at;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID FN 161285 i (Austria); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives.* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

10. SBERBANK INVESTMENTS LLC (a.k.a. LLC SBERBANK INVESTMENTS; a.k.a. SBERBANK INVESTMENTS OOO), 46 Molodezhnaya Ul., Odintsovo 143002, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

11. SBERBANK LEASING CJSC (a.k.a. CJSC SBERBANK LEASING; f.k.a. RUSSKO–GERMANSKAYA LIZINGOVAYA KOMPANIYA ZAO; a.k.a. SBERBANK LEASING JOINT STOCK COMPANY; a.k.a. SBERBANK LEASING ZAO; a.k.a. SBERBANK LIZING ZAKRYTOE AKTSIONERNOE OBSHCHESTVO), Russia; 6 Vorobievskoe shosse, Moscow 119285, Russia; Web site *www.sberleasing.ru;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1027739000728 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

12. BANCO VTB AFRICA, S.A. (a.k.a. VTB AFRICA), 22, Rua da Missao, Luanda, Angola; SWIFT/BIC VTBLAOLU; Web site *www.vtb.ao;* Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

13. BANK VTB (KAZAKHSTAN), JSC (a.k.a. JOINT STOCK COMPANY VTB BANK (KAZAKHSTAN); a.k.a. SUBSIDIARY JSC BANK VTB (KAZAKHSTAN)), 28 v Timiryazeva str., Almaty 050040, Kazakhstan; 28 Timiryazev Street, Almaty 050040, Kazakhstan; SWIFT/BIC VTBAKZKZ; Web site *http://en.vtb-bank.kz/;* Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

14. BANK VTB 24 PUBLIC JOINT STOCK COMPANY (f.k.a. BANK VTB 24 (ZAKRYTOE AKTSIONERNOE OBSHCHESTVO); a.k.a. BANK VTB 24 CLOSED JOINT STOCK COMPANY; a.k.a. BANK VTB 24 PUBLICHNOE AKTSIONERNOE OBSHCHESTVO; a.k.a. VTB 24 JSC; a.k.a. VTB 24 PAO), d. 35 ul. Myasnitskaya, Moscow 101000, Russia; SWIFT/BIC CBGURUMM; Web site *www.vtb24.ru;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1027739207462 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

15. JOINT STOCK COMPANY HALS–DEVELOPMENT (a.k.a. GALS–DEVELOPMENT, OAO; a.k.a. HALS

DEVELOPMENT OJSC; a.k.a. HALS–DEVELOPMENT JSC; a.k.a. HALS–DEVELOPMENT, OJSC; a.k.a. OTKRYTOE AKTSIONERNOE OBSHCHESTVO GALS DEVELOPMENT; f.k.a. ZAKRYTOE AKTSIONERNOE OBSHCHESTVO SISTEMA HALS), d. 35 str. 4 ul. Tatarskaya B, Moscow 115184, Russia; Web site *www.hals-development.ru;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1027739002510 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

16. MULTICARTA (a.k.a. MULTICARTA, LTD; a.k.a. MULTIKARTA, OOO; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU MULTIKARTA), d. 43 korp. 1 ul. Vorontsovskaya, Moscow 109147, Russia; Web site *www.multicarta.ru;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1027739116404 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

17. NPF VTB PENSION FUND, JSC (a.k.a. AKTSIONERNOE OBSHCHESTVO NEGOSUDARSTVENNY PENSIONNY FOND VTB PENSIONNY FOND; f.k.a. NEKOMMERCHESKAYA ORGANIZATSIYA NEGOSUDARSTVENNY PENSIONNY FOND VTB PENSIONNY FOND; a.k.a. NONPROFIT ORGANIZATION NON–STATE PENSION FUND VTB PENSION FUND; a.k.a. NON–STATE PENSION FUND VTB PENSION FUND, JSC; a.k.a. NPF VTB PENSIONNY FOND, AO), d. 43 str. 1 ul. Vorontsovskaya, Moscow 109147, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1147799014692 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

18. PJSC VTB BANK (KIEV) (a.k.a. PUBLICHNE AKTSIONERNE TOVARYSTVO VTB BANK; a.k.a. PUBLIC–JOINT STOCK COMPANY VTB BANK (UKRAINE); a.k.a. VTB BANK, PJSC; a.k.a. VTB BANK, PJSC (UKRAINE); a.k.a. VTB BANK, PUBLIC JOINT STOCK COMPANY), 8/26, Shevchenka boulevard/Pushkinska street, Kyiv 01004, Ukraine; 8/26 Pushkinskaya str/Shevchenko bulvr, Kiev 01004, Ukraine; SWIFT/BIC VTBRUAUK; Web site *www.vtb.com.ua;* Executive Order 13662 Directive Determination—Subject to Directive 1; Government Gazette Number 14359319 (Ukraine); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

19. VTB BANK (ARMENIA), CJSC (f.k.a. SAVINGS BANK OF THE REPUBLIC OF ARMENIA; a.k.a. VTB BANK (ARMENIA) CJSC), 46 Ul Nalbandyan, Yerevan 375010, Armenia; SWIFT/BIC ARMJAM22; Web site *www.vtb.am;* Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

20. VTB BANK (AUSTRIA) AG, Parking 6, PO Box 560, Vienna 1010, Austria; SWIFT/BIC DOBAATWW; Web site *www.vtb.at;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID FN 117595 i; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

21. VTB BANK (AZERBAIJAN), OJSC (a.k.a. BANK VTB (AZERBAIJAN) OJSC; a.k.a. JSC VTB BANK (AZERBAIJAN); f.k.a. OJSC AF BANK), 38 Khatai ave. Nasimi district, Baku AZ 1008, Azerbaijan; 60, Samed Vurgun str, Baku 1022, Azerbaijan; SWIFT/BIC VTBAAZ22; Web site *http://en.vtb.az/;* Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

22. VTB BANK (BELARUS), CJSC (f.k.a. CJSC SLAVNEFTEBANK; a.k.a. CJSC VTB BANK (BELARUS); a.k.a. VTB BANK (BELARUS); a.k.a. VTB BANK (BELARUS) CLOSED JOINT STOCK COMPANY), 14, Moskovskaya Street, Minsk 220007, Belarus; SWIFT/BIC SLANBY22; Web site *www.vtb-bank.by;* Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

23. VTB BANK (GEORGIA), JSC (a.k.a. JSC VTB BANK (GEORGIA); a.k.a. JSC VTB BANK GEORGIA; f.k.a. UNITED GEORGIAN BANK), 14, G. Chanturia Street, Tbilisi 0114, Georgia; SWIFT/BIC UGEBGE22; Web site *www.vtb.com.ge;* Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

24. VTB BANK JSC BELGRADE (f.k.a. MOSKOVSKA BANKA AD; a.k.a. VTB BANKA AD BEOGRAD), 2 Balkanska street, Belgrade 11 000, Serbia; SWIFT/BIC MBBGRSBG; Web site *www.vtbbanka.rs;* Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

25. VTB CAPITAL HOLDING CJSC (a.k.a. HOLDING VTB CAPITAL, CJSC; a.k.a. KHOLDING VTB KAPITAL ZAKRYTOE AKTSIONERNOE OBSHCHESTVO; a.k.a. VTB CAPITAL HOLDING ZAO), 12 Presnenskaya nab., Moscow 123100, Russia; Web site *http://vtbcapital.com;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1097746344596 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

26. VTB DC, LTD, Room 47, office XIV, 8 Brestskaya Street, Moscow 125047, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

27. VTB FACTORING, LTD (a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU VTB FAKTORING; a.k.a. VTB FACTORING LIMITED; a.k.a. VTB FAKTORING, OOO), d. 52 str. 1 nab.Kosmodamianskaya, Moscow 115054, Russia; Web site *www.vtbf.ru;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 5087746611145 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

28. VTB INSURANCE LIMITED (a.k.a. INSURANCE COMPANY VTB–INSURANCE LIMITED; a.k.a. INSURANCE COMPANY VTB–INSURANCE, LTD; f.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU STRAKHOVOI KAPITAL; a.k.a. VTB STRAKHOVANIE SK OOO; a.k.a. VTB STRAKHOVANIE STRAKHOVAYA KOMPANIYA OOO), str. 1 8 Chistoprudnyy bulvar, Moscow 101000, Russia; Web site *www.vtbins.ru;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1027700462514 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

29. VTB LEASING OPEN JOINT–STOCK COMPANY (a.k.a. JSC VTB LEASING; a.k.a. VTB LIZING, OAO; a.k.a. VTB LIZING, OTKRYTOE AKTSIONERNOE OBSHCHESTVO; a.k.a. VTB–LEASING, OJSC), 2nd Volkonskiy pereulok 10, Moscow 127473, Russia; 43 str. 1 ul. Vorontsovskaya, Moscow 109147, Russia; Web site *www.vtb-leasing.ru;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1037700259244 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

30. VTB PENSION ADMINISTRATOR, LIMITED (a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU VTB PENSIONNY ADMINISTRATOR; a.k.a. VTB PENSION ADMINISTRATOR, LTD;

a.k.a. VTB PENSIONNY ADMINISTRATOR, OOO), d. 52 str. 1 nab.Kosmodamianskaya, Moscow 115054, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1097746178232 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

31. VTB REAL ESTATE LIMITED LIABILITY COMPANY (a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU VTB NEDVIZHIMOST; a.k.a. VTB NEDVIZHIMOST, OOO; a.k.a. VTB REAL ESTATE, LLC), d.70 ul. Mosfilmovskaya, Moscow 119590, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1117746272907 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

32. VTB REGISTRAR, CJSC (a.k.a. VTB REGISTRAR), 23, Pravdy Street, Moscow 125040, Russia; Web site *www.vtbreg.ru;* Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

33. VTB SPECIALIZED DEPOSITORY, CJSC (a.k.a. CJS VTB SPECIALIZED DEPOSITORY), 35 Myasnitskaya Street, Moscow 101000, Russia; Web site *www.odk.ru;* Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: VTB BANK OAO).

34. ACTIVEBUSINESSCOLLECTION LIMITED LIABILITY COMPANY (a.k.a. AKTIVBIZNESKOLLEKSHN, OOO; a.k.a. LIMITED LIABILITY COMPANY ACTIVEBUSINESSCOLLECTION; a.k.a. LLC ACTIVEBUSINESSCOLLECTION; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU AKTIVBIZNESKOLLEKSHN), d.19 ul. Vavilova, Moscow 117997, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1137746390572 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

35. AUCTION LIMITED LIABILITY COMPANY (a.k.a. AUKCION LIMITED LIABILITY COMPANY; a.k.a. AUKTSION, OOO; a.k.a. LLC AUKCION; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU AUKTSION), d.14 shosse Entuziastov, Moscow 111024, Russia; Web site *www.aukcion-sbrf.ru;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1027700256297 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

36. BYLINNYE BOGATYRI LIMITED LIABILITY COMPANY (a.k.a. BYLINNYE BOGATYRI, OOO; a.k.a. LLC BYLINNYE BOGATYRI), 10 Presnenskaya Embankment, Moscow 123317, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

37. JSC SBERBANK–AUTOMATED SYSTEM FOR TRADING (a.k.a. JOINT STOCK COMPANY SBERBANK–AUTOMATED SYSTEM FOR TRADING; a.k.a. SBERBANK—AUTOMATED TRADING SYSTEM CLOSED JOINT–STOCK COMPANY; a.k.a. SBERBANK–AST, ZAO; a.k.a. ZAKRYTOE AKTSIONERNOE OBSHCHESTVO SBERBANKAVTOMATIZIROVANNAYA SISTEMA TORGOV), d. 24 str. 2 ul. Novoslobodskaya, Moscow 127055, Russia; Web site *www.sberbank-ast.ru;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1027707000441 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

38. KORUS CONSULTING CIS LIMITED LIABILITY COMPANY (a.k.a. KORUS KONSALTING SNG, OOO; a.k.a. LLL KORUS CONSULTING CIS; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU KORUS KONSALTING SNG), 68 Sampsonievsky Avenue, letter N, Room 1N, Saint Petersburg 194100, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1057812752502 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

39. LLC SOVREMENNYE TECHNOLOGII (a.k.a. MODERN TECHNOLOGIES LIMITED LIABILITY COMPANY; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU SOVREMENNYE TEKHNOLOGII; a.k.a. SOVREMENNYE TEKHNOLOGII, OOO), 12a Korp. 1str 6 Pr 2–I Yuzhnoportovy, Moscow 115432, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1037708040468 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

40. NON–STATE PENSION FUND OF SBERBANK (a.k.a. CJSC NON–STATE PENSION FUND OF SBERBANK; f.k.a. NEGOSUDARSTVENNY PENSIONNY FOND SBERBANKA; a.k.a. NPF SBERBANKA, ZAO; a.k.a. SBERBANK PRIVATE PENSION FUND CLOSED JOINT–STOCK COMPANY; a.k.a. ZAKRYTOE AKTSIONERNOE OBSHCHESTVO NEGOSUDARSTVENNY PENSIONNY FOND SBERBANKA), d. 31 G ul. Shabolovka, Moscow 115162, Russia; Web site *www.npfsberbanka.ru;* Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1147799009160 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

41. RUST CLOSED JOINT–STOCK COMPANY (a.k.a. CJSC RUST; a.k.a. JSC RUSTE; a.k.a. RUST ZAKRYTOE AKTSIONERNOE OBSHCHESTVO; a.k.a. RUST ZAO), 2 ul. Krasnogo Tekstilshchika, St. Petersburg 191124, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1027800513070 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

42. SB SECURITIES S.A., Boulevard Konrad Adenauer 2, Luxembourg 1115, Luxembourg; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID B171037 (Luxembourg); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

43. SBERBANK FINANCE COMPANY LIMITED LIABILITY COMPANY (a.k.a. LIMITED LIABILITY COMPANY SBERBANK FINANCIAL COMPANY; a.k.a. LLC SBERBANK FINANCIAL COMPANY; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU FINANSOVAYA KOMPANIYA SBERBANKA; a.k.a. SBERBANK–FINANS, OOO), d.29/16 per. Sivtsev Vrazhek, Moscow 119002, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1107746399903 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

44. SBERBANK INSURANCE BROKER LIMITED LIABILITY COMPANY (a.k.a. LLC INSURANCE BROKER OF SBERBANK; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU STRAKHOVOI BROKER SBERBANKA; a.k.a. OOO STRAKHOVOI BROKER SBERBANKA; a.k.a. STRAKHOVOI BROKER SBERBANKA,

OOO), 42 Bolshaya Yakimanka St., b. 1–2, office 206, Moscow 119049, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1147746683468 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

45. SBERBANK INSURANCE COMPANY LTD (a.k.a. LLC INSURANCE COMPANY SBERBANK INSURANCE; f.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU STRAKHOVAYA KOMPANIYA SBERBANK OBSHCHEE STRAKHOVANIE; a.k.a. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU STRAKHOVAYA KOMPANIYA SBERBANK STRAKHOVANIE; a.k.a. SBERBANK STRAHOVANIE OOO SK; a.k.a. SK SBERBANK STRAHOVANIE, LLC), 42 Bolshaya Yakimanka St., b. 1–2, office 209, Moscow 119049, Russia; 7 ul. Pavlovskaya, Moscow, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1147746683479 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

46. SBERBANK TECHNOLOGIES CLOSED JOINT STOCK COMPANY (a.k.a. CJSC SBERBANK–TECHNOLOGY; a.k.a. CLOSED JOINT STOCK COMPANY SBERBANK—TECHNOLOGY; a.k.a. SBERTEKH, ZAO; a.k.a. ZAKRYTOE AKTSIONERNOE OBSHCHESTVO SBERBANK—TEKHNOLOGII), d.10 nab.Novodanilovskaya, Moscow 117105, Russia; Executive Order 13662 Directive Determination—Subject to Directive 1; Registration ID 1117746533926 (Russia); For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: SBERBANK OF RUSSIA).

As entities owned, directly or indirectly, 50 percent or more by Sberbank of Russia or VTB Bank OAO, these entities are subject to the same prohibitions as Sberbank of Russia or VTB Bank OAO.

On December 22, 2015, OFAC identified as subject to the prohibitions of Directive 3 of September 12, 2014, the following 41 persons, pursuant to E.O. 13662, ''Blocking Property of Additional Persons Contributing to the Situation in Ukraine'' and 31 CFR 589.406, 589.802, and following the Secretary of the Treasury's determination pursuant to section 1(a)(i) of E.O. 13662 with respect to the defense and related materiel sector of the Russian Federation economy:

Entities

1. 90 EKSPERIMENTALNY ZAVOD OAO (a.k.a. 90 EXPERIMENTAL PLANT OPEN JOINT STOCK COMPANY; a.k.a. OPEN JOINT–STOCK COMPANY 90 EKSPERIMENTALNIY ZAVOD), P. Rassudovo, Street Tsentralnaya, D. 103, Moscow 143396, Russia; Web site *http://www.90zavod.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Tax ID No. 5030056754; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

2. AKTSIONERNOE OBSHCHESTVO MOSKOVSKI MASHINOSTROITELNY EKSPERIMENTALNY ZAVOD—KOMPOZITSIONNYE TEKHNOLOGII (a.k.a. JOINT STOCK COMPANY MOSKOW EXPERIMENTAL MACHINE–BUILDING PLANT—COMPOSITE TECHNOLOGIES; a.k.a. MMEZ–KT OJSC; a.k.a. MMEZ–KT, AO; a.k.a. MMEZ–KT–OAO; a.k.a. MOSCOW MECHANICAL EXPERIMENTAL PLANT—COMPOSITE TECHNOLOGIES OPEN JOINT STOCK COMPANY; a.k.a. MOSKOVSKIY MEKHANICHESKIY EKSPERIMENTALNIY ZAVOD—KOMPOZITSIONNYE TEKHNOLOGII; f.k.a. OTKRYTOE AKTSIONERNOE OBSHCHESTVO MOSKOVSKI MEKHANICHESKI EKSPEREMENTALNY ZAVOD), d. 9 Pr. 1–I Magistralny, Moscow 123290, Russia; Email Address *9400658@rambler.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1037714019815; Tax ID No. 7714303050; Government Gazette Number 00211286; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

3. AKTSIONERNOE OBSHCHESTVO NAUCHNO–PROIZVODSTVENNOE OBEDINENIE OPTIKA (a.k.a. FEDERAL STATE UNITARY ENTERPRISE @ SCIENTIFIC AND PRODUCTION ASSOCIATION OPTIKA; f.k.a. FEDERALNOE GOSUDARSTVENNOE UNITARNOE PREDPRIYATIE NAUCHNO PROIZVODSTVENNOE OBEDINENIE OPTIKA; a.k.a. NPO OPTIKA, AO; a.k.a. OPEN JOINT STOCK COMPANY NAUCHNO–PROIZVODSTVENNOYE OBYEDINENIYE OPTIKA), Vladenie 33 Shosse Altufevskoe, Moscow 127410, Russia; Shosse Altufyevskoye, D. 33, Moscow 127410, Russia; Email Address *TEOPT@MAIL.CNT.RU;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1127746188536; Tax ID No. 7715909132; Government Gazette Number 17412936; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

4. AKTSIONERNOE OBSHCHESTVO NAUCHNO–PROIZVODSTVENNY KONTSERN TEKHNOLOGII MASHINOSTROENIYA (f.k.a. AKTSIONERNOE OBSHCHESTVO NAUCHNO PROIZVODSTVENNY KONTSERN TECHNOLOGIES MASHINOSTROENIYA; a.k.a. JOINT STOCK COMPANY SCIENTIFIC INDUSTRIAL CONCERN MANUFACTURING ENGINEERING; a.k.a. JSC SCIENTIFIC INDUSTRIAL CONCERN MECHANICAL ENGINEERING; a.k.a. MANUFACTURING ENGINEERING SCIENTIFIC INDUSTRIAL CONCERN OPEN JOINT STOCK COMPANY; a.k.a. MECHANICAL ENGINEERING TECHNOLOGIES; a.k.a. NPK TECHNOLOGII MASCHINOSTROJENIJA; a.k.a. NPK TEKHMASH; a.k.a. NPK TEKHMASH AO; a.k.a. NPK TEKHMASH OAO; a.k.a. NPK TEKHMASH OJSC; a.k.a. OJSC MACHINE ENGINEERING TECHNOLOGIES; a.k.a. SCIENTIFIC INDUSTRIAL CONCERN MANUFACTURING ENGINEERING OJSC), d. 58 str. 4 shosse Leningradskoe, Moscow 125212, Russia; Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1117746260477; Tax ID No. 7743813961; Government Gazette Number 91420386; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

5. AKTSIONERNOE OBSHCHESTVO NOVOSIBIRSKI ZAVOD POLUPROVODNIKOVYKH PRIBOROV S OKB (a.k.a. NOVOSIBIRSK FACTORY OF SEMICONDUCTOR DEVICES WITH THE SPECIAL DESIGN CENTRE PUBLIK JOINT STOCK COMPANY; a.k.a. NZP POLUPROVODNIKOVYKH PRIBOROV S OKB, AO; a.k.a. NZPP S OKB OJSC; f.k.a. OTKRYTOE AKTSIONERNOE OBSHCHESTVO NOVOSIBIRSKI ZAVOD POLUPROVODNIKOVYKH PRIBOROV S OKB), 60 ul. Dachnaya, Novosibirsk, Novosibirskaya obl. 630082, Russia; Email Address *secretar@nzpp.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1115476167180; Tax ID No. 5402546039; Government Gazette Number 07617658; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

6. AKTSIONERNOE OBSHCHESTVO RT–AVTO (a.k.a. RT–AUTO OPEN JOINT STOCK COMPANY; a.k.a. RT–AVTO OJSC; a.k.a. ''RT–AUTO''; a.k.a. ''RT–AVTO, AO''; a.k.a. ''RT–AVTO, OAO''), d. 2/17 str. 1 tup Verkhni Taganski, Moscow 109240, Russia; Web site *http://rostec.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1107746247850; Tax ID No. 7709851082; Government Gazette Number 66310966; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

7. AKTSIONERNOE OBSHCHESTVO RT–BIOTEKHPROM (a.k.a. RT–BIOTECHPROM; a.k.a. RT–BIOTECHPROM OJSC; a.k.a. RT–BIOTEKHPROM, AO), d. 24 ul. Usacheva, Moscow 119048, Russia; Web site *www.rt-biotechprom.ru;* Email Address *dshumikhin@rt-biotechprom.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1097746425996;

Tax ID No. 7704730729; Government Gazette Number 62666778; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

8. AKTSIONERNOE OBSHCHESTVO RT–KHIMICHESKIE TEKHNOLOGII I KOMPOZITSIONNYE MATERIALY (a.k.a. JOINT STOCK COMPANY RT–CHEMICAL TECHNOLOGIES AND COMPOSITE MATERIALS; a.k.a. OAO JSC CHEMCOMPOSITE; f.k.a. OTKRYTOE AKTSIONERNOE OBSHCHESTVO RT KHIMICHESKIE I KOMPOZITSIONNYE TECHNOLOGIES I MATERIALY; f.k.a. OTKRYTOE AKTSIONERNOE OBSHCHESTVO RT KHIMICHESKIE TECHNOLOGIES I KOMPOZITSIONNYE MATERIALY; a.k.a. RT–CHEMICAL AND COMPOSITE TECHNOLOGIES AND MATERIALS; a.k.a. RT–KHIMKOMPOZIT OAO; a.k.a. RT–KHIMKOMPOZIT OJSC; a.k.a. RT–KHIMKOMPOZIT, AO), d. 40 korp. 1 ul. Narodnogo Opolcheniya, Moscow 123298, Russia; Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1097746269785; Tax ID No. 7734613934; Government Gazette Number 61698405; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

9. AKTSIONERNOE OBSHCHESTVO RT–OKHRANA (a.k.a. JOINT STOCK COMPANY RT–GUARD; a.k.a. RT–OKHRANA; a.k.a. RT–OKHRANA ZAO; a.k.a. RT–OKHRANA, AO; a.k.a. ZAO RT–OKHRANA), d. 24 ul. Usacheva, Moscow 119048, Russia; Web site *http://rtguard.ru/;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1107746577652; Tax ID No. 7704759968; Government Gazette Number 66902230; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

10. AKTSIONERNOE OBSHCHESTVO RT–STROITELNYE TEKHNOLOGII (a.k.a. JOINT STOCK COMPANY RT–CONSTRUCTION TECHNOLOGIES; a.k.a. OPEN JOINT–STOCK COMPANY RT–STROITELNYYE TEKHNOLOGII; a.k.a. RT–STROITELNYE TECHNOLOGIES OAO; a.k.a. RT–STROITELNYE TEKHNOLOGII, AO), d. 2 korp., 4 str., 16 kv., 6 per. Bolshoi Savvinski, Moscow 119435, Russia; Email Address *chernyakova-st@stroytech-rt.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1097746324400; Tax ID No. 7704727853; Government Gazette Number 61771160; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

11. AKTSIONERNOE OBSHCHESTVO SHVABE (a.k.a. JOINT STOCK COMPANY SHVABE; f.k.a. OTKRYTOE AKTSIONERNOE OBSHCHESTVO NAUCHNO PROIZVODSTVENNY KONTSERN OPTICHESKIE SISTEMY I TECHNOLOGIES; a.k.a. SHVABE OPEN JOINT STOCK COMPANY; a.k.a. SHVABE, AO), d. 33 B ul.Vostochnaya, Ekaterinburg, Sverdlovskaya obl. 620100, Russia; 33b, Vostochnaya St., Yekaterinburg City, Russia; Web site *http://www.shvabe.com;* Email Address *mail@shvabe.com;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1107746256727; Tax ID No. 7717671799; Government Gazette Number 07508641; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

12. AKTSIONERNOE OBSHCHESTVO TEKHNODINAMIKA (f.k.a. AGREGATNOE KONSTRUKTORSKOE BYURO YAKOR OAO; a.k.a. JOINT STOCK COMPANY AVIATION EQUIPMENT; a.k.a. ''TECHNODINAMIKA''; a.k.a. ''TEKHNODINAMIKA, AO''), d. 29 ul. Ibragimova, Moscow 105318, Russia; Web site *www.akbyakor.ru;* Email Address *amuravyeva@avia-equipment.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1037719005873; Tax ID No. 7719265496; Government Gazette Number 07543117; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

13. AKTSIONERNOE OBSHCHESTVO TSENTRALNOE KONSTRUKTORSKOE BYURO SPETSIALNYKH RADIOMATERIALOV (a.k.a. CENTRAL DESIGN BUREAU OF SPECIAL RADIO MATERIALS OPEN JOINT STOCK COMPANY; f.k.a. FEDERALNOE GOSUDARSTVENNOE UNITARNOE PREDPRIYATIE TSENTRALNOE KONSTRUKTORSKOE BYURO SPETSIALNYKH RADIOMATERIALOV; a.k.a. OPEN JOINT STOCK COMPANY TSENTRALNOYE KONSTRUKTORSKOYE BYURO SPETSIALNYKH RADIOMATERIALOV; a.k.a. OPEN JOINT–STOCK COMPANY CENTRAL DESIGN OFFICE OF RADIOMATERIALS; a.k.a. TSKB RM, AO), d.125b shosse Varshavskoe, Moscow 117587, Russia; Pr. Krasnokazarmenniy, D. 14 A, Bldg. 19, Moscow, Russia; Web site *www.ckbrm.nm.ru;* alt. Web site *http://ckbrm.ru;* Email Address *ckbrm@nm.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1077746102060; Tax ID No. 7722599844; Government Gazette Number 07550073; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

14. JOINT–STOCK COMMERCIAL BANK NOVIKOMBANK (a.k.a. AKTSIONERNY KOMMERCHESKI BANK NOVIKOMBANK AKTSIONERNOE OBSHCHESTVO; f.k.a. AKTSIONERNY KOMMERCHESKI BANK NOVIKOMBANK ZAKRYTOE AKTSIONERNOE OBSHCHESTVO; a.k.a. JSCB NOVIKOMBANK; a.k.a. NOVIKOMBANK, AO AKB), building 2, 4/4 Yakimanskaya naberezhnaya, Moscow 119180, Russia; d. 4/4 korp., 2 nab., Yakimanskaya, Moscow 119180, Russia; 4/4 Yakimanskaya emb., bld 2, Moscow 119180, Russia; SWIFT/BIC CNOV RU MM; Web site *http://www.novikom.ru;* Email Address *office@novikom.ru;* BIK (RU) 044583162; Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1027739075891; Tax ID No. 7706196340; Government Gazette Number 17541272; All offices worldwide. For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

15. KONTSERN AVIAPRIBOROSTROENIE OAO (a.k.a. AIRCRAFT ENGINEERING CONCERN OPEN JOINT STOCK COMPANY; a.k.a. ''OPEN JOINT–STOCK COMPANY KONTSERN AVIAPRIBOROSTROYENIYE''), Per. Aviatsionniy, D. 5, Moscow 125319, Russia; Web site *http://www.oao-aps.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Tax ID No. 7704729515; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

16. KONTSERN ORION OAO (a.k.a. OPEN JOINT–STOCK COMPANY KONTSERN ORION; a.k.a. ORION CONCERN OPEN JOINT STOCK COMPANY), Street Malaya Pirogovskaya, D. 18, Bldg. 1, Moscow 119435, Russia; Web site *http://www.concern-orion.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Tax ID No. 7704731673; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

17. KONTSERN SIRIUS OAO (a.k.a. CONCERN SIRIUS JOINT STOCK COMPANY; a.k.a. JSC SIRIUS), str. 1 18 Malaya Pirogovskaya ul., Moscow 119435, Russia; Web site *http://con-sirius.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1097746424368; Tax ID No. 7704730655; Government Gazette Number 62668197; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

18. MZ MAYAK OAO (a.k.a. MASHINOSTROITELNIY ZAVOD MAYAK; a.k.a. MAYAK MACHINE BUILDING PLANT OPEN JOINT STOCK COMPANY; a.k.a. OPEN JOINT–STOCK COMPANY MASHINOSTROITELNIY ZAVOD MAYAK), Street Ibragimova, D. 31, Moscow 105318, Russia; Web site *http://www.mzmayak.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Tax ID No. 7719024042; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/*

sanctions/Programs/Pages/ukraine.aspx#directives [UKRAINE–EO13662] (Linked To: ROSTEC).

19. OBEDINENNAYA DVIGATELESTROITELNAYA KORPORATSIYA OAO (f.k.a. OTKRYTOE AKTSIONERNOE OBSHCHESTVO UPRAVLYAYUSHCHAYA KOMPANIYA OBEDINENNAYA DVIGATELESTROITELNAYA KORPORATSIYA; a.k.a. UNITED ENGINE CORPORATION JSC; a.k.a. ''ODK OAO''), 16 Budennogo prospekt, Moscow 105118, Russia; Web site *www.uk-odk.ru;* Email Address *info@uecrus.com;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1107746081717; Tax ID No. 7731644035; Government Gazette Number 84023868; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

20. OBIEDINENNAYA PROMYSHLENNAYA KORPORATSIYA OBORONPROM OAO (a.k.a. OPK OBORONPROM; a.k.a. OPK OBORONPROM OAO; f.k.a. OTKRYTOE AKTSIONERNOE OBSHCHESTVO OBEDINENNAYA PROMYSHLENNAYA KORPORATSIYA OBORONPROM; a.k.a. UNITED INDUSTRIAL CORPORATION OBORONPROM OJSC; a.k.a. UNITED INDUSTRIAL DEFENCE CORPORATION OBORONPROM), str. 141 29 Vereiskaya ul., Moscow 121357, Russia; Web site *www.oboronprom.com;* Email Address *oboronprom@oboronprom.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1027718000221; Tax ID No. 7718218951; Government Gazette Number 59067382; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

21. OBSCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU PROMINVEST (a.k.a. PROMINVEST LIMITED LIABILITY COMPANY; a.k.a. PROMINVEST, OOO), 2–4–6, str. 14 per. Bolshoi Savvinski, Moscow 119435, Russia; Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1027739228857; Tax ID No. 7705422452; Government Gazette Number 58127923; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

22. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU RT–ENERGOEFFEKTIVNOST (a.k.a. RT–ENERGO LLC; a.k.a. RT–ENERGO, OOO; a.k.a. RT–ENERGOEFFEKTIVNOST LIMITED LIABILITY COMPANY; a.k.a. RT–ENERGY EFFICIENCY LIMITED LIABILITY COMPANY), d. 1 A ul. Udaltsova, Moscow 119415, Russia; Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1107746755258; Tax ID No. 7729663922; Government Gazette Number 68072726; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

23. OBSHCHESTVO S OGRANICHENNOI OTVETSTVENNOSTYU RT–INFORM (a.k.a. RT–INFORM; a.k.a. RT–INFORM LIMITED LIABILITY COMPANY; a.k.a. RT–INFORM, OOO), d. 1 pomeshchenie 1000 ul. Universitetskayap, Innopolis, Verkhneuslonski Raion, Tatarstan resp. 420500, Russia; Web site *http://www.rtinform.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1127746501190; Tax ID No. 7704810710; Government Gazette Number 09911571; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

24. OTKRYTOE AKTSIONERNOE OBSHCHESTVO KALINOVSKI KHIMICHESKI ZAVOD (f.k.a. AKTSIONERNOE OBSHCHESTVO OTKRYTOGO TIPA KALINOVSKI KHIMICHEKI ZAVOD; a.k.a. KALINOVO CHEMICAL PLANT OPEN JOINT STOCK COMPANY; a.k.a. OPEN JOINT–STOCK COMPANY KALINOVSKIY KHIMICHESKIY ZAVOD; a.k.a. ''KKHZ, OAO''), d. 8 ul. Lenina P Kalinovo, Nevyanski Raion, Sverdlovskaya obl. 624186, Russia; Web site *http://www.kcplant.ru/;* Email Address *kcp@uraltc.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1026601326597; Tax ID No. 6621001262; Government Gazette Number 07511005; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

25. OTKRYTOE AKTSIONERNOE OBSHCHESTVO KONTSERN AVIATSIONNOE OBORUDOVANIE (a.k.a. AVIATION EQUIPMENT CONCERN OPEN JOINT STOCK COMPANY; a.k.a. AVIATION EQUIPMENT HOLDING; a.k.a. JOINT STOCK COMPANY CONCERN OF AVIATION EQUIPMENT; a.k.a. KONTSERN AVIATSIONNOE OBORUDOVANIE, OAO), 29, korp.31 ul. Ibragimova, Moscow 105318, Russia; 29/31 Ibragimova Street, Moscow 105318, Russia; Web site *www.avia-equipment.ru;* Email Address *mailbox@avia-equipment.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1097746108250; Tax ID No. 7704722326; Government Gazette Number 60427973; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

26. OTKRYTOE AKTSIONERNOE OBSHCHESTVO NAUCHNO–PROIZVODSTVENNOE OBEDINENIE SPLAV (a.k.a. NPO SPLAV, OAO; a.k.a. OPEN JOINT–STOCK COMPANY NAUCHNO–PROIZVODSTVENNOYE OBYEDINENIYE SPLAV; a.k.a. OPEN JOINT–STOCK COMPANY SPLAV STATE AND RESEARCH PRODUCTION ASSOCIATION; a.k.a. SPLAV SCIENTIFIC PRODUCTION ASSOCIATION OPEN JOINT STOCK COMPANY), d. 33 ul. Shcheglovskaya Zaseka, Tula, Tulskaya obl. 300004, Russia; Web site *http://splav.org;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1127154020311; Tax ID No. 7105515987; Government Gazette Number 07504301; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

27. OTKRYTOE AKTSIONERNOE OBSHCHESTVO NOVOSIBIRSKOE PROIZVODSTVENNOE OBEDINENIE LUCH (f.k.a. FEDERALNOE GOSUDARSTVENNOE UNITARNOE PREDPRIYATIE NOVOSIBIRSKOE PROIZVODSTVENNOE OB EDINENIE LUCH; a.k.a. JOINT STOCK COMPANY NOVOSIBIRSK PRODUCTION AMALGAMATION LUCH; a.k.a. NPO LUCH, OAO), 32 ul. Stantsionnaya, Novosibirsk, Novosibirskaya obl. 630108, Russia; Email Address *it@luch-nsk.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1115476080610; Tax ID No. 5404441240; Government Gazette Number 07517605; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

28. OTKRYTOE AKTSIONERNOE OBSHCHESTVO NOVO–VYATKA (a.k.a. NOVO VYATKA OPEN JOINT STOCK COMPANY; a.k.a. NOVO–VYATKA, OAO; a.k.a. OPEN JOINT STOCK COMPANY NOVO–VYATKA), d. 51 korp. 2 ul. Sovetskaya, Kirov, Kirovskaya obl. 610008, Russia; Street Sovetskaya, d. 51, Bldg. 2, Kirov 61008, Russia; Web site *http://www.nmz.ru;* Email Address *nmz@nmz.kirov.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1034316578680; Tax ID No. 4345029946; Government Gazette Number 49616818; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

29. OTKRYTOE AKTSIONERNOE OBSHCHESTVO NOVOVYATSKI MEKHANICHESKI ZAVOD (a.k.a. NOVOVYATSKI MEKHANICHESKI ZAVOD OAO; a.k.a. OPEN JOINT STOCK COMPANY NOVOVYATSK MECHANICAL PLANT; a.k.a. OPEN JOINT–STOCK COMPANY NOVOVYATSKIY MEKHANICHESKIY ZAVOD; f.k.a. ''NMZ OAO''; a.k.a. ''NMZ OJSC''), d. 51 ul. Sovetskaya, Kirov, Kirovskaya obl. 610008, Russia; Email Address *nmz@nmz.kirov.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1034316578702; Tax ID No. 4345029953; Government Gazette Number 07501403; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/*

ukraine.aspx#directives [UKRAINE–EO13662] (Linked To: ROSTEC).

30. OTKRYTOE AKTSIONERNOE OBSHCHESTVO NPO VYSOKOTOCHNYE KOMPLEKSY (a.k.a. HIGH PRECISION WEAPONS SCIENTIFIC PRODUCTION ASSOCIATION OPEN JOINT STOCK COMPANY; a.k.a. HIGH–PRECISION WEAPONS JOINT STOCK COMPANY; a.k.a. JSC NPO HIGH–PRECISION COMPLEXES; a.k.a. JSC NPO VYSOKOTOCHNYE KOMPLEKSY; a.k.a. NPO HIGH PRECISION WEAPONS OJSC; a.k.a. NPO VYSOKOTOCHNYE KOMPLEKSY; a.k.a. NPO VYSOKOTOCHNYE KOMPLEKSY, OAO; a.k.a. OAO WYSOKOTOSCHNYE KOMPLETKSI; a.k.a. OAO WYSOKOTOTSCHNYE KOMPLEKSI; a.k.a. ''HIGH PRECISION SYSTEMS''; a.k.a. ''VYSOKOTOCHNYE KOMPLEKSY''; a.k.a. ''VYSOKOTOCHNYE KOMPLEKSY''), 21, Gogolevski blvd., Moscow 119991, Russia; 21 str., 1 bul. Gogolevski, Moscow 119991, Russia; Email Address *info@rostec.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1097746068012; Tax ID No. 7704721192; Government Gazette Number 60390527; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

31. OTKRYTOE AKTSIONERNOE OBSHCHESTVO RT–STANKOINSTRUMENT (a.k.a. OJSC STANKOINSTRUMENT; a.k.a. OPEN JOINT STOCK COMPANY RT–STANKOINSTRUMENT; a.k.a. RT–STANKOINSTRUMENT; a.k.a. RT–STANKOINSTRUMENT, OAO), d. 65 str. 1 ul. Gilyarovskogo, Moscow 107996, Russia; Web site *http://www.rt-stanko.ru/;* Email Address *n.dobrynina@rt-stanko.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1097746559020; Tax ID No. 7702715348; Government Gazette Number 62826319; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives.* [UKRAINE–EO13662] (Linked To: ROSTEC).

32. OTKRYTOE AKTSIONERNOE OBSHCHESTVO TEKHNOLOGII BEZOPASNOSTI (a.k.a. JOINT STOCK COMPANY SECURITY TECHNOLOGIES; a.k.a. TEKHNOLOGII BEZOPASNOSTI, OAO; a.k.a. ''SECURITY TECHNOLOGIES''), d. 24 ul. Usacheva, Moscow 119048, Russia; Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1137746355405; Tax ID No. 7704833788; Government Gazette Number 17434335; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

33. OTKRYTOE AKTSIONERNOE OBSHCHESTVO VNESHNEEKONOMICHESKOE OBEDINENIE STANKOIMPORT (a.k.a. OPEN JOINT–STOCK COMPANY FOREIGN TRADE ENTERPRISE STANKOIMPORT; a.k.a. STANKOIMPORT FOREIGN TRADE ASSOCIATION OPEN JOINT STOCK COMPANY; a.k.a. VO STANKOIMPORT OJSC; a.k.a. VO STANKOIMPORT, OAO), d. 34/63 ul. Obrucheva, Moscow 117342, Russia; Web site *www.vostankoimport.ru;* Email Address *info@stankoimport.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1047728029051; Tax ID No. 7728309982; Government Gazette Number 00225271; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

34. OTKRYTOE AKTSIONERNOE OBSHCHESTVO VNESHNEEKONOMICHESKOE OBEDINENIE TEKHNOPROMEKSPORT (a.k.a. JOINT STOCK COMPANY FOREIGN ECONOMIC ASSOCIATION TECHNOPROMEXPORT; a.k.a. OJSC TECHNOPROMEXPORT; a.k.a. TECHNOPROMEXPORT FOREIGN ECONOMIC ASSOCIATION OPEN JOINT STOCK COMPANY; a.k.a. TECHNOPROMEXPORT OJSC; a.k.a. VO TEKHNOPROMEKSPORT, OAO; a.k.a. ''JSC TPE''), d. 15 str. 2 ul. Novy Arbat, Moscow 119019, Russia; Web site *http://www.tpe.ru;* Email Address *inform@tpe.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1067746244026; Tax ID No. 7705713236; Government Gazette Number 02839043; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives.* [UKRAINE–EO13662] (Linked To: ROSTEC).

35. ROSOBORONEKSPORT OAO (a.k.a. OJSC ROSOBORONEXPORT; a.k.a. ROSOBORONEKSPORT OJSC; a.k.a. ROSOBORONEXPORT; a.k.a. ROSOBORONEXPORT JSC; a.k.a. RUSSIAN DEFENSE EXPORT ROSOBORONEXPORT), 27 Stromynka ul., Moscow 107076, Russia; Web site *www.roe.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1117746521452; Tax ID No. 7718852163; Government Gazette Number 56467052; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

36. ROSSISKAYA ELEKTRONIKA OAO (a.k.a. JSC RUSELECTRONICS; a.k.a. ROSELEKTRONIKA OAO; a.k.a. RUSELECTRONICS; a.k.a. RUSELECTRONICS JSC; a.k.a. RUSELEKTRONICS; a.k.a. RUSSIAN ELECTRONICS OPEN JOINT STOCK COMPANY; a.k.a. ''RUSSIAN ELECTRONICS''), 12 Kosmonavta Volkova ul., Moscow 127299, Russia; Web site *www.ruselectronics.ru;* alt. Web site *www.roselgroup.com;* Email Address *info@ruselectronics.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1027739000475; Tax ID No. 7710277994; Government Gazette Number 48532918; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

37. RT—GLOBALNYE RESURSY OOO (a.k.a. RT—GLOBAL RESOURCES LIMITED LIABILITY COMPANY; a.k.a. RT GLOBAL RESOURCES; a.k.a. ''R–T GR OOO''), str. 2 2 Paveletskaya pl., Moscow 115054, Russia; Email Address *info@rtgr.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1137746198930; Tax ID No. 7708784387; Government Gazette Number 17259280; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives.* [UKRAINE–EO13662] (Linked To: ROSTEC).

38. RT–METALLURGIYA OAO (a.k.a. OPEN JOINT–STOCK COMPANY RT–METALLURGIYA; a.k.a. RT–METALLURGY OPEN JOINT STOCK COMPANY), Per. Skatertniy, D. 18, Moscow 121069, Russia; Executive Order 13662 Directive Determination—Subject to Directive 3; Tax ID No. 7703697388; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

39. ULYANOVSKI GIPROAVIAPROM OAO (a.k.a. OPEN JOINT–STOCK COMPANY ULYANOVSKIY GOSUDARSTVENNIY PROYEKTNO–KONSTRUKTORSKIY INSTITUT AVIATSIONNOY PROMYSHLENNOSTI; a.k.a. ULYANOVSK STATE DESIGN AND ENGINEERING INSTITUTE FOR AVIATION INDUSTRY OPEN JOINT STOCK COMPANY; a.k.a. ULYANOVSKIY GIPROAVIAPROM OJSC), Street Vracha Mikhaylova, D. 34, Ulyanovsk 432010, Russia; Web site *http://www.ulgap.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; Tax ID No. 7328046337; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

40. UNITED INSTRUMENT MANUFACTURING CORPORATION (a.k.a. JSC–UNITED–INSTRUMENT–MANUFACTURING–CORPORATION; a.k.a. ''UIMC''), Vereiskaya 29, str. 141, Moscow 121357, Russia; 29/141 Verejskaya Street, Moscow 121357, Russia; Web site *http://www.opkrt.ru;* Email Address *info@opkrt.ru;* Executive Order 13662 Directive Determination—Subject to Directive 3; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

41. VERTOLETY ROSSII AO (a.k.a. OPEN JOINT STOCK COMPANY RUSSIAN HELICOPTERS; a.k.a. RUSSIAN HELICOPTERS JOINT STOCK COMPANY; a.k.a. VERTOLETY ROSSII), 12 Krasnopresnenskaya naberezhnaya, Moscow 123610, Russia; Entrance 9, 12,

Krasnopresnenskaya emb., Moscow 123610, Russia; podezd 9, etazh 21 12 Krasnopresnenskaya nab., Moscow 123610, Russia; Web site *www.russianhelicopters.aero;* Email Address *info@rus-helicopters.com;* Executive Order 13662 Directive Determination—Subject to Directive 3; Registration ID 1077746003334; Tax ID No. 7731559044; Government Gazette Number 98927243; For more information on directives, please visit the following link: *http://www.treasury.gov/resource-center/sanctions/Programs/Pages/ukraine.aspx#directives* [UKRAINE–EO13662] (Linked To: ROSTEC).

As entities owned, directly or indirectly, 50 percent or more by Rostec, these entities are subject to the same prohibitions as Rostec.

Dated: December 22, 2015.

John E. Smith,

Acting Director, Office of Foreign Assets Control.

Editorial Note: The Office of the Federal Register received this document on September 30, 2016.

[FR Doc. 2016–24043 Filed 10–4–16; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF THE TREASURY

Senior Executive Service; Legal Division Performance Review Board

AGENCY: Department of the Treasury.

ACTION: Notice of members of the Legal Division Performance Review Board (PRB).

SUMMARY: Pursuant to 5 U.S.C. 4314(c)(4), this notice announces the appointment of members of the Legal Division PRB. The purpose of this Board is to review and make recommendations concerning proposed performance appraisals, ratings, bonuses, and other appropriate personnel actions for incumbents of SES positions in the Legal Division.

DATES: *Effective Date: October 5, 2016.*

FOR FURTHER INFORMATION CONTACT: Office of the General Counsel, Department of the Treasury, 1500 Pennsylvania Avenue NW., Room 3000, Washington, DC 20220, Telephone: (202) 622–0283 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Composition of Legal Division PRB:

The Board shall consist of at least three members. In the case of an appraisal of a career appointee, more than half the members shall consist of career appointees. Composition of the specific PRBs will be determined on an ad hoc basis from among the individuals listed in this notice.

The names and titles of the PRB members are as follows:

Paul Ahern, Assistant General Counsel (Enforcement & Intelligence);
Brendan Crimmins, Deputy General Counsel;
Himamauli Das, Counselor;
Eric Froman, Deputy Assistant General Counsel (Financial Stability Oversight Council);
Jean Gentry, Chief Counsel, U.S. Mint
Anthony Gledhill, Chief Counsel, Alcohol Tobacco, Tax, and Trade Bureau;
Rochelle F. Granat, Assistant General Counsel (General Law, Ethics and Regulation);
Laura J. Hildner, Deputy General Counsel;
Elizabeth Horton, Deputy Assistant General Counsel (Ethics);
Mark S. Kaizen, Associate Chief Counsel (General Legal Services), Internal Revenue Service;
Jimmy Kirby, Chief Counsel, Financial Crimes Enforcement Network;
Jeffrey Klein, Deputy Assistant General Counsel (International Affairs);
Steven D. Laughton, Assistant General Counsel (Banking and Finance);
Robert Neis, Benefits Tax Counsel;
Douglas Poms, Deputy International Tax Counsel;
Sidney Rocke, Chief Counsel, Bureau of Engraving and Printing;
Danielle Rolfes, International Tax Counsel;
Bradley Smith, Chief Counsel, Office of Foreign Assets Control;
Brian Sonfield, Deputy Assistant General Counsel (General Law and Regulation);
Dustin M. Starbuck, Associate Chief Counsel (Finance and Management), Internal Revenue Service;
David Sullivan, Assistant General Counsel (International Affairs);
Heather Trew, Deputy Assistant General Counsel (Enforcement & Intelligence);
Krishna Vallabhaneni, Deputy Tax Legislative Counsel;
Thomas West, Tax Legislative Counsel and;
Paul Wolfteich, Chief Counsel, Bureau of the Fiscal Service.

Dated: September 28, 2016.

Priya R. Aiyar,

Acting General Counsel.

[FR Doc. 2016–23993 Filed 10–4–16; 8:45 am]

BILLING CODE 4810–25–P

DEPARTMENT OF VETERANS AFFAIRS

Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board Notice of Meetings

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463; Title 5 U.S.C. App. 2 (Federal Advisory Committee Act) that the subcommittees of the Joint Biomedical Laboratory Research and Development and Clinical Science Research and Development Services Scientific Merit Review Board (JBL/CS SMRB) will meet from 8:00 a.m. to 5:00 p.m. on the dates indicated below (unless otherwise listed):

Subcommittee	Date	Location
Surgery	November 16, 2016	Residence Inn Arlington Pentagon City.
Infectious Diseases-B	November 17, 2016	Hilton Crystal City—Reagan National Airport.
Oncology-A/D	November 17, 2016	Hilton Crystal City—Reagan National Airport.
Hematology	November 18, 2016	Hilton Crystal City—Reagan National Airport.
Oncology-C	November 18, 2016	Hilton Crystal City—Reagan National Airport.
Cellular & Molecular Medicine Oncology-E	November 21, 2016	* VA Central Office.
	November 21, 2016	Hilton Crystal City—Reagan National Airport.
Oncology-B	November 28, 2016	Hilton Crystal City—Reagan National Airport.
Infectious Diseases-A	November 29, 2016	* VA Central Office
Mental Health & Behavioral Sciences-A	November 29, 2016	Hilton Crystal City—Reagan National Airport.
Nephrology	November 29, 2016	Hilton Crystal City—Reagan National Airport.
Epidemiology	November 30, 2016	* VA Central Office.
Immunology-A	November 30, 2016	Hilton Crystal City—Reagan National Airport.
Mental Health & Behavioral Sciences-B	November 30, 2016	Hilton Crystal City—Reagan National Airport.
Cardiovascular Studies-A	December 1, 2016	Hilton Crystal City—Reagan National Airport.
Endocrinology-B	December 1, 2016	Hilton Crystal City—Reagan National Airport.
Neurobiology-C	December 1, 2016	Hilton Crystal City—Reagan National Airport.

Subcommittee	Date	Location
Pulmonary Medicine	December 1, 2016	Hilton Crystal City—Reagan National Airport.
Neurobiology-A	December 2, 2016	Hilton Crystal City—Reagan National Airport.
Neurobiology-E	December 2, 2016	Hilton Crystal City—Reagan National Airport.
Special Emphasis on Genomics	December 2, 2016	* VA Central Office.
Endocrinology-A	December 5, 2016	Hyatt Regency Washington.
Neurobiology-B	December 6, 2016	Hilton Crystal City—Reagan National Airport.
Neurobiology-F	December 6, 2016	* VA Central Office.
Cardiovascular Studies-B	December 8, 2016	Hilton Crystal City—Reagan National Airport.
Gastroenterology	December 8, 2016	Hilton Crystal City—Reagan National Airport.
Neurobiology-D	December 9, 2016	Hilton Crystal City—Reagan National Airport.
Neurobiology-R	December 9, 2016	* VA Central Office.
Gulf War Research	December 9, 2016	* VA Central Office.
Jt BL/CS SMRB	January 26, 2017	* VA Central Office.
Eligibility	January 27, 2017	Hyatt Regency Washington.

The addresses of the meeting sites are:
Hilton Crystal City—Reagan National Airport, 2399 Jefferson Davis Hwy., Arlington, VA.
Hyatt Regency Washington on Capitol Hill, 400 New Jersey Avenue NW., Washington, DC.
VA Central Office, 1100 First Street NE., Suite 600, Washington, DC.
* Teleconference.

The purpose of the subcommittees is to provide advice on the scientific quality, budget, safety and mission relevance of investigator-initiated research proposals submitted for VA merit review evaluation. Proposals submitted for review include diverse medical specialties within the general areas of biomedical, behavioral and clinical science research.

These subcommittee meetings will be closed to the public for the review, discussion, and evaluation of initial and renewal research proposals, which involve reference to staff and consultant critiques of research proposals. Discussions will deal with scientific merit of each proposal and qualifications of personnel conducting the studies, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Additionally, premature disclosure of research information could significantly frustrate implementation of proposed agency action regarding the research proposals. As provided by subsection 10(d) of Public Law 92–463, as amended by Public Law 94–409, closing the subcommittee meetings is in accordance with Title 5 U.S.C. 552b(c)(6) and (9)(B).

Those who would like to obtain a copy of the minutes from the closed subcommittee meetings and rosters of the subcommittee members should contact Holly Krull, Ph.D., Manager, Merit Review Program (10P9B), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, at (202) 632–8522 or email at *holly.krull@va.gov.*

Dated: September 30, 2016.

LaTonya L. Small,

Advisory Committee Management Officer.

[FR Doc. 2016–24074 Filed 10–4–16; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

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Part II

Office of Government Ethics

5 CFR Part 2634
Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture; Proposed Rule

OFFICE OF GOVERNMENT ETHICS

5 CFR Part 2634

RIN 3209–AA00

Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture

AGENCY: Office of Government Ethics (OGE).

ACTION: Proposed rule.

SUMMARY: The Stop Trading on Congressional Knowledge Act (STOCK Act) was enacted on April 4, 2012. The Act imposed additional financial disclosure requirements on individuals required to file public financial disclosure statements pursuant to the Ethics in Government Act. Pursuant to section 402(b) of the Ethics in Government Act, the U.S. Office of Government Ethics (OGE) is revising the regulations governing financial disclosure to incorporate the new reporting requirements imposed by the STOCK Act. As a part of the revision, OGE also is modernizing language, making changes to the confidential filing requirements, adding and updating examples, and conforming the language of the regulation more closely to that of the Ethics in Government Act. In addition, OGE is proposing an updated definition of ''widely diversified'' for Excepted Investment Fund purposes that brings the definition in line with the definition of ''diversified'' found in the exemptions to the conflicts of interest law governing personal financial interests.

DATES: Written comments are invited and must be received on or before December 5, 2016.

ADDRESSES: You may submit comments, in writing, to OGE on this proposed rule, identified by RIN 3209–AA00, by any of the following methods:

E-Mail: usoge@oge.gov. Include the reference ''Proposed Revisions to Financial Disclosure Regulations'' in the subject line of the message.

Fax: (202) 482–9237.

Mail/Hand Delivery/Courier: Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005–3917, Attention: ''Proposed Revisions to Financial Disclosure Regulations.''

Instructions: All submissions must include OGE's agency name and the Regulation Identifier Number (RIN), 3209–AA00, for this proposed rulemaking. All comments, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Comments may be posted on OGE's Web site, *www.oge.gov.* Sensitive personal information, such as account numbers or Social Security numbers, should not be included. Comments generally will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Heather A. Jones, Senior Counsel for Financial Disclosure, Office of Government Ethics, Suite 500, 1201 New York Avenue NW., Washington, DC 20005–3917; Telephone: 202–482–9300; TTY: 800–877–8339; FAX: 202–482–9237.

SUPPLEMENTARY INFORMATION:

I. Background

On October 26, 1978, President Carter signed into law the Ethics in Government Act of 1978 (EIGA) (Pub. L. 95–521, 92 Stat. 1824). This sweeping legislation established the Office of Government Ethics within the Civil Service Commission (which became the Office of Personnel Management in 1979), and charged it with providing the overall direction of executive branch policies related to the prevention of conflicts of interest. 5 U.S.C. App., sec. 402(a). It also created the first public financial disclosure requirement. On April 12, 1989, President Bush issued Executive Order 12674, as modified by Executive Order 12731, that directed OGE to establish a new, uniform branch-wide confidential financial disclosure system to complement the public financial disclosure system that had been established by the Ethics Act. Sec. 201(d) of Executive Order 12674. Also, on November 30, 1989, President Bush signed into law the Ethics Reform Act of 1989 (Pub. L. 101–194, 103 Stat. 1716), which contained a modified provision for confidential disclosure as prescribed by each supervising ethics office, OGE for the executive branch. 5 U.S.C. app., sec. 107(a). In response, OGE published an interim regulation covering both the public and confidential financial disclosure systems in a revised 5 CFR part 2634. 57 FR 11800, Apr. 2, 1992, as corrected at 57 FR 21854, May 22, 1992, and 62605, Dec. 31, 1992.

On April 4, 2012, President Obama signed into law the STOCK Act. (Pub. L. 112–105, 126 Stat. 291). The law imposed additional reporting requirements on public financial disclosure filers, including transaction reporting throughout the year and the reporting of mortgages on personal residences for some filers.

II. Regulatory Amendments to 5 CFR Part 2634

A. Technical Changes

OGE proposes amending the Table of Contents to conform to the proposed substantive amendments to this part, which are explained elsewhere in this document. OGE also proposes a number of general technical and non-substantive changes that would apply throughout this part to enhance clarity and readability and to remove gender-specific terms from the substantive regulatory text. OGE proposes to replace the term ''shall'' as used throughout the regulation with the terms ''will,'' ''must,'' or ''does'' where the term is used to indicate an affirmative obligation or requirement, and to replace the term ''shall not'' with the terms ''may not'' or ''does not'' as appropriate. In addition, OGE has added and updated examples throughout this part. These changes are intended to enhance clarity and do not constitute a substantive change to the regulation. Because of the extensive rewriting of the regulation being proposed, we are publishing the full text of the regulation as proposed for revision.

B. Changes Resulting From the STOCK Act

OGE is proposing revisions to the regulations to implement the requirements of the STOCK Act. OGE proposes to revise §§ 2634.201(f) and 2634.309 and add § 2634.310(d) to include in the regulations the requirement that transactions be reported throughout the calendar year. OGE proposes to move the provisions currently found at §§ 2634.201(f) and 2634.309 to §§ 2634.201(g) and 2634.311 respectively. OGE is proposing to modify § 2634.305 to add the requirement for certain financial disclosure filers to report mortgages secured by a personal residence and to reorganize the section to provide greater clarity. OGE also proposes to revise § 2634.601 to reference the new disclosure forms developed for transaction reporting and for the internet-based filing system, *Integrity,* that the STOCK Act required OGE to develop.

C. Changes To Establish Consistency With the EIGA

In the current regulations there are requirements that differ somewhat from the requirements of the EIGA or provisions contained in the EIGA that are not reflected in the current regulations. To establish consistency between the regulation and the statute, OGE proposes to make the following

changes. OGE proposes to add § 2634.201(h) to include a provision so that filers can receive an extension of the filing deadline when they are serving in a combat zone. OGE also proposes revising § 2634.302, § 2634.308 (revised § 2634.310 in the proposed rule), § 2634.309 (revised § 2634.311 in the proposed rule), § 2634.310 (proposed § 2634.312 in the revised regulation), and § 2634.907 so that filers report income that is ''received,'' rather than income that is ''received or accrued'' or ''received or accrued to his benefit.''

Under section 101(f)(5) of the EIGA, the Director may exclude any individual or group of individuals from filing by rule. Section 2634.203 of the current regulations requires a case-by-case determination by the Director regarding whether an employee can be excluded from filing a financial disclosure statement by OGE without regard to grade level. OGE is proposing to modify § 2634.203 to exclude, as a group, certain GS–13 employees and below from filing public financial disclosure statement by rule and retain the requirement to exclude certain GS–14 and GS–15 employees on a case-by-case basis. The revised regulations will permit the Designated Agency Ethics Official to make those determinations for employees who are GS–13s or below and meet the criteria stated in the proposed rule.

D. Additional Changes to Public Reporting Requirements

OGE proposes revising § 2634.201(e) to permit a termination filer to submit the termination report up to 15 days prior to the termination date with an obligation to update the report if there are any changes. OGE believes this change will result in more timely filings of termination reports because it is often difficult to collect termination reports after an employee has left government service.

OGE proposes revising § 2634.304 to clarify that filers are not required to report travel paid for or travel reimbursements in connection with their non-Federal employment. OGE considers these travel payments an expense of the business that employs the filer rather than a gift or travel reimbursement to the filer. OGE also proposes revising the language of paragraph (f) of that section to clarify the procedures for seeking a waiver of the gift reporting requirement, though the proposed language would not change the process. In addition, OGE proposes a note to explain how the gift reporting threshold is set and to inform readers that it is revised every three years. In order to improve clarity, the proposed modification to § 2634.308 would narrow the scope of that section to focus only on the rules concerning the disclosure of compensation in excess of $5,000. OGE proposes to move other subjects currently addressed in the existing § 2634.308 to a revised § 2634.310. In addition, OGE proposes to add information from DAEOgram DO–06–011 to the example to § 2634.308, in order to explain the circumstances under which the name of a client is considered privileged.

In addition, proposed § 2634.312(c), which is § 2634.310(c) in the current regulations, is revised to change the definition of ''widely-diversified'' so that it tracks the definition of ''diversified'' at 5 CFR 2640.102(a). This change will permit investment funds that qualify for an exemption under part 2640 to also qualify as excepted investment funds under § 2634.310(c).

Finally, OGE proposes revising § 2634.311, which will be § 2634.313 in the revised regulation, to remove the requirement that filers specify that reported sales were made pursuant to a certificate of divesture and, for filers not reviewed by OGE, to allow attachments to the report in lieu of restating information in the report, provided that the attachments are approved by the Designated Agency Ethics Official as being both readily understood and complete as to all required elements. This proposed change is consistent with section 103(g) of the EIGA.

E. Changes to the Confidential Reporting Requirements

OGE proposes to revise § 2634.903 so that an employee who has left a filing position prior to the confidential report due date is not required to file. OGE is proposing to revise § 2634.904 to provide more guidance regarding which special Government employees should file the confidential financial disclosure report. Proposed § 2634.905 is modified to encourage the use of alternative procedures for filing confidential disclosure reports and to remove the Form 450–A as the default alternative procedure. OGE intends to encourage agencies to consider the information that they need to make a thorough conflicts determination for confidential filers and then design an alternative form that captures that information required to make such a determination.

OGE is proposing several revisions to §§ 2634.907 and 2634.908 that would change the information required to be reported by confidential filers. OGE is proposing to increase the threshold for reportable income from over $200 to over $1,000, to no longer require filers to report the agreement to participate in a defined contribution plan to which the former employer is no longer contributing, and to no longer require filers to report a diversified fund held in an employee benefit plan. In addition, OGE is proposing that new entrant filers are no longer required to report holdings that were sold before their entry into Federal service, even if those holdings generated income prior to entering Federal service. OGE believes these changes will simplify the reporting requirements for filers without reducing the ability of ethics officials to complete a conflicts analysis.

F. Changes to Certificates of Divestiture

OGE proposes to revise § 2634.1005 to require Designated Agency Ethics Officials to inform OGE of any circumstances that weigh against granting a certificate of divesture. Proposed § 2634.1007 is modified to inform employees that certificates of divesture will not be granted for the sale of assets held in tax-deferred or tax-advantaged accounts that do not incur capital gains.

G. Miscellaneous Changes

OGE proposes to revise § 2634.605 to clarify that the standard for review of financial disclosure forms should focus on identifying and resolving conflicts of interest. It also provides guidance regarding timelines for receiving additional information from filers. Proposed § 2634.606 is modified to clarify the procedure for submitting a five-day update letter to the Senate. OGE also proposes updating § 2634.607 to include an explanation about the effect of seeking and following ethics advice on potential disciplinary action.

OGE proposes to revise § 2634.803(a) to notify agencies and filers that an ethics agreement that was approved by OGE during the nomination process for a filer who was nominated by the President and confirmed by the Senate may not be modified without the approval of OGE. In addition, OGE proposes to remove the appendices. The model documents in Appendix A and Appendix B will be available on the OGE Web site, *www.oge.gov.*

III. Matters of Regulatory Procedure

Regulatory Flexibility Act

As Director of the Office of Government Ethics, I certify under the Regulatory Flexibility Act (5 U.S.C. chapter 6) that this proposed rule will not have a significant economic impact on a substantial number of small entities because it primarily affects Federal executive branch employees.

Paperwork Reduction Act

No additional clearance is needed under the Paperwork Reduction Act (44 U.S.C. chapter 35) for the proposed rule, because it would not affect the public financial disclosure, the financial disclosure request, financial disclosure waiver, the confidential financial disclosure, or qualified trusts information collection requirements in the regulation that are currently approved under OMB paperwork control numbers 3209–001, 3209–002, 3209–004, 3209–006, and 3209–0007.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), this proposed rule will not significantly or uniquely affect small governments and will not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (as adjusted for inflation) in any one year.

Executive Order 12866 and Executive Order 13563

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. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule has been designated a ''significant regulatory action'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

Executive Order 12988

As Director of the Office of Government Ethics, I have reviewed this proposed rule in light of section 3 of Executive Order 12988, Civil Justice Reform, and certify that it meets the applicable standards provided therein.

List of Subjects in 5 CFR Part 2634

Certificates of divestiture, Conflict of interests, Financial disclosure, Government employees, Penalties, Privacy, Reporting and recordkeeping requirements, Trusts and trustees.

Approved: September 20, 2016.

Walter M. Shaub, Jr.,

Director, Office of Government Ethics.

Accordingly, for the reasons set forth in the preamble, the Office of Government Ethics proposes to revise 5 CFR part 2634 to read as follows:

PART 2634—EXECUTIVE BRANCH FINANCIAL DISCLOSURE, QUALIFIED TRUSTS, AND CERTIFICATES OF DIVESTITURE

Subpart A—General Provisions

Sec.

Subpart B—Persons Required To File Public Financial Disclosure Reports

Subpart C—Contents of Public Reports

Subpart D—Qualified Trusts

Subpart E—Revocation of Trust Certificates and Trustee Approvals

Subpart F—Procedure

Subpart G—Penalties

Subpart H—Ethics Agreements

Subpart I—Confidential Financial Disclosure Reports

Subpart J—Certificates of Divestiture

Authority: 5 U.S.C. App.; 26 U.S.C. 1043; Pub. L. 101–410, 104 Stat. 890, 28 U.S.C. 2461 note, as amended by Sec. 31001, Pub. L. 104–134, 110 Stat. 1321 and Sec. 701, Pub. L. 114–74; Pub. L. 112–105, 126 Stat. 291; E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306.

Subpart A—General Provisions

§ 2634.101 Authority.

The regulation in this part is issued pursuant to the authority of the Ethics in Government Act of 1978, as amended; 26 U.S.C. 1043; the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996 and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015; the Stop Trading on Congressional Knowledge Act (STOCK Act), as amended; and Executive Order 12674 of April 12, 1989, as modified by Executive Order 12731 of October 17, 1990.

§ 2634.102 Purpose and overview.

(a) The regulation in this part supplements and implements title I of the Act, sections 8 (a)–(b) and 11 of the STOCK Act, and section 201(d) of Executive Order 12674 (as modified by Executive Order 12731) with respect to executive branch employees, by setting forth more specifically the uniform procedures and requirements for financial disclosure and for the certification and use of qualified blind and diversified trusts. Additionally, this regulation implements section 502 of the Reform Act by establishing procedures for executive branch personnel to obtain Certificates of Divestiture, which permit deferred recognition of capital gain in certain instances.

(b) The rules in this part govern both public and confidential (nonpublic) financial disclosure systems. Subpart I of this part contains the rules applicable to the confidential disclosure system.

§ 2634.103 Executive agency supplemental regulations.

(a) The regulation in this part is intended to provide uniformity for executive branch financial disclosure systems. However, an agency may, subject to the prior written approval of the Office of Government Ethics (OGE), issue supplemental regulations implementing this part, if necessary to address special or unique agency circumstances. Such regulations:

(1) Must be consistent with the Act, the STOCK Act, Executive Orders 12674 and 12731, and this part; and

(2) Must not impose additional reporting requirements on either public or confidential filers, unless specifically authorized by the Office of Government Ethics as supplemental confidential reporting.

Note to paragraph (a): Supplemental regulations will not be used to satisfy the separate requirement of 5 U.S.C. App. (Ethics in Government Act of 1978, section 402(d)(1)) that each agency have established written procedures on how to collect, review, evaluate, and, where appropriate, make publicly available, financial disclosure statements filed with it.

(b) Requests for approval of supplemental regulations under paragraph (a) of this section must be submitted in writing to the Office of Government Ethics, and must set forth the agency's need for any proposed supplemental reporting requirements. See § 2634.901(b) and (c).

(c) Agencies should review all of their existing financial disclosure regulations to determine which of those regulations must be modified or revoked in order to conform with the requirements of this part. Any amendatory agency regulations will be processed in accordance with paragraphs (a) and (b) of this section.

§ 2634.104 Policies.

(a) Title I of the Act requires that high-level Federal officials disclose publicly their personal financial interests, to ensure confidence in the integrity of the Federal Government by demonstrating that they are able to carry out their duties without compromising the public trust. Title I also authorizes the Office of Government Ethics to establish a confidential (nonpublic) financial disclosure system for less senior executive branch personnel in certain designated positions, to facilitate internal agency conflict-of-interest review.

(b) Public and confidential financial disclosure serves to prevent conflicts of interest and to identify potential conflicts, by providing for a systematic review of the financial interests of both current and prospective officers and employees. These reports assist agencies in administering their ethics programs and providing counseling to employees.

(c) Financial disclosure reports are not net worth statements. Financial disclosure systems seek only the information that the President, Congress, or OGE as the supervising ethics office for the executive branch has deemed relevant to the administration and application of the criminal conflict of interest laws, other statutes on ethical conduct or financial interests, and Executive orders or regulations on standards of ethical conduct.

(d) Nothing in the Act, the STOCK Act, or this part requiring reporting of information or the filing of any report will be deemed to authorize receipt of income, honoraria, gifts, or reimbursements; holding of assets, liabilities, or positions; or involvement in transactions that are prohibited by law, Executive order, or regulation.

(e) The provisions of title I of the Act, the STOCK Act, and this part requiring the reporting of information supersede any general requirement under any other provision of law or regulation on the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest. However, the provisions of title I and this part do not supersede the requirements of 5 U.S.C. 7342 (the Foreign Gifts and Decorations Act).

(f) This regulation is intended to be gender-neutral; therefore, use of the terms he, his, and him include she, hers, and her, and vice versa.

§ 2634.105 Definitions.

For purposes of this part:

(a) *Act* means the Ethics in Government Act of 1978 (Pub. L. 95–521), as amended, as modified by the Ethics Reform Act of 1989 (Pub. L. 101–194), as amended.

(b) *Agency* means any executive agency as defined in 5 U.S.C. 105 (any executive department, Government corporation, or independent establishment in the executive branch), any military department as defined in 5 U.S.C. 102, and the Postal Service and the Postal Regulatory Commission. It does not include the Government Accountability Office.

(c) *Confidential filer.* For the definition of ''confidential filer,'' see § 2634.904.

(d) *Dependent child* means, when used with respect to any reporting individual, any individual who is a son, daughter, stepson, or stepdaughter and who:

(1) Is unmarried, under age 21, and living in the household of the reporting individual; or

(2) Is a dependent of the reporting individual within the meaning of section 152 of the Internal Revenue Code of 1986, see 26 U.S.C. 152.

(e) *Designated agency ethics official* means the primary officer or employee who is designated by the head of an agency to administer the provisions of title I of the Act and this part within an agency, and in the designated agency ethics official's absence the alternate who is designated by the head of the agency. The term also includes a delegate of such an official, unless otherwise indicated. See part 2638 of this chapter on the appointment and additional responsibilities of a designated agency ethics official and alternate.

(f) *Executive branch* means any agency as defined in paragraph (b) of this section and any other entity or administrative unit in the executive branch.

(g) *Filer* is used interchangeably with ''reporting individual,'' and may refer to a ''confidential filer'' as defined in paragraph (c) of this section, a ''public filer'' as defined in paragraph (m) of this section, or a nominee or candidate as described in § 2634.201.

(h) *Gift* means a payment, advance, forbearance, rendering, free attendance at an event, deposit of money, or anything of value, unless consideration of equal or greater value is received by the donor, but does not include:

(1) Bequests and other forms of inheritance;

(2) Suitable mementos of a function honoring the reporting individual;

(3) Food, lodging, transportation, and entertainment provided by a foreign government within a foreign country or by the United States Government, the District of Columbia, or a State or local government or political subdivision thereof;

(4) Food and beverages, unless they are consumed in connection with a gift of overnight lodging;

(5) Communications to the offices of a reporting individual, including subscriptions to newspapers and periodicals;

(6) Consumable products provided by home-state businesses to the offices of the President or Vice President, if those products are intended for consumption by persons other than the President or Vice President; or

(7) Exclusions and exceptions as described at § 2634.304(c) and (d).

(i) *Honorarium* means a payment of money or anything of value for an appearance, speech, or article.

(j) *Income* means all income from whatever source derived. It includes but is not limited to the following items: Earned income such as compensation for services, fees, commissions, salaries, wages, and similar items; gross income derived from business (and net income if the individual elects to include it); gains derived from dealings in property including capital gains; interest; rents; royalties; dividends; annuities; income from the investment portion of life insurance and endowment contracts; pensions; income from discharge of indebtedness; distributive share of partnership income; and income from an interest in an estate or trust. The term includes all income items, regardless of whether they are taxable for Federal income tax purposes, such as interest on municipal bonds. Generally, income means ''gross income'' as determined in conformity with the Internal Revenue Service principles at 26 CFR 1.61–1 through 1.61–15 and 1.61–21.

(k) *Personal hospitality of any individual* means hospitality extended for a nonbusiness purpose by an individual, not a corporation or organization, at the personal residence of or on property or facilities owned by that individual or the individual's family.

(l) *Personal residence* means any property used exclusively as a private dwelling by the reporting individual or his spouse, which is not rented out during any portion of the reporting period. The term is not limited to one's domicile; there may be more than one personal residence, including a vacation home.

(m) *Public filer.* For the definition of ''public filer,'' see § 2634.202.

(n) *Reimbursement* means any payment or other thing of value received by the reporting individual (other than gifts, as defined in paragraph (h) of this section) to cover travel-related expenses of such individual, other than those which are:

(1) Provided by the United States Government, the District of Columbia, or a State or local government or political subdivision thereof;

(2) Required to be reported by the reporting individual under 5 U.S.C. 7342 (the Foreign Gifts and Decorations Act); or

(3) Required to be reported under section 304 of the Federal Election Campaign Act of 1971 (52 U.S.C. 30104) (relating to reports of campaign contributions).

Note to paragraph (n): Payments which are not made to the individual are not reimbursements for purposes of this part. Thus, payments made to the filer's employing agency to cover official travel-related expenses do not fit this definition of reimbursement. For example, payments being accepted by the agency pursuant to statutory authority such as 31 U.S.C. 1353, as implemented by 41 CFR part 304–1, are not considered reimbursements under this part, because they are not payments received by the reporting individual. On the other hand, travel payments made to the employee by an outside entity for private travel are considered reimbursements for purposes of this part. Likewise, travel payments received from certain nonprofit entities under authority of 5 U.S.C. 4111 are considered reimbursements, even though for official travel, since that statute specifies that such payments must be made to the individual directly (with prior approval from the individual's agency).

(o) *Relative* means an individual who is related to the reporting individual, as father, mother, son, daughter, brother, sister, uncle, aunt, great-uncle, great-aunt, first cousin, nephew, niece, husband, wife, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half-brother, half-sister, or who is the grandfather or grandmother of the spouse of the reporting individual, and will be deemed to include the fiancé or fiancée of the reporting individual.

(p) *Reporting individual* is used interchangeably with ''filer,'' and may refer to a ''confidential filer'' as defined in § 2634.904, a ''public filer'' as defined in § 2634.202, or a nominee or candidate as described in § 2634.201(c) and (d).

(q) *Reviewing official* means the designated agency ethics official or the delegate, the Secretary concerned, the head of the agency, or the Director of the Office of Government Ethics.

(r) *Secretary concerned* has the meaning set forth in 10 U.S.C. 101(a)(9) (relating to the Secretaries of the Army, Navy, Air Force, and for certain Coast Guard matters, the Secretary of Homeland Security); and, in addition, means:

(1) The Secretary of Commerce, in matters concerning the National Oceanic and Atmospheric Administration;

(2) The Secretary of Health and Human Services, with respect to matters concerning the Public Health Service; and

(3) The Secretary of State with respect to matters concerning the Foreign Service.

(s) *Special Government employee* has the meaning given to that term by the first sentence of 18 U.S.C. 202(a): An officer or employee of an agency who is retained, designated, appointed, or employed to perform temporary duties, with or without compensation, for not to exceed 130 days during any period of 365 consecutive days, either on a full-time or intermittent basis.

(t) *STOCK Act* means the Stop Trading on Congressional Knowledge Act (Pub. L. 112–105), as amended.

(u) *Value* means a good faith estimate of the fair market value if the exact value is neither known nor easily obtainable by the reporting individual without undue hardship or expense. In the case of any interest in property, see the alternative valuation options in § 2634.301(e). For gifts and reimbursements, see § 2634.304(e).

Subpart B—Persons Required To File Public Financial Disclosure Reports

§ 2634.201 General requirements, filing dates, and extensions.

(a) *Incumbents.* A public filer as defined in § 2634.202 who, during any calendar year, performs the duties of the position or office, as described in that section, for a period in excess of 60 days must file a public financial disclosure report containing the information prescribed in subpart C of this part, on or before May 15 of the succeeding year.

Example 1: An SES official commences performing the duties of his position on November 15. He will not be required to file an incumbent report for that calendar year.

Example 2: An employee, who is classified at GS–15, is formally assigned to fill an SES position in an acting capacity, from October 15 through December 31. Having performed the duties of a covered position for more than 60 days during the calendar year, he will be required to file an incumbent report. In addition, he must file a new entrant report the first time he serves more than 60 days in

a calendar year in the position, in accordance with § 2634.201(b) and § 2634.204(c)(1).

Example 3: An SES employee terminates her employment with an agency on March 7, 2015. The employee will file a termination report by April 6, 2015, in accordance with § 2634.201(e), but will not file an incumbent report on May 15.

(b) *New entrants.* (1) Within 30 days of assuming a public filer position or office described in § 2634.202, an individual must file a public financial disclosure report containing the information prescribed in subpart C of this part.

(2) However, no report will be required if the individual:

(i) Has, within 30 days prior to assuming such position, left another position or office for which a public financial disclosure report under the Act was required to be filed; or

(ii) Has already filed such a report as a nominee or candidate for the position.

Example: Y, an employee of the Treasury Department who has previously filed reports in accordance with the rules of this section, terminates employment with that Department on January 10, 2015, and begins employment with the Commerce Department on January 11, 2015, in a Senior Executive Service position. Y is not a new entrant because he has assumed a position described in § 2634.202 within thirty days of leaving another position so described. Accordingly, he need not file a new report with the Commerce Department.

Note to example: While Y did not have to file a new entrant report with the Commerce Department, that Department should request a copy of the last report which he filed with the Treasury Department, so that Commerce could determine whether or not there would be any conflicts or potential conflicts in connection with Y's new employment. Additionally, Y will have to file an incumbent report covering the 2014 calendar year, in accordance with paragraph (a) of this section, due not later than May 15, 2015, with Commerce, which should provide a copy to Treasury so that both may review it.

(c) *Nominees.* (1) At any time after a public announcement by the President or President-elect of the intention to nominate an individual to an executive branch position, appointment to which requires the advice and consent of the Senate, such individual may, and in any event within five days after the transmittal of the nomination to the Senate must, file a public financial disclosure report containing the information prescribed in subpart C of this part.

(2) This requirement will not apply to any individual who is nominated to a position as:

(i) An officer of the uniformed services; or

(ii) A Foreign Service Officer.

Note to paragraph (c)(2)(1): Although the statute, 5 U.S.C. app. (Ethics in Government Act of 1978, section 101(b)(1)), exempts uniformed service officers only if they are nominated for appointment to a grade or rank for which the pay grade is 0–6 or below, the Senate confirmation committees have adopted a practice of exempting all uniformed service officers, unless otherwise specified by the committee assigned.

(3) Section 2634.605(c) provides expedited procedures in the case of individuals described in paragraph (c)(1) of this section. Those individuals referred to in paragraph (c)(2) of this section as being exempt from filing nominee reports must file new entrant reports, if required by paragraph (b) of this section.

(d) *Candidates.* A candidate (as defined in section 301 of the Federal Election Campaign Act of 1971, 52 U.S.C. 30101) for nomination or election to the office of President or Vice President (other than an incumbent) must file a public financial disclosure report containing the information prescribed in subpart C of this part, in accordance with the following:

(1) Within 30 days of becoming a candidate or on or before May 15 of the calendar year in which the individual becomes a candidate, whichever is later, but in no event later than 30 days before the election; and

(2) On or before May 15 of each successive year an individual continues to be a candidate. However, in any calendar year in which an individual continues to be a candidate but all elections relating to such candidacy were held in prior calendar years, the individual need not file a report unless the individual becomes a candidate for a vacancy during that year.

Example: P became a candidate for President in January 2015. P will be required to file a public financial disclosure report on or before May 15, 2015. If P had become a candidate on June 1, 2015, P would have been required to file a disclosure report within 30 days of that date.

(e) *Termination of employment.* (1) On or before the thirtieth day after termination of employment from a public filer position or office described in § 2634.202 but no more than 15 days prior to termination, an individual must file a public financial disclosure report containing the information prescribed in subpart C of this part. If the individual files prior to the termination date and there are any changes between the filing date and the termination date, the individual must update the report.

(2) However, if within 30 days of such termination the individual assumes employment in another position or office for which a public report under the Act is required to be filed, no report will be required by the provisions of this paragraph. See the related *Example* in paragraph (b) of this section.

(f) *Transactions occurring throughout the calendar year.* (1) A public filer as defined in § 2634.202 who, during any calendar year, performs, or is reasonably expected to perform, the duties of his position or office, as described in that section, for a period in excess of 60 days must file a transaction report within 30 days of receiving notification of a covered transaction, but not later than 45 days after such transaction. The report must contain the information prescribed in subpart C of this part.

(2) A covered transaction is any purchase, sale, or exchange required to be reported according to the provisions of § 2634.309.

Example: A filer receives a statement on October 10 notifying her of all of the covered transactions executed by her broker on her behalf in September. Although each transaction may have a different due date, if the filer reports all the covered transactions from September on a report filed on or before October 15, the filer will ensure that all transactions have been timely reported.

(g) *Extensions generally.* The reviewing official may, for good cause shown, grant to any public filer or class thereof an extension of time for filing which must not exceed 45 days. The reviewing official may, for good cause shown, grant an additional extension of time which must not exceed 45 days. The employee must set forth in writing specific reasons why such additional extension of time is necessary. The reviewing official must approve or deny such requests in writing. Such records must be maintained as part of the official report file. For extensions on confidential financial disclosure reports, see § 2634.903(d).

(h) *Exceptions for individuals in combat zones.* In the case of an individual who is serving in the Armed Forces, or serving in support of the Armed Forces, in an area while that area is designated by the President by Executive order as a combat zone for purposes of section 112 of the Internal Revenue Code of 1986:

(1) The date for the filing of any report will be extended so that the date is 180 days after the later of:

(i) The last day of the individual's service in such area during such designated period; or

(ii) The last day of the individual's hospitalization as a result of injury received or disease contracted while serving in such area; and

(2) The exception described in this paragraph will apply automatically to any individual who qualifies for the

exception, unless the Secretary of Defense establishes written guidelines for determining eligibility or for requesting an extension under this paragraph.

§ 2634.202 Public filer defined.

The term *public filer* includes:

(a) The President;

(b) The Vice President;

(c) Each officer or employee in the executive branch, including a special Government employee as defined in 18 U.S.C. 202(a), whose position is classified above GS–15 of the General Schedule prescribed by 5 U.S.C. 5332, or the rate of basic pay for which is fixed, other than under the General Schedule, at a rate equal to or greater than 120% of the minimum rate of basic pay for GS–15 of the General Schedule; each member of a uniformed service whose pay grade is at or in excess of O–7 under 37 U.S.C. 201; and each officer or employee in any other position determined by the Director of the Office of Government Ethics to be of equal classification;

(d) Each employee who is an administrative law judge appointed pursuant to 5 U.S.C. 3105;

(e) Any employee not otherwise described in paragraph (c) of this section who is in a position in the executive branch which is excepted from the competitive service by reason of being of a confidential or policy-making character, unless excluded by virtue of a determination under § 2634.203;

(f) The Postmaster General, the Deputy Postmaster General, each Governor of the Board of Governors of the United States Postal Service and each officer or employee of the United States Postal Service or Postal Regulatory Commission whose basic rate of pay is equal to or greater than 120% of the minimum rate of basic pay for GS–15 of the General Schedule;

(g) The Director of the Office of Government Ethics and each agency's designated agency ethics official;

(h) Any civilian employee not otherwise described in paragraph (c) of this section who is employed in the Executive Office of the President (other than a special Government employee, as defined in 18 U.S.C. 202(a)) and holds a commission of appointment from the President; and

(i) Anyone whose employment in a position or office described in paragraphs (a) through (h) of this section has terminated, but who has not yet satisfied the filing requirements of § 2634.201(e).

§ 2634.203 Persons excluded by rule.

(a) *In general.* Any individual or group of individuals described in § 2634.202(e) (relating to positions of a confidential or policy-making character) may be excluded by rule from the public reporting requirements of this subpart when the Director of the Office of Government Ethics determines, in his sole discretion, that such exclusion would not affect adversely the integrity of the Government or the public's confidence in the integrity of the Government.

(b) *Exclusion determination for employees at or below the GS–13 grade level.* The determination required by paragraph (a) of this section has been made for any individual who, as a factual matter, serves in a position that meets the criteria set forth in this paragraph. The exclusion applies to a position upon a written determination by the designated agency ethics official that the position meets the following criteria:

(1) The position is paid at the GS–13 grade level or below or, in the case of a position not under the General Schedule, both the level of pay and the nature of responsibilities of the position are commensurate with the GS–13 grade level or below; and

(2) The incumbent in the position does not have a substantial policy-making role with respect to agency programs.

The designated agency ethics official must consider whether the position meets the standards for filing a confidential financial disclosure report enumerated in § 2634.904(a)(4).

(c) *Exclusion determination for employees at or below the GS–15 grade level, but above the GS–13 grade level.* The exclusion determination required by paragraph (a) of this section may also be made on a case-by-case basis by the Office of Government Ethics. To receive an exclusion determination, an agency must follow the procedures set forth in paragraph (d) and must demonstrate that the employee:

(1) Has a position that has been established at the GS–14 or GS–15 grade level or, in the case of a position not under the General Schedule, both the level of pay and the nature of responsibilities of the position are commensurate with the GS–14 or GS–15 grade level; and

(2) Has no policy-making role with respect to agency programs. In the event that the Office of Government Ethics permits the requested exclusion, the designated agency ethics official must consider whether the position meets the standards for filing a confidential financial disclosure report enumerated in § 2634.904(a)(4).

(d) *Procedure.* (1) The exclusion of any individual from reporting requirements pursuant to paragraph (c) of this section will be effective as of the time the employing agency files with the Office of Government Ethics the name of the employee, the name of any incumbent in the position, and a position description. Exclusions should be requested prior to due dates for the reports which such employees would otherwise have to file. If the position description changes in a substantive way, the employing agency must provide the Office of Government Ethics with a revised position description.

(2) If the Office of Government Ethics finds that one or more positions has been improperly excluded, it will advise the agency and set a date for the filing of any report that is due.

Example: An agency requests an exclusion for a special assistant, who is a Schedule C appointee whose position description is classified at the GS–14 level. The position description indicates that the employee's duties involve the analysis of policy options and the presentation of findings and recommendations to superiors. On the basis of this position description, the requested exception is denied.

§ 2634.204 Employment of 60 days or less.

(a) *In general.* Any public filer or nominee who, as determined by the official specified in this paragraph, is not reasonably expected to perform the duties of an office or position described in § 2634.201(c) or § 2634.202 for more than 60 days in any calendar year will not be subject to the reporting requirements of § 2634.201(b), (c), or (e). This determination will be made by:

(1) The designated agency ethics official or Secretary concerned, in a case to which the provisions of § 2634.201(b) or (e) (relating to new entrant and termination reports) would otherwise apply; or

(2) The Director of the Office of Government Ethics, in a case to which the provisions of § 2634.201(c) (relating to nominee reports) would otherwise apply.

(b) *Alternative reporting.* Any new entrant who is exempted from filing a public financial report under paragraph (a) of this section and who is a special Government employee is subject to confidential reporting under § 2634.903(b). See § 2634.904(a)(2).

(c) *Exception.* If the public filer or nominee actually performs the duties of an office or position referred to in paragraph (a) of this section for more than 60 days in a calendar year, the public report otherwise required by:

(1) Section 2634.201(b) or (c) (relating to new entrant and nominee reports) must be filed within 15 calendar days after the sixtieth day of duty; and

(2) Section 2634.201(e) (relating to termination reports) must be filed as provided in that paragraph.

§ 2634.205 Special waiver of public reporting requirements.

(a) *General rule.* In unusual circumstances, the Director of the Office of Government Ethics may grant a request for a waiver of the public reporting requirements under this subpart for an individual who is reasonably expected to perform, or has performed, the duties of an office or position for fewer than 130 days in a calendar year, but only if the Director determines that:

(1) The individual is a special Government employee, as defined in 18 U.S.C. 202(a), who performs temporary duties either on a full-time or intermittent basis;

(2) The individual is able to provide services specially needed by the Government;

(3) It is unlikely that the individual's outside employment or financial interests will create a conflict of interest; and

(4) Public financial disclosure by the individual is not necessary under the circumstances.

(b) *Procedure.* (1) Requests for waivers must be submitted to the Office of Government Ethics, via the requester's agency, within 10 days after an employee learns that the employee will hold a position which requires reporting and that the employee will serve in that position for more than 60 days in any calendar year, or upon serving in such a position for more than 60 days, whichever is earlier.

(2) The request must consist of:

(i) A cover letter which identifies the individual and the position, states the approximate number of days in a calendar year which the employee expects to serve in that position, and requests a waiver of public reporting requirements under this section;

(ii) An enclosure which states the reasons for the individual's belief that the conditions of paragraphs (a) (1) through (4) of this section are met in the particular case; and

(iii) The report otherwise required by this subpart, as a factual basis for the determination required by this section. The report must bear the legend: ''CONFIDENTIAL: WAIVER REQUEST PENDING PURSUANT TO 5 CFR 2634.205.''

(3) The agency in which the individual serves must advise the Office of Government Ethics as to the justification for a waiver.

(4) In the event a waiver is granted, the report will not be subject to the public disclosure requirements of § 2634.603; however, the waiver request cover letter will be subject to those requirements. In the event that a waiver is not granted, the confidential legend will be removed from the report, and the report will be subject to public disclosure; however, the waiver request cover letter will not then be subject to public disclosure.

Subpart C—Contents of Public Reports

§ 2634.301 Interests in property.

(a) *In general.* Except reports required under § 2634.201(f), each financial disclosure report filed pursuant to this subpart must include a brief description of any interest in property held by the filer at the end of the reporting period in a trade or business, or for investment or the production of income, having a fair market value in excess of $1,000. The report must designate the category of value of the property in accordance with paragraph (d) of this section. Each item of real and personal property must be disclosed separately. Note that for Individual Retirement Accounts (IRAs), defined contribution plans, brokerage accounts, trusts, mutual or pooled investment funds and other entities with portfolio holdings, each underlying asset must be separately disclosed, unless the entity qualifies for special treatment under § 2634.312.

(b) *Types of property reportable.* Subject to the exceptions in paragraph (c) of this section, examples of the types of property required to be reported include, but are not limited to:

(1) Real estate;

(2) Stocks, bonds, securities, and futures contracts;

(3) Mutual funds, exchange-traded funds, and other pooled investment funds;

(4) Pensions and annuities;

(5) Vested beneficial interests in trusts;

(6) Ownership interests in businesses or partnerships;

(7) Deposits in banks or other financial institutions; and

(8) Accounts receivable.

(c) *Exceptions.* The following property interests are exempt from the reporting requirements under paragraphs (a) and (b) of this section:

(1) Any personal liability owed to the filer, spouse, or dependent child by a spouse, or by a parent, brother, sister, or child of the filer, spouse, or dependent child;

(2) Personal savings accounts (defined as any form of deposit in a bank, savings and loan association, credit union, or similar financial institution) in a single financial institution or holdings in a single money market mutual fund, aggregating $5,000 or less in that institution or fund;

(3) A personal residence of the filer or spouse, as defined in § 2634.105(l); and

(4) Financial interests in any retirement system of the United States (including the Thrift Savings Plan) or under the Social Security Act.

(d) *Valuation categories.* The valuation categories specified for property items are as follows:

(1) None (or less than $1,001);

(2) $1,001 but not more than $15,000;

(3) Greater than $15,000 but not more than $50,000;

(4) Greater than $50,000 but not more than $100,000;

(5) Greater than $100,000 but not more than $250,000;

(6) Greater than $250,000 but not more than $500,000;

(7) Greater than $500,000 but not more than $1,000,000; and

(8) Greater than $1,000,000;

(9) Provided that, with respect to items held by the filer alone or held jointly by the filer with the filer's spouse and/or dependent children, the following additional categories over $1,000,000 will apply:

(i) Greater than $1,000,000 but not more than $5,000,000;

(ii) Greater than $5,000,000 but not more than $25,000,000;

(iii) Greater than $25,000,000 but not more than $50,000,000; and

(iv) Greater than $50,000,000.

(e) *Valuation of interests in property.* A good faith estimate of the fair market value of interests in property may be made in any case in which the exact value cannot be obtained without undue hardship or expense to the filer. If a filer is unable to make a good faith estimate of the value of an asset, the filer may indicate on the report that the ''value is not readily ascertainable.'' Value may also be determined by:

(1) The purchase price (in which case, the filer should indicate date of purchase);

(2) Recent appraisal;

(3) The assessed value for tax purposes (adjusted to reflect the market value of the property used for the assessment if the assessed value is computed at less than 100 percent of that market value);

(4) The year-end book value of nonpublicly traded stock, the year-end exchange value of corporate stock, or the face value of corporate bonds or comparable securities;

(5) The net worth of a business partnership;

(6) The equity value of an individually owned business; or

(7) Any other recognized indication of value (such as the last sale on a stock exchange).

Example 1: An official has a $4,000 savings account in Bank A. The filer's spouse has a $2,500 certificate of deposit issued by Bank B and his dependent daughter has a $200 savings account in Bank C. The official does not have to disclose the deposits, as the total value of the deposits in any one bank does not exceed $5,000.

Example 2: Public filer R has a collection of post-impressionist paintings which have been carefully selected over the years. From time to time, as new paintings have been acquired to add to the collection, R has made sales of both less desirable works from his collection and paintings of various schools which he acquired through inheritance. Under these circumstances, R must report the value of all the paintings he retains as interests in property pursuant to this section, as well as income from the sales of paintings pursuant to § 2634.302(b). Recurrent sales from a collection indicate that the collection is being held for investment or the production of income.

Example 3: A reporting individual has investments which her broker holds as an IRA and invests in stocks, bonds, and mutual funds. Each such asset having a value in excess of $1,000 at the close of the reporting period must be separately listed, and the value must be shown.

§ 2634.302 Income.

(a) *Noninvestment income.* Except reports required under § 2634.201(f), each financial disclosure report filed pursuant to this subpart must disclose the source, type, and the actual amount or value, of earned or other noninvestment income in excess of $200 from any one source which is received by the filer during the reporting period, including:

(1) Salaries, fees, commissions, wages and any other compensation for personal services (other than from United States Government employment);

(2) Retirement benefits (other than from United States Government employment, including the Thrift Savings Plan, or from Social Security);

(3) Any honoraria, and the date services were provided, including payments made or to be made to charitable organizations on behalf of the filer in lieu of honoraria; and

(4) Any other noninvestment income, such as prizes, awards, or discharge of indebtedness.

Note to paragraph (a)(3): In calculating the amount of an honorarium, subtract any actual and necessary travel expenses incurred by the recipient and one relative. If such expenses are paid or reimbursed by the honorarium source, they shall not be counted as part of the honorarium payment.

Example 1: An official is a participant in the defined benefit retirement plan of Coastal Airlines. Since his retirement from Coastal Airlines, the filer receives a $5,000 pension payment each month. The pension income must be disclosed as employment-related income.

Example 2: An official serves on the board of directors at a bank, for which he receives a $5,000 fee each calendar quarter. He also receives an annual fee of $15,000 for service as trustee of a private trust. In both instances, such fees received or earned during the reporting period must be disclosed, and the actual amount must be shown.

(b) *Investment income.* Except as indicated in § 2634.309, each financial disclosure report filed pursuant to this subpart must disclose:

(1) The source and type of investment income, characterized as dividends, rent, interest, capital gains, or income from qualified or excepted trusts or excepted investment funds (see § 2634.312), which is received by the filer during the reporting period, and which exceeds $200 in amount or value from any one source. Examples include, but are not limited to, income derived from real estate, collectible items, stocks, bonds, notes, copyrights, pensions, mutual funds, the investment portion of life insurance contracts, loans, and personal savings accounts (as defined in § 2634.301(c)(2)). Note that for entities with portfolio holdings, such as brokerage accounts or trusts, each underlying source of income must be separately disclosed, unless the entity qualifies for special treatment under § 2634.312. The amount or value of income from each reported source must also be disclosed and categorized in accordance with the following table:

(i) None (or less than $201);

(ii) $201 but not more than $1,000;

(iii) Greater than $1,000 but not more than $2,500;

(iv) Greater than $2,500 but not more than $5,000;

(v) Greater than $5,000 but not more than $15,000;

(vi) Greater than $15,000 but not more than $50,000;

(vii) Greater than $50,000 but not more than $100,000;

(viii) Greater than $100,000 but not more than $1,000,000; and

(ix) Greater than $1,000,000;

(x) Provided that, with respect to investment income of the filer alone or joint investment income of the filer with the filer's spouse and/or dependent children, the following additional categories over $1,000,000 will apply:

(A) Greater than $1,000,000 but not more than $5,000,000; and

(B) Greater than $5,000,000.

(2) The source, type, and the actual amount or value of gross income from a business, distributive share of a partnership, joint business venture income, payments from an estate or an annuity or endowment contract, or any other items of income not otherwise covered by paragraphs (a) or (b)(1) of this section which are received by the filer during the reporting period and which exceed $200 from any one source.

Example 1: An official rents out a portion of his residence. He receives rental income of $6,000 from one individual for four months and $12,000 from another individual for the remaining eight months of the year covered by his incumbent financial disclosure report. He must identify the property, specify the type of income (rent), and indicate the category of the total amount of rent received. (He must also disclose the asset information required by § 2634.301.)

Example 2: An official has an ownership interest in a fast-food restaurant, from which she receives $25,000 in annual income. She must specify on her financial disclosure report the type of income, such as partnership distributive share or gross business income, and indicate the actual amount of such income. (Additionally, she must describe the business and categorize its asset value, pursuant to § 2634.301.)

Example 3: A reporting individual owned stock in XYZ, a publicly-traded corporation. During the reporting period, she received $85 in dividends and, when she sold her shares, $175 in capital gains. The individual must disclose XYZ Corporation because the stock generated more than $200 in income. She also must specify the type of income (dividends and capital gains), and indicate the category of the total amount of income received. (She must also disclose the asset information required by § 2634.301.)

§ 2634.303 Purchases, sales, and exchanges.

(a) *In general.* Except for reports required under § 2634.201(f) and as indicated in § 2634.310(b), each financial disclosure report filed pursuant to this subpart must include a brief description, the date, and value (using the categories of value in § 2634.301(d)(2) through (9)) of any purchase, sale, or exchange by the filer during the reporting period, in which the amount involved in the transaction exceeds $1,000. The acquisition of an asset through inheritance is not considered a transaction for purposes of this section. Reportable transactions include:

(1) Of real property, other than a personal residence of the filer or spouse, as defined in § 2634.105(l); and

(2) Of stocks, bonds, commodity futures, mutual fund shares, and other forms of securities.

(b) *Exceptions.* The following transactions need not be reported under paragraph (a) of this section:

(1) Transactions solely by and between the reporting individual, the reporting individual's spouse, or the reporting individual's dependent children;

(2) Transactions involving Treasury bills, notes, and bonds; money market mutual funds or accounts; and bank accounts (as defined in § 2634.301(c)(2)), provided they occur at rates, terms, and conditions available generally to members of the public;

(3) Transactions involving holdings of trusts and investment funds described in § 2634.312(b) and (c);

(4) Transactions which occurred at a time when the reporting individual was not a public financial disclosure filer or was not a Federal Government officer or employee; and

(5) Transactions fully disclosed in any public financial disclosure report filed during the calendar year pursuant to § 2634.309.

Example 1: An employee sells her personal residence in Virginia for $650,000 and purchases a personal residence in the District of Columbia for $800,000. She did not rent out any portion of the Virginia property and does not intend to rent out the property in DC. She need not report the sale of the Virginia residence or the purchase of the DC residence.

Example 2: An official sells his beach home in Maryland for $350,000. Because he has rented it out for one month every summer, it does not qualify as a personal residence. He must disclose the sale under this section and any capital gain over $200 realized on the sale under § 2634.302.

Example 3: An official sells a ranch to his dependent daughter. The official need not report the sale because it is a transaction between the reporting individual and a dependent child; however, any capital gain, except for that portion attributable to a personal residence, is required to be reported under § 2634.302.

Example 4: An official sells an apartment building and realizes a loss of $100,000. He must report the sale of the building if the sale price of the property exceeds $1,000; however, he need not report anything under § 2634.302, as the sale did not result in a capital gain.

Example 5: An official buys shares in an S&P 500 mutual fund worth $12,000 in the 401(k) account that he has with a previous employer. He must disclose the purchase under this section. To make the purchase, he sold $12,000 worth of shares in a money market fund also held in the 401(k). He does not need to disclose the sale of the money market fund shares.

Example 6: An official sells her interest in a private business for $75,000. She must disclose the sale under this section, and she must disclose any capital gain over $200 realized on the sale under § 2634.302.

§ 2634.304 Gifts and reimbursements.

(a) *Gifts.* Except reports required under § 2634.201(f) and as indicated in § 2634.310(b), each financial disclosure report filed pursuant to this subpart must contain the identity of the source, a brief description, and the value of all gifts aggregating more than $375 in value which are received by the filer during the reporting period from any one source. For in-kind travel-related gifts, include a travel itinerary, dates, and nature of expenses provided.

Note to paragraph (a): Under sections 102(a)(2)(A) and (B) of the Ethics in Government Act, the reporting thresholds for gifts, reimbursements, and travel expenses are tied to the dollar amount for the ''minimal value'' threshold for foreign gifts established by the Foreign Gifts and Decoration Act, 5 U.S.C. 7342(a)(5). The General Services Administration (GSA), in consultation with the Secretary of State, redefines the value every 3 years. In 2014, the amount was set at $375. In subsection (d) the Office of Government Ethics sets the aggregation exception amount and redefines the value every 3 years. In 2014, the amount was set at $150. The Office of Government Ethics will update this regulation in 2017 and every three years thereafter to reflect the new amounts.

(b) *Reimbursements.* Except as indicated in §§ 2634.309 and 2634.310(b), each financial disclosure report filed pursuant to this subpart must contain the identity of the source, a brief description (including a travel itinerary, dates, and the nature of expenses provided), and the value of any travel-related reimbursements aggregating more than $375 in value, which are received by the filer during the reporting period from any one source. The filer is not required to report travel reimbursements received from the filer's non-Federal employer.

(c) *Exclusions.* Reports need not contain any information about gifts and reimbursements to which the provisions of this section would otherwise apply which are received from relatives (see § 2634.105(o)) or during a period in which the filer was not an officer or employee of the Federal Government. Additionally, any food, lodging, or entertainment received as ''personal hospitality of any individual,'' as defined in § 2634.105(k), need not be reported. See also exclusions specified in the definitions of gift and reimbursement, at § 2634.105(h) and (n).

(d) *Aggregation exception.* Any gift or reimbursement with a fair market value of $150 or less need not be aggregated for purposes of the reporting rules of this section. However, the acceptance of gifts, whether or not reportable, is subject to the restrictions imposed by Executive Order 12674, as modified by Executive Order 12731, and the implementing regulations on standards of ethical conduct.

Example 1: An official accepts a print, a pen and pencil set, and a letter opener from a community service organization he has worked with solely in his private capacity. He determines, in accordance with paragraph (e) of this section, that these gifts are valued as follows:
Gift 1—Print: $220
Gift 2—Pen and pencil set: $185
Gift 3—Letter opener: $20

The official must disclose Gifts 1 and 2, since together they aggregate more than $375 in value from the same source. Gift 3 need not be aggregated, because its value does not exceed $150.

Example 2: An official receives the following gifts from a single source:

1. Dinner for two at a local restaurant—$200.
2. Round-trip taxi fare to meet donor at the restaurant—$25.
3. Dinner at donor's city residence—(value uncertain).
4. Round-trip airline transportation and hotel accommodations to visit Epcot Center in Florida—$600.
5. Weekend at donor's country home, including duck hunting and tennis match—(value uncertain).

Based on the minimal value threshold established in 2014, the official need only disclose Gift 4. Gift 1 falls within the exclusion in § 2634.105(h)(4) for food and beverages not consumed in connection with a gift of overnight lodging. Gifts 3 and 5 need not be disclosed because they fall within the exception for personal hospitality of an individual. Gift 2 need not be aggregated and reported, because its value does not exceed $150.

Example 3: A non-Federal organization asks an official to speak at an out-of-town meeting on a matter that is unrelated to her official duties and her agency. She accepts the invitation and travels on her own time to the event. The round-trip airfare costs $500. Based on the minimal value threshold established in 2014, the official must disclose the value of the plane ticket whether the organization pays for the ticket directly or reimburses her for her purchase of the ticket.

(e) *Valuation of gifts and reimbursements.* The value to be assigned to a gift or reimbursement is its fair market value. For most reimbursements, this will be the amount actually received. For gifts, the value should be determined in one of the following manners:

(1) Except as provided in paragraph (e)(4) of this section, if the gift is readily available in the market, the value is its retail price. The filer need not contact the donor, but may contact a retail establishment selling similar items to determine the present cost in the market.

(2) If the item is not readily available in the market, such as a piece of art, a handmade item, or an antique, the filer may make a good faith estimate of the value of the item.

(3) The term ''readily available in the market'' means that an item generally is available for retail purchase.

(4) The market value of a ticket entitling the holder to attend an event which includes food, refreshments, entertainment, or other benefits is the face value of the ticket, which may exceed the actual cost of the food and other benefits.

Example: Items such as a pen and pencil set, letter opener, leather case, or engraved pen are generally available in the market and can be determined by researching the retail price for each item online.

(f) *Waiver rule in the case of certain gifts.* In unusual cases, the value of a gift as defined in § 2634.105(h) need not be aggregated for reporting threshold purposes under this section, and therefore the gift need not be reported on a public financial disclosure report, if the Director of the Office of Government Ethics grants a publicly available waiver to a public filer.

(1) *Standard.* If the Director receives a written request for a waiver, the Director will issue a waiver upon determining that:

(i) Both the basis of the relationship between the grantor and the grantee and the motivation behind the gift are personal; and

(ii) No countervailing public purpose requires public disclosure of the nature, source, and value of the gift.

Example: The Secretary of Education and her spouse receive the following two wedding gifts: (A) A crystal decanter valued at $450 from the Secretary's former college roommate and lifelong friend, who is a real estate broker in Wyoming; and (B) A gift of a print valued at $500 from a business partner of the spouse, who owns a catering company. Under these circumstances, the Director of OGE may grant a request for a waiver of the requirement to report on a public financial disclosure report each of these gifts.

(2) *Public disclosure of waiver request.* If approved in whole or in part, the cover letter requesting the waiver and the waiver will be subject to the public disclosure requirements in § 2634.603. Enclosures to the cover letter, required by paragraph (3)(ii) of this section, are not covered by § 2634.603.

(3) *Procedure.* (i) A public filer seeking a waiver under this section must submit a request to the designated agency ethics official for the employee's agency. The designated agency ethics official must sign a cover letter that identifies the filer and the filer's position and states that a waiver is requested under this section. To the extent practicable, the designated agency ethics official should avoid including other personal identifying information about the employee in the cover letter.

(ii) In an enclosure to the cover letter, the filer must set forth:

(A) The identity and occupation of the donor;

(B) A statement that the relationship between the donor and the filer is personal in nature;

(C) An explanation of all relevant circumstances surrounding the gift, including whether any donor is a prohibited source, as defined in § 2635.203(d), or represents a prohibited source and whether the gift was given because of the employee's official position; and

(D) A brief description of the gift and the value of the gift.

(iii) With respect to the information required in paragraph (f)(3)(ii) of this section, if a gift has more than one donor, the filer shall provide the necessary information for each donor.

(iv) The Director will approve or disapprove any request for a waiver in writing. In the event that a waiver is granted, the Director will avoid including personal information about the filer to the extent practicable.

§ 2634.305 Liabilities.

(a) *In general.* Except reports required under § 2634.201(f), each financial disclosure report filed pursuant to this subpart must identify and include a brief description of the filer's liabilities exceeding $10,000 owed to any creditor at any time during the reporting period, and the name of the creditors to whom such liabilities are owed. The report also must designate the category of value of the liabilities in accordance with § 2634.301(d) based on the greatest amount owed to the creditor during the period, except that the amount of a revolving charge account is based on the balance at the end of the reporting period.

(b) *Exceptions.* The following are not required to be reported under paragraph (a) of this section:

(1) Personal liabilities owed to a spouse or to the parent, brother, sister, or child of the filer, spouse, or dependent child; and

(2) Any loan secured by a personal motor vehicle, household furniture, or appliances, provided that the loan does not exceed the purchase price of the item which secures it; and

(c) *Limited exception for mortgages on personal residences.* (1) The President, the Vice President, and a filer nominated for or appointed by the President to a position that requires the advice and consent of the Senate, other than those identified in paragraph (c)(2) of this section, must disclose a mortgage on a personal residence.

(2) Other public filers are not required to disclose a mortgage on a personal residence. Such filers include individuals who are nominated or appointed by the President to a Senate-confirmed position as a Foreign Service Officer below the rank of ambassador or a special Government employee.

Example 1: A career official in the Senior Executive Service has the following debts outstanding during the reporting period:

1. Mortgage on personal residence—$200,000.

2. Mortgage on rental property—$150,000.

3. VISA Card—$1,000.

4. Loan balance of $15,000, secured by family automobile purchased for $16,200.

5. Loan balance of $10,500, secured by antique furniture purchased for $8,000.

6. Loan from parents—$20,000.

7. A personal line of credit up to $20,000 on which no draws have been made.

The loans indicated in items 2 and 5 must be disclosed in the official's annual financial disclosure report. Loan 1 is exempt from disclosure under paragraph (c) of this section because it is secured by the personal residence and the filer is not covered by the STOCK Act provision requiring reporting. Loan 3 need not be disclosed under paragraph (a) of this section because it is considered to be a revolving charge account with an outstanding liability that does not exceed $10,000 at the end of the reporting period. Loan 4 need not be disclosed under paragraph (b)(2) of this section because it is secured by a personal motor vehicle which was purchased for more than the value of the loan. Loan 6 need not be disclosed because the creditors are persons specified in paragraph (b)(1) of this section. Loan 7 need not be disclosed because the filer has not drawn on the line of credit and, as a result, had no outstanding liability associated with the line of credit during the reporting period.

Example 2: An incumbent official has $15,000 of outstanding debt in an American Express account in July. On December 31, the outstanding liability is $7,000. The liability does not need to be disclosed in the official's annual financial disclosure report because it does not exceed $10,000 at the end of the reporting period.

Example 3: A Secretary of a Department has an outstanding home improvement loan in the amount of $25,000, which is secured by her home. This liability must be disclosed on the annual financial disclosure report.

§ 2634.306 Agreements and arrangements.

Except reports required under § 2634.201(f), each financial disclosure report filed pursuant to this subpart must identify the parties to and the date of, and must briefly describe the terms of, any agreement or arrangement of the filer in existence at any time during the reporting period with respect to:

(a) Future employment;

(b) A leave of absence from employment during the period of the

reporting individual's Government service;

(c) Continuation of payments by a former employer other than the United States Government; and

(d) Continuing participation in an employee welfare or benefit plan maintained by a former employer, other than the United States Government.

§ 2634.307 Outside positions.

(a) *In general.* Except reports required under § 2634.201(f), each financial disclosure report filed pursuant to this subpart must identify all positions held at any time by the filer during the reporting period, as an officer, director, trustee, general partner, proprietor, representative, executor, employee, or consultant of any corporation, company, firm, partnership, trust, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution other than the United States.

(b) *Exceptions.* The following need not be reported under paragraph (a) of this section:

(1) Positions held in any religious, social, fraternal, or political entity; and

(2) Positions solely of an honorary nature, such as those with an emeritus designation.

Example 1: An official recently terminated her role as the managing member of a limited liability corporation upon appointment to a position in the executive branch. The managing member position must be disclosed in the official's new entrant financial disclosure report pursuant to this section.

Example 2: An official is a member of the board of his church. The official does not need to disclose the position in his financial disclosure report.

Example 3: An official is an officer in a fraternal organization that exists for the purpose of performing service work in the community. The official does not need to disclose this position in her financial disclosure report.

Example 4: An official is the ceremonial Parade Marshal for a local town's annual Founders' Day event and, in that capacity, leads a parade and serves as Master of Ceremonies for an awards ceremony at the town hall. The official does not need to disclose this position in her financial disclosure report.

Example 5: An official recently terminated his role as a campaign manager for a candidate for the Office of the President of the United States upon appointment to a noncareer position in the executive branch. The official does not need to disclose the campaign manager position in his financial disclosure report.

Example 6: Immediately prior to her recent appointment to a position in an agency, an official terminated her employment as a corporate officer. In connection with her employment, she served for several years as the corporation's representative to an association that represents members of the industry in which the corporation operates. She does not need to disclose her role as her employer's representative to the association because she performed her representative duties in her capacity as a corporate officer.

Example 7: An official holds a position on the board of directors of the local food bank. The official must disclose the position in his financial disclosure report.

§ 2634.308 Filer's sources of compensation exceeding $5,000 in a year

(a) *In general.* A public filer required to file a report as a New Entrant or a Nominee, pursuant to § 2634.201(b) or (c), must identify the filer's sources of compensation which exceed $5,000 in any one calendar year. This requirement includes compensation paid to another person, such as an employer, in exchange for the filer's services (*e.g.,* payments to a law firm exceeding $5,000 in any one calendar year in exchange for the services of a partner or associate attorney). The filer must also briefly describe the nature of the duties performed or services rendered (*e.g.,* ''legal services'').

(b) *Exceptions.* (1) The name of a source of compensation may be excluded only if that information is specifically determined to be confidential as a result of a privileged relationship established by law and if the disclosure is specifically prohibited by law or regulation, by a rule of a professional licensing organization, or by a client agreement that at the time of engagement of the filer's services expressly provided that the client's name would not be disclosed publicly to any person. If the filer excludes the name of any source, the filer must indicate in the report that such information has been excluded, the number of sources excluded, and, if applicable, a citation to the statute, regulation, rule of professional conduct, or other authority pursuant to which disclosure of the information is specifically prohibited.

(2) The report need not contain any information with respect to any person for whom services were provided by any firm or association of which the filer was a member, partner, or employee, unless the filer was directly involved in the provision of such services.

(3) The President, the Vice President, and a candidate referred to in § 2634.201(d) are not required to report this information.

Example: A nominee who is a partner or employee of a law firm and who has worked on a matter involving a client from which the firm received over $5,000 in fees during a calendar year must report the name of the client only if the value of the services rendered by the nominee exceeded $5,000. The name of the client would not normally be considered confidential, unless the matter potentially involved an investigation or enforcement action involving the client by the government and the client's name has never been disclosed publicly in connection with the representation. As a result, the nominee must disclose the client's identity unless it is protected by statute, a court order, is under seal, or is considered confidential because: (1) The client is the subject of a non-public proceeding or investigation and the client has not been identified in a public filing, statement, appearance, or official report; (2) disclosure of the client's name is specifically prohibited by a rule of professional conduct that can be enforced by a professional licensing body; or (3) a privileged relationship was established by a written confidentiality agreement, entered into at the time that the filer's services were retained, that expressly prohibits disclosure of the client's identity.

§ 2634.309 Periodic Reporting of Transactions.

(a) *In general.* Each financial disclosure report filed pursuant to § 2634.201(f) must include a brief description, the date, and value (using the categories of value in § 2634.301(d)(2) through (9)) of any purchase, sale, or exchange of stocks, bonds, commodity futures, and other forms of securities by the filer during the reporting period, in which the amount involved in the transaction exceeds $1,000.

(b) *Exceptions.* The following transactions need not be reported under paragraph (a) of this section:

(1) Transactions solely by and between the reporting individual, the reporting individual's spouse, or the reporting individual's dependent children;

(2) Transactions of excepted investment funds as defined in § 2634.312(c);

(3) Transactions involving Treasury bills, notes, and bonds; money market mutual funds or accounts; and bank accounts (as defined in § 2634.301(c)(2)), provided they occur at rates, terms, and conditions available generally to members of the public;

(4) Transactions involving holdings of trusts and investment funds described in § 2634.312(b) and (c); and

(5) Transactions which occurred at a time when the reporting individual was not a public financial disclosure filer or was not a Federal Government officer or employee.

§ 2634.310 Reporting periods.

(a) *Incumbents.* Each financial disclosure report filed pursuant to § 2634.201(a) must include a full and complete statement of the information required to be reported under this

subpart, for the preceding calendar year (except for §§ 2634.303 and 2634.304, relating to transactions and gifts/reimbursements, for which the reporting period does not include any portion of the previous calendar year during which the filer was not a Federal employee). In the case of §§ 2634.306 and 2634.307, the reporting period also includes the current calendar year up to the date of filing.

(b) *New entrants, nominees, and candidates.* Each financial disclosure report filed pursuant to § 2634.201(b) through (d) must include a full and complete statement of the information required to be reported under this subpart, except for § 2634.303 (relating to purchases, sales, and exchanges of certain property) and § 2634.304 (relating to gifts and reimbursements). The following special rules apply:

(1) *Interests in property.* For purposes of § 2634.301, the report must include all interests in property specified by that section which are held on or after a date which is fewer than 31 days before the date on which the report is filed.

(2) *Income.* For purposes of § 2634.302, the report must include all income items specified by that section which are received during the period beginning on January 1 of the preceding calendar year and ending on the date on which the report is filed, except as otherwise provided by § 2634.606 relating to updated disclosure for nominees.

(3) *Liabilities.* For purposes of § 2634.305, the report must include all liabilities specified by that section which are owed during the period beginning on January 1 of the preceding calendar year and ending fewer than 31 days before the date on which the report is filed.

(4) *Agreements and arrangements.* For purposes of § 2634.306, the report will include only those agreements and arrangements which still exist at the time of filing.

(5) *Outside positions.* For purposes of § 2634.307, the report must include all such positions held during the preceding two calendar years and the current calendar year up to the date of filing.

(6) *Certain sources of compensation.* For purposes of § 2634.308, the report must also identify the filer's sources of compensation which exceed $5,000 during either of the preceding two calendar years or during the current calendar year up to the date of filing.

(c) *Termination reports.* Each financial disclosure report filed under § 2634.201(e) must include a full and complete statement of the information required to be reported under this subpart, covering the preceding calendar year if an incumbent report required by § 2634.201(a) has not been filed and covering the portion of the calendar year in which such termination occurs up to the date the individual left such office or position.

(d) *Periodic reporting of transactions.* Each financial disclosure report filed under § 2634.201(f) must include a full and complete statement of the information required to be reported according to the provisions of § 2634.309. The report must be filed within 30 days of receiving notification of a covered transaction, but not later than 45 days after the date such transaction was executed.

Example: A filer receives a statement on October 10 notifying her of all of the covered transactions executed by her broker on her behalf in September. Although each transaction may have a different due date, if the filer reports all the covered transactions from September on a report filed on or before October 15, the filer will ensure that all transactions have been timely reported.

§ 2634.311 Spouses and dependent children.

(a) *Special disclosure rules.* Each report required by the provisions of subpart B of this part must also include the following information with respect to the spouse or dependent children of the reporting individual:

(1) *Income.* For purposes of § 2634.302:

(i) With respect to a spouse, the source but not the amount of earned income (other than honoraria) which exceeds $1,000 from any one source; and if earned income is derived from a spouse's self-employment in a business or profession, the nature of the business or profession but not the amount of the earned income;

(ii) With respect to a spouse, the source and the actual amount or value of any honoraria received by the spouse (or payments made or to be made to charity on the spouse's behalf in lieu of honoraria) which exceed $200 from any one source, and the date on which the services were provided; and

(iii) With respect to a spouse or dependent child, the type and source, and the amount or value (category or actual amount, in accordance with § 2634.302), of all other income exceeding $200 from any one source, such as investment income from interests in property (if the property itself is reportable according to § 2634.301).

Example 1: The spouse of a filer is employed as a teller at Bank X and earns $50,000 per year. The report must disclose that the spouse is employed by Bank X. The amount of the spouse's earnings need not be disclosed.

Example 2: The spouse of a reporting individual is self-employed as a pediatrician. The report must disclose her self-employment as a physician, but need not disclose the amount of income.

(2) *Gifts and reimbursements.* For purposes of § 2634.304, gifts and reimbursements received by a spouse or dependent child, unless the gift was given to the spouse or dependent child totally independent of their relationship to the filer.

(3) *Interests in property, transactions, and liabilities.* For purposes of §§ 2634.301, 2634.303, 2634.305, and 2634.309, all information concerning property interests, transactions, or liabilities referred to by those sections of a spouse or dependent child.

(b) *Exception.* For reports filed as a new entrant, nominee, or candidate under § 2634.201(b) through (d), no information regarding gifts and reimbursements or transactions is required for a spouse or dependent child.

(c) *Divorce and separation.* A reporting individual need not report any information about:

(1) A spouse living separate and apart from the reporting individual with the intention of terminating the marriage or providing for permanent separation;

(2) A former spouse or a spouse from whom the reporting individual is permanently separated; or

(3) Any income or obligations of the reporting individual arising from dissolution of the reporting individual's marriage or permanent separation from a spouse.

(d) *Unusual circumstances.* In very rare cases, certain interests in property, transactions, and liabilities of a spouse or a dependent child are excluded from reporting requirements, provided that each requirement of this paragraph is strictly met.

(1) The filer must certify without qualification that the item represents the spouse's or dependent child's sole financial interest or responsibility, and that the filer has no knowledge regarding that item;

(2) The item must not be in any way, past or present, derived from the income, assets or activities of the filer; and

(3) The filer must not derive, or expect to derive, any financial or economic benefit from the item.

Note to paragraph (d): The exception described in paragraph (d) is not available to most filers. A filer who files a joint tax return with a spouse will normally be deemed to derive a financial or economic benefit from every financial interest of the spouse, and the

filer will not be able to rely on this exception. If a filer and the filer's spouse cohabitate, share any expenses, or are jointly responsible for the care of children, the filer will be deemed to derive an economic benefit from every financial interest of the spouse.

Example: The spouse of a filer shares in paying expenses or taxes of the marriage or family (for example, any such item as: a household item, food, clothing, vacation, automobile maintenance or fuel, any child-related expense, income tax, or real estate tax, etc.). The spouse of a filer has a brokerage account. The spouse does not share any information about the holdings and does not want the information disclosed on a financial disclosure statement. The filer must disclose the holdings in the spouse's brokerage account because the filer is deemed to derive a financial or economic benefit from any asset of the filer's spouse who shares in paying expenses or taxes of the marriage or family.

§ 2634.312 Trusts, estates, and investment funds.

(a) *In general.* (1) Except as otherwise provided in this section, each financial disclosure report must include the information required by this subpart about the holdings of and income from the holdings of any trust, estate, investment fund or other financial arrangement from which income is received by, or with respect to which a beneficial interest in principal or income is held by, the filer, the filer's spouse, or dependent child.

(2) Information about the underlying holdings of a trust is required if the filer, filer's spouse, or dependent child currently is entitled to receive income from the trust or is entitled to access the principal of the trust. If a filer, filer's spouse, or dependent child has a beneficial interest in a trust that either will provide income or the ability to access the principal in the future, the filer should determine whether there is a vested interest in the trust under controlling state law. However, no information about the underlying holdings of the trust is required for a nonvested beneficial interest in the principal or income of a trust.

Note to paragraph (a): Nothing in this section requires the reporting of the holdings or income of a revocable inter vivos trust (also known as a ''living trust'') with respect to which the filer, the filer's spouse, or dependent child has only a remainder interest, whether or not vested, provided that the grantor of the trust is neither the filer, the filer's spouse, nor the filer's dependent child. Furthermore, nothing in this section requires the reporting of the holdings or income of a revocable inter vivos trust from which the filer, the filer's spouse, or dependent child receives any discretionary distribution, provided that the grantor of the trust is neither the filer, the filer's spouse, nor the filer's dependent child.

(b) *Qualified trusts and excepted trusts.* (1) A filer should not report information about the holdings of or income from holdings of, any qualified blind trust (as defined in § 2634.402) or any qualified diversified trust (as defined in § 2634.402). For a qualified blind trust, a public financial disclosure report must disclose the category of the aggregate amount of the trust's income attributable to the beneficial interest of the filer, the filer's spouse, or dependent child in the trust. For a qualified diversified trust, a public financial disclosure report must disclose the category of the aggregate amount of income with respect to such a trust which is actually received by the filer, the filer's spouse, or dependent child, or applied for the benefit of any of them.

(2) In the case of an excepted trust, a filer should indicate the general nature of its holdings, to the extent known, but will not otherwise need to report information about the trust's holdings or income from holdings. The category of the aggregate amount of income from an excepted trust which is received by the filer, the filer's spouse, or dependent child must be reported on public financial disclosure reports. For purposes of this part, the term ''excepted trust'' means a trust:

(i) Which was not created directly by the filer, spouse, or dependent child; and

(ii) The holdings or sources of income of which the filer, spouse, or dependent child have no specific knowledge through a report, disclosure, or constructive receipt, whether intended or inadvertent.

(c) *Excepted investment funds.* (1) No information is required under paragraph (a) of this section about the underlying holdings of or income from underlying holdings of an *excepted investment fund* as defined in paragraph (c)(2) of this section, except that the fund itself must be identified as an interest in property and/or a source of income. Filers must also disclose the category of value of the fund interest held; aggregate amount of income from the fund which is received by the filer, the filer's spouse, or dependent child; and value of any transactions involving shares or units of the fund.

(2) For purposes of financial disclosure reports filed under the provisions of this part, an ''excepted investment fund'' means a widely held investment fund (whether a mutual fund, regulated investment company, common trust fund maintained by a bank or similar financial institution, pension or deferred compensation plan, or any other pooled investment fund), if:

(i)(A) The fund is publicly traded or available; or

(B) The assets of the fund are widely diversified; and

(ii) The filer neither exercises control over nor has the ability to exercise control over the financial interests held by the fund.

(3) A fund is widely diversified if it does not have a stated policy of concentrating its investments in any industry, business, or single country other than the United States or bonds of a single state within the United States.

Note to paragraph (c): The fact that an investment fund qualifies as an excepted investment fund is not relevant to a determination as to whether the investment qualifies for an exemption to the criminal conflict of interest statute at 18 U.S.C. 208(a), pursuant to part 2640 of this chapter. Some excepted investment funds qualify for exemptions pursuant to part 2640, while other excepted investment funds do not qualify for such exemptions. If an employee holds an excepted investment fund that is not exempt from 18 U.S.C. 208(a), the ethics official may need additional information from the filer to determine if the holdings of the fund create a conflict of interest and should advise the employee to monitor the fund's holdings for potential conflicts of interest.

§ 2634.313 Special rules.

(a) *Political campaign funds.* Political campaign funds, including campaign receipts and expenditures, need not be included in any report filed under this part. However, if the individual has authority to exercise control over the fund's assets for personal use rather than campaign or political purposes, that portion of the fund over which such authority exists must be reported.

(b) *Reporting standards.* (1) A filer may attach to the financial disclosure report, a copy of a statement which, in a clear and concise fashion, readily discloses all information that the filer would otherwise have been required to enter, but only if authorized by the designated agency ethics official or for reports that are reviewed by the Office of Government Ethics, the Director. The filer must annotate the report clearly to the extent necessary to identify information required by this part, including, when required, the identification of assets as excepted investment funds and the identification of income types. In addition, the statement must identify all income required to be disclosed for the entire reporting period. Any statement attached to a financial disclosure report and its contents may be subject to public release. A filer who attaches a statement to a reporting form is solely responsible for redacting personal

information not otherwise subject to disclosure prior to filing the financial disclosure report (*e.g.,* account numbers, addresses, etc.).

(2) In lieu of reporting the category of amount or value of any item listed in any report filed pursuant to this subpart, a filer may report the actual dollar amount of such item.

Subpart D—Qualified Trusts

§ 2634.401 Overview.

(a) *Purpose.* The Ethics in Government Act of 1978 created two types of qualified trusts, the qualified blind trust and the qualified diversified trust, that may be used by employees to reduce real or apparent conflicts of interest. The primary purpose of an executive branch qualified trust is to confer on an independent trustee and any other designated fiduciary the sole responsibility to administer the trust and to manage trust assets without participation by, or the knowledge of, any interested party or any representative of an interested party. This responsibility includes the duty to decide when and to what extent the original assets of the trust are to be sold or disposed of, and in what investments the proceeds of sale are to be reinvested. Because the requirements set forth in the Ethics in Government Act and this regulation assure true ''blindness,'' employees who have a qualified trust cannot be influenced in the performance of their official duties by their financial interests in the trust assets. Their official actions, under these circumstances, should be free from collateral attack arising out of real or apparent conflicts of interest.

(b) *Scope.* Two characteristics of the qualified trust assure that true ''blindness'' exists: The independence of the trustee and the restriction on communications between the independent trustee and the interested parties. In order to serve as a trustee for an executive branch qualified trust, an entity must meet the strict requirements for independence set forth in the Ethics in Government Act and this regulation. Restrictions on communications also reinforce the independence of the trustee from the interested parties. During both the establishment of the trust and the administration of the trust, communications are limited to certain reports that are required by the Act and to written communications that are pre-screened by the Office of Government Ethics. No other communications, even about matters not connected to the trust, are permitted between the independent trustee and the interested parties.

§ 2634.402 Definitions.

As used in this subpart:

(a) *Director* means the Director of the Office of Government Ethics.

(b) *Employee* means an officer or employee of the executive branch of the United States.

(c) *Independent trustee* means a trustee who meets the requirements of § 2634.405 and who is approved by the Director under this subpart.

(d) *Interested party* means the President, the Vice President, an employee, a nominee or candidate as described in § 2634.201, and the spouse and any minor or dependent child of the President, Vice President, employee, or a nominee or candidate as described in § 2634.201, in any case in which the employee, spouse, or minor or dependent child has a beneficial interest in the principal or income of a trust proposed for certification under this subpart or certified under this subpart.

(e) *Qualified blind trust* means a trust in which the interested party has a beneficial interest and which:

(1) Is certified pursuant to § 2634.407 by the Director;

(2) Has a portfolio as specified in § 2634.406(a);

(3) Follows the model trust document prepared by the Office of Government Ethics; and

(4) Has an independent trustee as defined in § 2634.405.

(f) *Qualified diversified trust* means a trust in which the interested party has a beneficial interest and which:

(1) Is certified pursuant to § 2634.407 by the Director;

(2) Has a portfolio as specified in § 2634.406(b);

(3) Follows the model trust document prepared by the Office of Government Ethics; and

(4) Has an independent trustee as defined in § 2634.405.

(g) *Qualified trust* means a trust described in the Ethics in Government Act of 1978 and this regulation and certified by the Director under this subpart. There are two types of qualified trusts, the qualified blind trust and the qualified diversified trust.

§ 2634.403 General description of trusts.

(a) *Qualified blind trust.* (1) The qualified blind trust is the most universally adaptable qualified trust. An interested party may put most types of assets (such as cash, stocks, bonds, mutual funds, or real estate) into a qualified blind trust.

(2) In the case of a qualified blind trust, 18 U.S.C. 208 and other Federal conflict of interest statutes and regulations apply to the assets that an interested party transfers to the trust until such time as he or she is notified by the independent trustee that such asset has been disposed of or has a value of less than $1,000. Because the interested party knows what assets he or she placed in the trust and there is no requirement that these assets be diversified, the possibility still exists that the interested party could be influenced in the performance of official duties by those interests.

(b) *Qualified diversified trust.* (1) An interested party may put only readily marketable securities into a qualified diversified trust. In addition, the portfolio must meet the diversification requirements of § 2634.406(b)(2).

(2) In the case of a qualified diversified trust, the conflict of interest laws do not apply to the assets that an interested party transfers to the trust. Because the assets that an interested party puts into this trust must meet the diversification requirements set forth in this regulation, the diversification achieves ''blindness'' with regard to the initial assets.

(3) *Special notice for Presidential appointees*—(i) *In general.* In any case in which the establishment of a qualified diversified trust is contemplated with respect to an individual whose nomination is being considered by a Senate committee, that individual must inform the committee of the intention to establish a qualified diversified trust at the time of filing a financial disclosure report with the committee.

(ii) *Applicability.* Paragraph (b)(3)(i) of this section is not applicable to members of the uniformed services or Foreign Service officers. The special notice requirement of this section will not preclude an individual from seeking the certification of a qualified blind trust or qualified diversified trust after the Senate has given its advice and consent to a nomination.

(c) *Conflict of interest laws.* In the case of each type of trust, the conflict of interest laws do not apply to the assets that the independent trustee or any other designated fiduciary adds to the trust.

§ 2634.404 Summary of procedures for creation of a qualified trust.

(a) *Consultation with the Office of Government Ethics.* Any interested party (or that party's representative) who is considering setting up a qualified blind or qualified diversified trust must contact the Office of Government Ethics prior to beginning the process of creating the trust. The Office of Government Ethics is the only entity that has the authority to certify a qualified trust. Because an interested

party must propose, for the approval of the Office of Government Ethics, an entity to serve as the independent trustee, the Office of Government Ethics will explain the requirements that an entity must meet in order to qualify as an independent trustee. Such information is essential in order for the interested party to interview entities for the position of independent trustee. The Office of Government Ethics will also explain the restrictions on the communications between the interested parties and the proposed trustee.

(b) *Selecting an independent trustee.* After consulting with the Office of Government Ethics, the interested party may interview entities who meet the requirements of § 2634.405(a) in order to find one to serve as an independent trustee. At an interview, the interested party may ask general questions about the institution, such as how long it has been in business, its policies and philosophy in managing assets, the types of clients it serves, its prior performance record, and the qualifications of the personnel who would be handling the trust. Because the purpose of a qualified trust is to give an independent trustee the sole responsibility to manage the trust assets without the interested party having any knowledge of the identity of the assets in the trust, the interested party may communicate his or her general financial interests and needs to any institution which he or she interviews. For example, the interested party may communicate a preference for maximizing income or long-term capital gain or for balancing safety of capital with growth. The interested party may not give more specific instructions to the proposed trustee, such as instructing it to maintain a specific allocation between stocks and bonds, or choosing stocks in a particular industry.

(c) *The proposed independent trustee.* (1) The entity selected by an interested party as a possible trustee must contact the Office of Government Ethics to receive guidance on the qualified trust program. The Office of Government Ethics will ask the proposed trustee to submit a letter describing its past and current contacts, including banking and client relationships, with the interested party, spouse, and minor or dependent children. The extent of these contacts will determine whether the proposed trustee is independent under the Act and this regulation.

(2) In addition, an interested party may select an investment manager or other fiduciary. Other proposed fiduciaries selected by an interested party, such as an investment manager, must meet the independence requirements.

(d) *Approval of the independent trustee.* If the Director determines that the proposed trustee meets the requirements of independence, the Director will approve, in writing, that entity as the trustee for the qualified trust.

(e) *Confidentiality agreement.* If any person other than the independent trustee or designated fiduciary has access to information that may not be shared with an interested party or that party's representative, that person must file a Confidentiality Agreement with the Office of Government Ethics. Persons filing a Confidentiality Agreement must certify that they will not make prohibited contacts with an interested party or that party's representative.

(f) *Drafting the trust instrument.* The representative of the interested party will use the model documents provided by the Office of Government Ethics to draft the trust instrument. There are two annexes to the model trust document: An annex describing any current, permissible banking or client relationships between any interested parties and the independent trustee or other fiduciaries and an annex listing the initial assets that the interested party transfers to the trust. Any deviations from the model trust documents must be approved by the Director.

(g) *Certification of the trust.* The representative then presents the unexecuted trust instrument to the Office of Government Ethics for review. If the Director finds that the instrument conforms to one of the model documents, the Director will certify the qualified trust. After certification, the interested party and the independent trustee will sign the trust instrument. They will submit a copy of the executed instrument to the Office of Government Ethics within 30 days of execution. The interested party will then transfer the assets to the trust.

Note to paragraph (g): Existing qualified trusts approved under any State law or by the legislative or judicial branches of the Federal Government of the United States will not be recertified by the Director. Individuals with existing qualified trusts who are required to file a financial disclosure report upon entering the executive branch, becoming a nominee for a position appointed by the President and subject to confirmation by the Senate, or becoming a candidate for President or Vice President must file a complete financial disclosure form that includes a full disclosure of items in the trust. After filing a complete form, the individual may establish a qualified trust under the policies and provisions of this rule.

§ 2634.405 Standards for becoming an independent trustee or other fiduciary.

(a) *Eligible entities.* An interested party must select an entity that meets the requirements of this regulation to serve as an independent trustee or other fiduciary. The type of entity that is allowed to serve as an independent trustee is a financial institution, not more than 10 percent of which is owned or controlled by a single individual, which is:

(1) A bank, as defined in 12 U.S.C. 1841(c); or

(2) An investment adviser, as defined in 15 U.S.C. 80b–2(a)(11).

Note to paragraph (a): By the terms of paragraph (3)(A)(i) of section 102(f) of the Act, an individual who is an attorney, a certified public accountant, a broker, or an investment advisor is also eligible to serve as an independent trustee. However, experience of the Office of Government Ethics over the years dictates the necessity of limiting service as a trustee or other fiduciary to the financial institutions referred to in this paragraph, to maintain effective administration of trust arrangements and preserve confidence in the Federal qualified trust program. Accordingly, under its authority pursuant to paragraph (3)(D) of section 102(f) of the Act, the Office of Government Ethics will not approve proposed trustees or other fiduciaries who are not financial institutions, except in unusual cases where compelling necessity is demonstrated to the Director, in his or her sole discretion.

(b) *Orientation.* After the interested party selects a proposed trustee, that proposed trustee should contact the Office of Government Ethics for an orientation about the qualified trust program.

(c) *Independence requirements.* The Director will determine that a proposed trustee is independent if:

(1) The entity is independent of and unassociated with any interested party so that it cannot be controlled or influenced in the administration of the trust by any interested party;

(2) The entity is not and has not been affiliated with any interested party, and is not a partner of, or involved in any joint venture or other investment or business with, any interested party; and

(3) Any director, officer, or employee of such entity:

(i) Is independent of and unassociated with any interested party so that such director, officer, or employee cannot be controlled or influenced in the administration of the trust by any interested party;

(ii) Is not and has not been employed by any interested party, not served as a director, officer, or employee of any organization affiliated with any interested party, and is not and has not

been a partner of, or involved in any joint venture or other investment with, any interested party; and

(iii) Is not a relative of any interested party.

(d) *Required documents.* In order to make this determination, the proposed trustee must submit the following documentation to the Director:

(1) A letter describing its past and current contacts, including banking and client relationships, with the interested party, spouse, or minor or dependent child; and

(2) A Certificate of Independence, which follows the model Certificate of Independence prepared by the Office of Government Ethics. Any variation from the model document must be approved by the Director.

(e) *Determination.* If the Director determines that the current relationships, if any, between the interested party and the independent trustee do not violate the independence requirements, these relationships will be disclosed in an annex to the trust instrument. No additional relationships with the independent trustee may be established unless they are approved by the Director.

(f) *Approval of the trustee.* If the Director determines that the proposed trustee meets applicable requirements, the Office of Government Ethics will send the interested parties and their representatives a letter indicating its approval of a proposed trustee.

(g) *Revocation.* The Director may revoke the approval of a trustee or any other designated fiduciary pursuant to the rules of subpart E of this part.

(h) *Adding fiduciaries.* An independent trustee may employ or consult other entities, such as investment counsel, investment advisers, accountants, and tax preparers, to assist in any capacity to administer the trust or to manage and control the trust assets, if all of the following conditions are met:

(1) When any interested party or any representative of an interested party learns about such employment or consultation, the person must sign the trust instrument as a party, subject to the prior approval of the Director;

(2) Under all the facts and circumstances, the person is determined pursuant to the requirements for eligible entities under paragraphs (a) through (f) of this section to be independent of an interested party with respect to the trust arrangement;

(3) The person is instructed by the independent trustee or other designated fiduciary not to disclose publicly or to any interested party information which might specifically identify current trust assets or those assets which have been sold or disposed of from trust holdings, other than information relating to the sale or disposition of original trust assets in the case of the blind trust; and

(4) The person is instructed by the independent trustee or other designated fiduciary to have no direct communication with respect to the trust with any interested party or any representative of an interested party, and to make all indirect communications with respect to the trust only through the independent trustee, pursuant to § 2634.408(a).

§ 2634.406 Initial portfolio.

(a) *Qualified blind trust.* (1) An interested party may not place any asset in the blind trust that any interested party would be prohibited from holding by the Act, by the implementing regulations, or by any other applicable Federal law, Executive order, or regulation.

(2) Except as described in paragraph (a)(1) of this section, an interested party may put most types of assets (such as cash, stocks, bonds, mutual funds, or real estate) into a qualified blind trust.

(b) *Qualified diversified trust.* (1) The initial portfolio may not contain securities of entities having substantial activities in an employee's primary area of Federal responsibility. If requested by the Director, the designated agency ethics official for the employee's agency must certify whether the proposed portfolio meets this standard.

(2) The initial assets of a diversified trust must comprise a well-diversified portfolio of readily marketable securities.

(i) A portfolio will be well diversified if:

(A) The value of the securities concentrated in any particular or limited economic or geographic sector is no more than 20 percent of the total; and

(B) The value of the securities of any single entity (other than the United States Government) is no more than five percent of the total.

(ii) A security will be readily marketable if:

(A) Daily price quotations for the security appear regularly in media, including Web sites, that publish the information; and

(B) The trust holds the security in a quantity that does not unduly impair liquidity.

(iii) The interested party or the party's representative must provide the Director with a detailed list of the securities proposed for inclusion in the portfolio, specifying their fair market value and demonstrating that these securities meet the requirements of this paragraph. The Director will determine whether the initial assets of the trust proposed for certification comprise a widely diversified portfolio of readily marketable securities.

(c) *Hybrid qualified trust.* A qualified trust may contain both a blind portfolio of assets and a diversified portfolio of assets. The Office of Government Ethics refers to this arrangement as a hybrid qualified trust.

§ 2634.407 Certification of qualified trust by the Office of Government Ethics.

(a) *General.* After the Director approves the independent trustee, the interested party or a representative will prepare the trust instrument for review by the Director. The representative of the interested party will use the model documents provided by the Office of Government Ethics to draft the trust instrument. Any deviations from the model trust documents must be approved by the Director. No trust will be considered qualified for purposes of the Act until the Office of Government Ethics certifies the trust prior to execution.

(b) *Certification procedures.* (1) After the Director has approved the trustee, the interested party or the party's representative must submit the following documents to the Office of Government Ethics for review:

(i) A copy of the proposed, unexecuted trust instrument;

(ii) A list of the assets which the interested party proposes to place in the trust; and

(iii) In the case of a pre-existing trust as described in § 2634.409 which the interested party asks the Office of Government Ethics to certify, a copy of the pre-existing trust instrument and a list of that trust's assets categorized as to value in accordance with § 2634.301(d).

(2) In order to assure timely trust certification, the interested parties and their representatives will be responsible for the expeditious submission to the Office of Government Ethics of all required documents and responses to requests for information.

(3) The Director will indicate that he or she has certified the trust in a letter to the interested parties or their representatives. The interested party and the independent trustee may then execute the trust instrument.

(4) Within 30 days after the trust is certified under this section by the Director, the interested party or that party's representative must file with the Director a copy of the executed trust instrument and all annexed schedules (other than those provisions which

relate to the testamentary disposition of the trust assets), including a list of the assets which were transferred to the trust, categorized as to value of each asset in accordance with § 2634.301(d).

(5) Once a trust is classified as a qualified blind or qualified diversified trust in the manner discussed in this section, § 2634.312(b) applies less inclusive financial disclosure requirements to the trust assets.

(c) *Certification standard.* A trust will be certified for purposes of this subpart only if:

(1) It is established to the Director's satisfaction that the requirements of section 102(f) of the Act and this subpart have been met; and

(2) The Director determines that approval of the trust arrangement as a qualified trust is appropriate to assure compliance with applicable laws and regulations.

(d) *Revocation.* The Director may revoke certification of a trust pursuant to the rules of subpart E of this part.

§ 2634.408 Administration of a qualified trust.

(a) *General rules on communications between the independent fiduciaries and the interested parties.* (1) There must be no direct or indirect communications with respect to the qualified trust between an interested party or the party's representative and the independent trustee or any other designated fiduciary with respect to the trust unless:

(i) In the case of the blind trust, the proposed communication is approved in advance by the Director and it relates to:

(A) A distribution of cash or other unspecified assets of the trust;

(B) The general financial interest and needs of the interested party including, but not limited to, a preference for maximizing income or long-term capital gain;

(C) Notification to the independent trustee by the employee that the employee is prohibited by a subsequently applicable statute, Executive order, or regulation from holding an asset, and to direction to the independent trustee that the trust may not hold that asset; or

(D) Instructions to the independent trustee to sell all of an asset which was initially placed in the trust by an interested party, and which in the determination of the employee creates a real or apparent conflict due to duties the employee subsequently assumed (but nothing herein requires such instructions); or

(ii) In the case of the diversified trust, the proposed communication is approved in advance by the Director and it relates to:

(A) A distribution of cash or other unspecified assets of the trust;

(B) The general financial interest and needs of the interested party including, but not limited to, a preference for maximizing income or long-term capital gain; or

(C) Information, documents, and funds concerning income tax obligations arising from sources other than the property held in trust that are required by the independent trustee to enable him to file, on behalf of an interested party, the personal income tax returns and similar tax documents which may contain information relating to the trust.

(2) The person initiating a communication approved under paragraphs (a)(1)(i) or (a)(1)(ii) of this section must file a copy of the communication with the Director within five days of the date of its transmission.

Note to paragraph (a): By the terms of paragraph (3)(C)(vi) of section 102(f) of the Act, communications which solely consist of requests for distributions of cash or other unspecified assets of the trust are not required to be in writing. Further, there is no statutory mechanism for pre-screening of proposed communications. However, experience of the Office of Government Ethics over the years dictates the necessity of prohibiting any oral communications between the trustee and an interested party with respect to the trust and pre-screening all proposed written communications, to prevent inadvertent prohibited communications and preserve confidence in the Federal qualified trust program. Accordingly, under its authority pursuant to paragraph (3)(D) of section 102(f) of the Act, the Office of Government Ethics will not approve proposed trust instruments that do not contain language conforming to this policy, except in unusual cases where compelling necessity is demonstrated to the Director, in his or her sole discretion.

(b) *Required reports from the independent trustee to the interested parties*—(1) *Quarterly reports.* The independent trustee must, without identifying specifically an asset or holding, report quarterly to the interested parties and their representatives the aggregate market value of the assets representing the interested party's interest in the trust. The independent trustee must follow the model document for this report and must file a copy of the report, within five days of the date of its transmission, with the Director.

(2) *Annual report.* In the case of a qualified blind trust, the independent trustee must, without identifying specifically an asset or holding, report annually to the interested parties and their representatives the aggregate amount of the trust's income attributable to the interested party's beneficial interest in the trust, categorized in accordance with § 2634.302(b) to enable the employee to complete the public financial disclosure form. In the case of a qualified diversified trust, the independent trustee must, without identifying specifically an asset or holding, report annually to the interested parties and their representatives the aggregate amount actually distributed from the trust to the interested party or applied for the party's benefit. Additionally, in the case of the blind trust, the independent trustee must report on Schedule K–1 the net income or loss of the trust and any other information necessary to enable the interested party to complete an individual tax return. The independent trustee must follow the model document for each report and must file a copy of the report, within five days of the date of its transmission, with the Director.

(3) *Report of sale of asset.* In the case of the qualified blind trust, the independent trustee must promptly notify the employee and the Director when any particular asset transferred to the trust by an interested party has been completely disposed of or when the value of that asset is reduced to less than $1,000. The independent trustee must file a copy of the report, within five days of the date of its transmission, with the Director.

(c) *Communications regarding trust and beneficiary taxes.* The Act establishes special tax filing procedures to be used by the independent trustee and the trust beneficiaries in order to maintain the substantive separation between trust beneficiaries and trust administrators.

(1) *Trust taxes.* Because a trust is a separate entity distinct from its beneficiaries, an independent trustee must file an annual fiduciary tax return for the trust (IRS Form 1041). The independent trustee is prohibited from providing the interested parties and their representatives with a copy of the trust tax return.

(2) *Beneficiary taxes.* The trust beneficiaries must report income received from the trust on their individual tax returns.

(i) For beneficiaries of qualified blind trusts, the independent trustee sends a modified K–1 summarizing trust income in appropriate categories to enable the beneficiaries to file individual tax returns. The independent trustee is prohibited from providing the interested parties or their representatives with the identity of the assets.

(ii) For beneficiaries of qualified diversified trusts, the Act requires the independent trustee to file the

individual tax returns on behalf of the trust beneficiaries. The interested parties must give the independent trustee a power of attorney to prepare and file, on their behalf, the personal income tax returns and similar tax documents which may contain information relating to the trust. Appropriate Internal Revenue Service power of attorney forms will be used for this purpose. The beneficiaries must transmit to the trustee materials concerning taxable transactions and occurrences outside of the trust, pursuant to the requirements in each trust instrument which detail this procedure. This communication must be approved in advance by the Director in accordance with paragraph (a) of this section.

(iii) Some qualified trust beneficiaries may pay estimated income taxes.

(A) In order to pay the proper amount of estimated taxes each quarter, the beneficiaries of a qualified blind trust will need to receive information about the amount of income, if any, generated by the trust each quarter. To assist the beneficiaries, the independent trustee is permitted to send, on a quarterly basis, information about the amount of income generated by the trust in that quarter. This communication must be approved in advance by the Director in accordance with paragraph (a) of this section.

(B) In order to pay the proper amount of estimated taxes each quarter, the independent trustee of a qualified diversified trust will need to receive information about the amount of income, if any, earned by the beneficiaries on assets that are not in the trust. To assist the independent trustee, the beneficiaries are permitted to send, on a quarterly basis, information about the amount of income they earned in that quarter on assets that are outside of the trust. This communication must be approved in advance by the Director in accordance with paragraph (a) of this section.

(d) *Responsibilities of the independent trustee and other fiduciaries.* (1) Any independent trustee or any other designated fiduciary of a qualified trust may not knowingly and willfully, or negligently:

(i) Disclose any information to an interested party or that party's representative with respect to the trust that may not be disclosed under title I of the Act, the implementing regulations, or the trust instrument;

(ii) Acquire any holding:

(A) Directly from an interested party or that party's representative without the prior written approval of the Director; or

(B) The ownership of which is prohibited by, or not in accordance with, title I of the Act, the implementing regulations, the trust instrument, or with other applicable statutes and regulations;

(iii) Solicit advice from any interested party or any representative of that party with respect to such trust, which solicitation is prohibited by title I of the Act, the implementing regulations, or the trust instrument; or

(iv) Fail to file any document required by the implementing regulations or the trust instrument.

(2) The independent trustee and any other designated fiduciary, in the exercise of their authority and discretion to manage and control the assets of the trust, may not consult or notify any interested party or that party's representative.

(3) The independent trustee may not acquire by purchase, grant, gift, exercise of option, or otherwise, without the prior written approval of the Director, securities, cash, or other property from any interested party or any representative of an interested party.

(4) *Certificate of Compliance.* An independent trustee and any other designated fiduciary must file, with the Director by May 15 following any calendar year during which the trust was in existence, a properly executed Certificate of Compliance that follows the model Certificate of Compliance prepared by the Office of Government Ethics. Any variation from the model must be approved by the Director.

(5) In addition, the independent trustee and such fiduciary must maintain and make available for inspection by the Office of Government Ethics, as it may from time to time direct, the trust's books of account and other records and copies of the trust's tax returns for each taxable year of the trust.

(e) *Responsibilities of the interested parties and their representatives.* (1) Interested parties to a qualified trust and their representatives may not knowingly and willfully, or negligently:

(i) Solicit or receive any information about the trust that may not be disclosed under title I of the Act, the implementing regulations or the trust instrument; or

(ii) Fail to file any document required by this subpart or the trust instrument.

(2) The interested parties and their representatives may not take any action to obtain, and must take reasonable action to avoid receiving, information with respect to the holdings and the sources of income of the trust, including a copy of any trust tax return filed by the independent trustee, or any information relating to that return, except for the reports and information specified in paragraphs (b) and (c) of this section.

(3) In the case of any qualified trust, the interested party must, within 30 days of transferring an asset, other than cash, to a previously established qualified trust, file a report with the Director, which identifies each asset, categorized as to value in accordance with § 2634.301(d).

(4) Any portfolio asset transferred to the trust by an interested party must be free of any restriction with respect to its transfer or sale, except as fully described in schedules attached to the trust instrument, and as approved by the Director.

(5) During the term of the trust, the interested parties may not pledge, mortgage, or otherwise encumber their interests in the property held by the trust.

(f) *Amendment of the trust.* The independent trustee and the interested parties may amend the terms of a qualified trust only with the prior written approval of the Director and upon a showing of necessity and appropriateness.

§ 2634.409 Pre-existing trusts.

An interested party may place a pre-existing irrevocable trust into a qualified trust, which may then be certified by the Office of Government Ethics. This arrangement should be considered in the case of a pre-existing trust whose terms do not permit amendments that are necessary to satisfy the rules of this subpart. All of the relevant parties (including the employee, any other interested parties, the trustee of the pre-existing trust, and all of the other parties and beneficiaries of the pre-existing trust) will be required pursuant to section 102(f)(7) of the Act to enter into an umbrella trust agreement. The umbrella trust agreement will specify that the pre-existing trust will be administered in accordance with the provisions of this subpart. A parent or guardian may execute the umbrella trust agreement on behalf of a required participant who is a minor child. The Office of Government Ethics has prepared model umbrella trust agreements that the interested party can use in this circumstance. The umbrella trust agreement will be certified as a qualified trust if all of the requirements of this subpart are fulfilled under conditions where required confidentiality with respect to the trust can be assured.

§ 2634.410 Dissolution.

Within 30 days of dissolution of a qualified trust, the interested party must file a report of the dissolution with the Director and a list of assets of the trust at the time of the dissolution, categorized as to value in accordance with § 2634.301(d).

§ 2634.411 Reporting on financial disclosure reports.

An employee who files a public or confidential financial disclosure report must report the trust on the financial disclosure report.

(a) *Public financial disclosure report.* If the employee files a public financial disclosure report, the employee must report the trust as an asset, including the overall category of value of the trust. Additionally, in the case of a qualified blind trust, the employee must disclose the category of value of income earned by the trust. In the case of a qualified diversified trust, the employee must report the category of value of income received from the trust by the employee, the employee's spouse, or dependent child, or applied for the benefit of any of them.

(b) *Confidential financial disclosure report.* In the case of a confidential financial disclosure report, the employee must report the trust as an asset.

§ 2634.412 Sanctions and enforcement.

Section 2634.702 sets forth civil sanctions, as provided by sections 102(f)(6)(C)(i) and (ii) of the Act and as adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act, which apply to any interested party, independent trustee, or other trust fiduciary who violates the obligations under the Act, its implementing regulations, or the trust instrument. Subpart E of this part delineates the procedure which must be followed with respect to the revocation of trust certificates and trustee approvals.

§ 2634.413 Public access.

(a) *Documents subject to public disclosure requirements.* The following qualified trust documents filed by a public filer, nominee, or candidate are subject to the public disclosure requirements of § 2634.603:

(1) The executed trust instrument and any amendments (other than those provisions which relate to the testamentary disposition of the trust assets), and a list of the assets which were transferred to the trust, categorized as to the value of each asset;

(2) The identity of each additional asset (other than cash) transferred to a qualified trust by an interested party during the life of the trust, categorized as to the value of each asset;

(3) The report of the dissolution of the trust and a list of the assets of the trust at the time of the dissolution, categorized as to the value of each asset;

(4) In the case of a blind trust, the lists provided by the independent trustee of initial assets placed in the trust by an interested party which have been sold or whose value is reduced to less than $1,000; and

(5) The Certificates of Independence and Compliance.

(b) *Documents exempt from public disclosure requirements.* The following documents are exempt from the public disclosure requirements of § 2634.603 and also may not be disclosed to any interested party:

(1) Any document (and the information contained therein) filed under the requirements of § 2634.408(a) and (c); and

(2) Any document (and the information contained therein) inspected under the requirements of § 2634.408(d)(4) (other than a Certificate of Compliance).

§ 2634.414 OMB control number.

The various model trust documents and Certificates of Independence and Compliance referenced in this subpart, together with the underlying regulatory provisions, are all approved by the Office of Management and Budget under control number 3209–0007.

Subpart E—Revocation of Trust Certificates and Trustee Approvals

§ 2634.501 Purpose and scope.

(a) *Purpose.* This subpart establishes the procedures of the Office of Government Ethics for enforcement of the qualified blind trust, qualified diversified trust, and independent trustee provisions of title I of the Ethics in Government Act of 1978, as amended, and the regulation issued thereunder (subpart D of this part).

(b) *Scope.* This subpart applies to all trustee approvals and trust certifications pursuant to §§ 2634.405 and 2634.407, respectively.

§ 2634.502 Definitions.

For purposes of this subpart (unless otherwise indicated), the term ''trust restrictions'' means the applicable provisions of title I of the Ethics in Government Act of 1978, subpart D of this part, and the trust instrument.

§ 2634.503 Determinations.

(a) *Violations.* If the Office of Government Ethics learns that violations or apparent violations of the trust restrictions exist that may warrant revocations of trust certification or trustee approval previously granted under § 2634.407 or § 2634.405, the Director may, pursuant to the procedure specified in paragraph (b) of this section, appoint an attorney on the staff of the Office of Government Ethics to review the matter. After completing the review, the attorney will submit findings and recommendations to the Director.

(b) *Review procedure.* (1) In the review of the matter, the attorney will perform such examination and analysis of violations or apparent violations as the attorney deems reasonable.

(2) The attorney will provide an independent trustee and, if appropriate, the interested parties, with:

(i) Notice that revocation of trust certification or trustee approval is under consideration pursuant to the procedures in this subpart;

(ii) A summary of the violation or apparent violations that will state the preliminary facts and circumstances of the transactions or occurrences involved with sufficient particularity to permit the recipients to determine the nature of the allegations; and

(iii) Notice that the recipients may present evidence and submit statements on any matter in issue within 10 business days of the recipient's actual receipt of the notice and summary.

(c) *Determination.* (1) In making determinations with respect to the violations or apparent violations under this section, the Director will consider the findings and recommendations submitted by the attorney, as well as any written statements submitted by the independent trustee or interested parties.

(2) The Director may take one of the following actions upon finding a violation or violations of the trust restrictions:

(i) Issue an order revoking trust certification or trustee approval;

(ii) Resolve the matter through any other remedial action within the Director's authority;

(iii) Order further examination and analysis of the violation or apparent violation; or

(iv) Decline to take further action.

(3) If the Director issues an order of revocation, parties to the trust instrument will receive prompt written notification. The notice will state the basis for the revocation and will inform the parties of the consequence of the revocation, which will be either of the following:

(i) The trust is no longer a qualified blind or qualified diversified trust for any purpose under Federal law; or

(ii) The independent trustee may no longer serve the trust in any capacity and must be replaced by a successor, who is subject to the prior written approval of the Director.

Subpart F—Procedure

§ 2634.601 Report forms.

(a) This section prescribes the required forms for financial disclosure made pursuant to this part.

(1) *New entrant, annual, and termination public financial disclosure reports.* The Office of Government Ethics provides a form for publicly disclosing the information described in subpart B of this part in connection with new entrant, nominee, incumbent, and termination reports filed pursuant to § 2634.201(a) through (e). That form is the OGE Form 278e (Executive Branch Personnel Public Financial Disclosure Report) or any successor form.

(2) *Periodic transaction public financial disclosure reports.* The Office of Government Ethics provides a form for publicly disclosing the information described in subpart B of this part in connection with periodic transaction public financial disclosure reports filed pursuant to § 2634.201(f). That form is the OGE Form 278–T (Periodic Transaction Report), or any successor form.

(3) *Confidential financial disclosure reports.* The Office of Government Ethics also provides a form for confidentially disclosing information described in subpart I of this part in connection with confidential financial disclosure reports filed pursuant to § 2634.903. That form is the OGE Form 450 (Confidential Financial Disclosure Report), or any successor form.

(b) Supplies of the OGE Form 278e, OGE Form 278–T, and OGE Form 450 are to be reproduced locally by each agency. The Office of Government Ethics has published copies on its official Web site.

(c) Subject to the prior written approval of the Director of the Office of Government Ethics, an agency may require employees to file additional confidential financial disclosure forms which supplement the standard form referred to in paragraph (a)(3) of this section, if necessary because of special or unique agency circumstances. The Director may approve such agency forms when, in his opinion, the supplementation is shown to be necessary for a comprehensive and effective agency ethics program to identify and resolve conflicts of interest. See §§ 2634.103 and 2634.901.

(d) The information collection and recordkeeping requirements have been approved by the Office of Management and Budget under control number 3209–0001 for the OGE Form 278e, and control number 3209–0006 for OGE Form 450. OGE Form 278–T has been determined not to require an OMB paperwork control number, as the form is used exclusively by current Government employees.

§ 2634.602 Filing of reports.

(a) Except as otherwise provided in this section, the reporting individual will file financial disclosure reports required under this part with the designated agency ethics official or the delegate at the agency where the individual is employed, or was employed immediately prior to termination of employment, or in which the individual will serve, unless otherwise directed by the employee's home agency. Detailees will file with their home agency. Reports are due at the times indicated in § 2634.201 (public disclosure) or § 2634.903 (confidential disclosure), unless an extension is granted pursuant to the provisions of subparts B or I of this part. Filers must certify that the information contained in the report is true, correct, and complete to their best knowledge.

(b) The President, the Vice President, any independent counsel, and persons appointed by independent counsel under 28 U.S.C. chapter 40, will file the public financial disclosure reports required under this part with the Director of the Office of Government Ethics.

(c)(1) Each agency receiving the public financial disclosure reports required to be filed under this part by the following individuals must transmit copies to the Director of the Office of Government Ethics:

(i) The Postmaster General;

(ii) The Deputy Postmaster General;

(iii) The Governors of the Board of Governors of the United States Postal Service;

(iv) The designated agency ethics official;

(v) Employees of the Executive Office of the President who are appointed under 3 U.S.C. 105(a)(2)(A) or (B) or 3 U.S.C. 107(a)(1)(A) or (b)(1)(A)(i), and employees of the Office of Vice President who are appointed under 3 U.S.C. 106(a)(1)(A) or (B); and

(vi) Officers and employees in, and nominees to, offices or positions which require confirmation by the Senate, other than members of the uniformed services.

(2) Prior to transmitting a copy of a report to the Director of the Office of Government Ethics, the designated agency ethics official or the delegate must review that report in accordance with § 2634.605, except for the designated agency ethics official's own report, which must be reviewed by the agency head or by a delegate of the agency head.

(3) For nominee reports, the Director of the Office of Government Ethics must forward a copy to the Senate committee that is considering the nomination. See § 2634.605(c) for special procedures regarding the review of such reports.

(d) The Director of the Office of Government Ethics must file the Director's financial disclosure report with the Office of Government Ethics, which will make it immediately available to the public in accordance with this part.

(e) Candidates for President and Vice President identified in § 2634.201(d), other than an incumbent President or Vice President, must file their financial disclosure reports with the Federal Election Commission, which will review and send copies of such reports to the Director of the Office of Government Ethics.

(f) Members of the uniformed services identified in § 2634.202(c) must file their financial disclosure reports with the Secretary concerned, or the Secretary's delegate.

§ 2634.603 Custody of and access to public reports.

(a) Each agency must make available to the public in accordance with the provisions of this section those public reports filed with the agency by reporting individuals described under subpart B of this part.

(b) This section does not require public availability of those reports filed by:

(1) Any individual in the Office of the Director of National Intelligence, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, or the National Security Agency, or any individual engaged in intelligence activities in any agency of the United States, if the President finds or has found that, due to the nature of the office or position occupied by that individual, public disclosure of the report would, by revealing the identity of the individual or other sensitive information, compromise the national interest of the United States. Individuals referred to in this paragraph who are exempt from the public availability requirement may also be authorized, notwithstanding § 2634.701, to file any additional reports necessary to protect their identity from public disclosure, if the President finds or has found that

such filings are necessary in the national interest; or

(2) An independent counsel whose identity has not been disclosed by the Court under 28 U.S.C. chapter 40, or any person appointed by that independent counsel under such chapter.

(c) Each agency will, within 30 days after any public report is received by the agency, permit inspection of the report by, or furnish a copy of the report to, any person who makes written application as provided by agency procedure. Agency reviewing officials and the support staffs who maintain the files, the staff of the Office of Government Ethics, and Special Agents of the Federal Bureau of Investigation who are conducting a criminal inquiry into possible conflict of interest violations need not submit an application. The agency may utilize Office of Government Ethics Form 201 for such applications. An application must state:

(1) The requesting person's name, occupation, and address;

(2) The name and address of any other person or organization on whose behalf the inspection or copy is requested; and

(3) That the requesting person is aware of the prohibitions on obtaining or using the report set forth in paragraph (f) of this section.

(d) Applications for the inspection of or copies of public reports will also be made available to the public throughout the period during which the report itself is made available, utilizing the procedures in paragraph (c) of this section.

(e) The agency may require a reasonable fee, established by agency regulation, to recover the direct cost of reproduction or mailing of a public report, excluding the salary of any employee involved. A copy of the report may be furnished without charge or at a reduced charge if the agency determines that waiver or reduction of the fee is in the public interest. The criteria used by an agency to determine when a fee will be reduced or waived will be established by regulation. Agency regulations contemplated by paragraph (e) of this section do not require approval pursuant to § 2634.103.

(f) It is unlawful for any person to obtain or use a public report:

(1) For any unlawful purpose;

(2) For any commercial purpose, other than by news and communications media for dissemination to the general public;

(3) For determining or establishing the credit rating of any individual; or

(4) For use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

Example 1: The deputy general counsel of Agency X is responsible for reviewing the public financial disclosure reports filed by persons within that agency. The agency personnel director, who does not exercise functions within the ethics program, wishes to review the disclosure report of an individual within the agency. The personnel director must file an application to review the report. However, the supervisor of an official with whom the deputy general counsel consults concerning matters arising in the review process need not file such an application.

Example 2: A state law enforcement agent is conducting an investigation which involves the private financial dealings of an individual who has filed a public financial disclosure report. The agent must complete a written application in order to inspect or obtain a copy.

Example 3: A financial institution has received an application for a loan from an official which indicates her present financial status. The official has filed a public financial disclosure statement with her agency. The financial institution cannot be given access to the disclosure form for purposes of verifying the information contained on the application.

(g)(1) Any public report filed with an agency or transmitted to the Director of the Office of Government Ethics under this section will be retained by the agency, and by the Office of Government Ethics when it receives a copy. The report will be made available to the public for a period of six years after receipt. After the six-year period, the report must be destroyed unless needed in an ongoing investigation, except that in the case of an individual who filed the report pursuant to § 2634.201(c) as a nominee and was not subsequently confirmed by the Senate, or who filed the report pursuant to § 2634.201(d) as a candidate and was not subsequently elected, the report, unless needed in an ongoing investigation, must be destroyed one year after the individual either is no longer under consideration by the Senate or is no longer a candidate for nomination or election to the Office of President or Vice President. See also the OGE/GOVT–1 Governmentwide executive branch Privacy Act system of records (available for inspection at the Office of Government Ethics or on OGE's Web site, *www.oge.gov*), as well as any applicable agency system of records.

(2) For purposes of paragraph (g)(1) of this section, in the case of a reporting individual with respect to whom a trust has been certified under subpart D of this part, a copy of the qualified trust agreement, the list of assets initially placed in the trust, and all other publicly available documents relating to the trust will be retained and made available to the public until the periods for retention of all other reports of the individual have lapsed under paragraph (g)(1) of this section.

Approved by the Office of Management and Budget under control numbers 3209–0001 and 3209–0002)

§ 2634.604 Custody of and denial of public access to confidential reports.

(a) Any report filed with an agency under subpart I of this part will be retained by the agency for a period of six years after receipt. After the six-year period, the report must be destroyed unless needed in an ongoing investigation. See also the OGE/GOVT–2 Governmentwide executive branch Privacy Act system of records (available for inspection at the Office of Government Ethics or on OGE's Web site, *www.oge.gov*), as well as any applicable agency system of records.

(b) The reports filed pursuant to subpart I of this part are confidential. No member of the public will have access to such reports, except pursuant to the order of a Federal court or as otherwise provided under the Privacy Act. See 5 U.S.C. 552a and the OGE/GOVT–2 Privacy Act system of records (and any applicable agency system); 5 U.S.C. app. (Ethics in Government Act of 1978, section 107(a)); sections 201(d) and 502(b) of Executive Order 12674, as modified by Executive Order 12731; and § 2634.901(d).

§ 2634.605 Review of reports.

(a) *In general.* The designated agency ethics official will normally serve as the reviewing official for reports submitted to the official's agency. That responsibility may be delegated, except in the case of certification of nominee reports required by paragraph (c) of this section. See also § 2634.105(q). The designated agency ethics official will note on any report or supplemental report the date on which it is received. Except as indicated in paragraph (c) of this section, all reports must be reviewed within 60 days after the date of filing. Reports that are reviewed by the Director of the Office of Government Ethics must be forwarded promptly by the designated agency ethics official to the Director. The Director will review the reports within 60 days from the date on which they are received by the Office of Government Ethics. If additional information is needed, the Director will notify the agency. In the event that additional information must be obtained from the filer, the agency will require that the filer provide that information as promptly as is practical but not more than 30 days after the request. Final certification in accordance with

paragraph (b)(3) of this section may, of necessity, occur later, when additional information is being sought or remedial action is being taken under this section.

(b) *Responsibilities of reviewing official*—(1) *Initial review.* As a part of the initial review, the reviewing official may request an intermediate review by the filer's supervisor or another reviewer. In the case of a filer who is detailed to another agency for more than 60 days during the reporting period, the reviewing official will coordinate with the ethics official at the agency at which the employee is serving the detail if the report reveals a potential conflict of interest.

(2) *Standards of Review.* The reviewing official must examine the report to determine, to the reviewing official's satisfaction, that:

(i) Each required part of the report is completed; and

(ii) No interest or position disclosed on the report violates or appears to violate:

(A) Any applicable provision of chapter 11 of title 18, United States Code;

(B) The Act, as amended, and the implementing regulations;

(C) Executive Order 12674, as modified by Executive Order 12731, and the implementing regulations;

(D) Any other applicable Executive Order in force at the time of the review; or

(E) Any other agency-specific statute or regulation which governs the filer.

(3) *Signature by reviewing official.* If the reviewing official is of the opinion that the report meets the requirements of paragraph (b)(2) of this section, the reviewing official will certify it by signature and date. The reviewing official need not audit the report to ascertain whether the disclosures are correct. Disclosures will be taken at ''face value'' as correct, unless there is a patent omission or ambiguity or the official has independent knowledge of matters outside the report. However, a report which is signed by a reviewing official certifies that the filer's agency has reviewed the report, that the reviewing official is of the opinion that each required part of the report has been completed, and that on the basis of information contained in such report the filer is in compliance with applicable laws and regulations noted in paragraph (b)(2)(ii) of this section.

(4) *Requests for, and review based on, additional information.* If the reviewing official believes that additional information is required to be reported, the reviewing official will request that any additional information be submitted within 30 days from the date of the request, unless the reviewing official grants an extension in writing. This additional information will be incorporated into the report. If the reviewing official concludes, on the basis of the information disclosed in the report and any additional information submitted, that the report fulfills the requirements of paragraph (b)(2) of this section, the reviewing official will sign and date the report.

(5) *Compliance with applicable laws and regulations.* If the reviewing official concludes that information disclosed in the report may reveal a violation of applicable laws and regulations as specified in paragraph (b)(2)(ii) of this section, the official must:

(i) Notify the filer of that conclusion;

(ii) Afford the filer a reasonable opportunity for an oral or written response; and

(iii) Determine, after considering any response, whether or not the filer is then in compliance with applicable laws and regulations specified in paragraph (b)(2)(ii) of this section. If the reviewing official concludes that the report does fulfill the requirements, the reviewing official will sign and date the report. If the reviewing official determines that it does not and additional remedial actions are required, the reviewing official must:

(A) Notify the filer of the conclusion;

(B) Afford the filer an opportunity for personal consultation if practicable;

(C) Determine what remedial action under paragraph (b)(6) of this section should be taken to bring the report into compliance with the requirements of paragraph (b)(2)(ii) of this section; and

(D) Notify the filer in writing of the remedial action which is needed, and the date by which such action should be taken.

(6) *Remedial action.* (i) Except in unusual circumstances, which must be fully documented to the satisfaction of the reviewing official, remedial action must be completed not later than three months from the date on which the filer received notice that the action is required.

(ii) Remedial action may include, as appropriate:

(A) Divestiture of a conflicting interest (see subpart J of this part);

(B) Resignation from a position with a non-Federal business or other entity;

(C) Restitution;

(D) Establishment of a qualified blind or diversified trust under the Act and subpart D of this part;

(E) Procurement of a waiver under 18 U.S.C. 208(b)(1) or (b)(3);

(F) Recusal; or

(G) Voluntary request by the filer for transfer, reassignment, limitation of duties, or resignation.

(7) *Compliance or referral.* (i) If the filer complies with a written request for remedial action under paragraph (b)(6) of this section, the reviewing official will memorialize what remedial action has be taken. The official will also sign and date the report.

(ii) If the filer does not comply by the designated date with the written request for remedial action transmitted under paragraph (b)(6) of this section, the reviewing official must, in the case of a public filer under subpart B of this part, notify the head of the agency and the Office of Government Ethics for appropriate action. Where the filer is in a position in the executive branch (other than in the uniformed services or the Foreign Service), appointment to which requires the advice and consent of the Senate, the Director of the Office of Government Ethics shall refer the matter to the President. In the case of the Postmaster General or Deputy Postmaster General, the Director of the Office of Government Ethics shall recommend to the Governors of the Board of Governors of the United States Postal Service the action to be taken. For confidential filers, the reviewing official will follow agency procedures.

(c) *Expedited procedure in the case of individuals appointed by the President and subject to confirmation by the Senate.* In the case of a report filed by an individual described in § 2634.201(c) who is nominated by the President for appointment to a position that requires the advice and consent of the Senate:

(1) In most cases, the Executive Office of the President will furnish the applicable financial disclosure report form to the nominee. It will forward the completed report to the designated agency ethics official at the agency where the nominee is serving or will serve, or it may direct the nominee to file the completed report directly with the designated agency ethics official.

(2) The designated agency ethics official will complete an accelerated review of the report, in accordance with the standards and procedures in paragraph (b) of this section. If that official concludes that the report reveals no unresolved conflict of interest under applicable laws and regulations, the official will:

(i) Personally certify the report by signature, and date the certification;

(ii) Write an opinion letter to the Director of the Office of Government Ethics, personally certifying that there is no unresolved conflict of interest under applicable laws and regulations;

(iii) Provide a copy of any commitment, agreement, or other undertaking which is reduced to writing

in accordance with subpart H of this part; and

(iv) Transmit the letter and the report to the Director of the Office of Government Ethics, within three working days after the designated agency ethics official receives the report.

Note to paragraph (c)(2): The designated agency ethics official's certification responsibilities in § 2634.605(c) are nondelegable and must be accomplished by him personally, or by the agency's alternate designated agency ethics official, in his absence. See part 2638 of this chapter.

(3) The Director of the Office of Government Ethics will review the report and the letter from the designated agency ethics official. If the Director is satisfied that no unresolved conflicts of interest exist, then the Director will sign and date the report form. The Director will then submit the report with a letter to the appropriate Senate committee, expressing the Director's opinion whether, on the basis of information contained in the report, the nominee has complied with all applicable conflict laws and regulations.

(4) If, in the case of any nominee or class of nominees, the expedited procedure specified in this paragraph cannot be completed within the time set forth in paragraph (c)(2)(iv) of this section, the designated agency ethics official must inform the Director. When necessary and appropriate, the Director may modify the rule of that paragraph for a nominee or a class of nominees with respect to a particular department or agency.

§ 2634.606 Updated disclosure of advice-and-consent nominees.

(a) *General rule.* Each individual described in § 2634.201(c) who is nominated by the President for appointment to a position that requires advice and consent of the Senate must submit a letter updating the information in the report previously filed under § 2634.201(c) through the period ending no more than five days prior to the commencement of the first hearing of a Senate Committee considering the nomination to all Senate Committees considering the nomination. The letter must update the information required with respect to receipt of:

(1) Outside earned income; and

(2) Honoraria, as defined in § 2634.105(i).

(b) *Timing.* The nominee's letter must be submitted to the Senate committees considering the nomination by the agency at or before the commencement of the first committee hearing to consider the nomination. The agency must also transmit copies of the nominee's letter to the designated agency ethics official referred to in § 2634.605(c)(1) and to the Office of Government Ethics.

(c) *Additional certification.* In each case to which this section applies, the Director of the Office of Government Ethics will, at the request of the committee considering the nomination, submit to the committee an opinion letter of the nature described in § 2634.605(c)(3) concerning the updated disclosure. If the committee requests such a letter, the expedited procedure provided by § 2634.605(c) will govern review of the updated disclosure, which will be deemed a report filed for purposes of that paragraph.

§ 2634.607 Advice and opinions.

To assist employees in avoiding situations in which they might violate applicable financial disclosure laws and regulations:

(a) The Director of the Office of Government Ethics will render formal advisory opinions and informal advisory letters on generally applicable matters, or on important matters of first impression. See also part 2638 of this chapter. The Director will ensure that these advisory opinions and letters are compiled, published, and made available to agency ethics officials and the public.

(b) Designated agency ethics officials will offer advice and guidance to employees as needed, to assist them in complying with the requirements of the Act and this part on financial disclosure.

(c) Employees who have questions about the application of this part or any supplemental agency regulations to particular situations should seek advice from an agency ethics official. Disciplinary action for violating this part will not be taken against an employee who has engaged in conduct in good faith reliance upon the advice of an agency ethics official, provided that the employee, in seeking such advice, has made full disclosure of all relevant circumstances. Where the employee's conduct violates a criminal statute, reliance on the advice of an agency ethics official cannot ensure that the employee will not be prosecuted under that statute. However, good faith reliance on the advice of an agency ethics official is a factor that may be taken into account by the Department of Justice in the selection of cases for prosecution. Disclosures made by an employee to an agency ethics official are not protected by an attorney-client privilege. An agency ethics official is required by 28 U.S.C. 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code.

Subpart G—Penalties

§ 2634.701 Failure to file or falsifying reports.

(a) *Referral of cases.* The head of each agency, each Secretary concerned, or the Director of the Office of Government Ethics, as appropriate, must refer to the Attorney General the name of any individual when there is reasonable cause to believe that such individual has willfully failed to file a public report or information required on such report, or has willfully falsified any information (public or confidential) required to be reported under this part.

(b) *Civil action.* The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully falsifies or who knowingly and willfully fails to file or report any information required by filers of public reports under subpart B of this part. The court in which the action is brought may assess against the individual a civil monetary penalty in any amount, not to exceed the amounts set forth in Table 1 to this section, as provided by section 104(a) of the Act, as amended, and as adjusted in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended:

TABLE 1 TO § 2634.701

Date of violation or assessment	Penalty
Violation occurring before Sept. 29, 1999	$10,000
Violation occurring between Sept. 29, 1999 and Sept. 13, 2007	11,000
Violation occurring between Sept. 14, 2007 and Nov. 2, 2015	50,000
Violation occurring after Nov. 2, 2015 and penalty assessed on or before Aug. 1, 2016	50,000
Violation occurring after Nov. 2, 2015 and penalty assessed after Aug. 1, 2016	56,916

(c) *Criminal action.* An individual may also be prosecuted under criminal statutes for supplying false information on any financial disclosure report.

(d) *Administrative remedies.* The President, the Vice President, the Director of the Office of Government Ethics, the Secretary concerned, the head of each agency, and the Office of Personnel Management may take appropriate personnel or other action in accordance with applicable law or regulation against any individual for failing to file public or confidential reports required by this part, for filing

such reports late, or for falsifying or failing to report required information. This may include adverse action under 5 CFR part 752, if applicable.

§ 2634.702 Breaches by trust fiduciaries and interested parties.

(a) The Attorney General may bring a civil action in any appropriate United States district court against any individual who knowingly and willfully violates the provisions of § 2634.407. The court in which the action is brought may assess against the individual a civil monetary penalty in any amount, not to exceed the amounts set forth in Table 1 to this section, as provided by section 102(f)(6)(C)(i) of the Act and as adjusted in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

TABLE 1 TO § 2634.702

Date of violation or assessment	Penalty
Violation occurring before Sept. 29, 1999	$10,000
Violation occurring between Sept. 29, 1999 and Nov. 2, 2015	11,000
Violation occurring after Nov. 2, 2015 and penalty assessed on or before Aug. 1, 2016	11,000
Violation occurring after Nov. 2, 2015 and penalty assessed after Aug. 1, 2016	18,936

(b) The Attorney General may bring a civil action in any appropriate United States district court against any individual who negligently violates the provisions of § 2634.407. The court in which the action is brought may assess against the individual a civil monetary penalty in any amount, not to exceed the amounts set forth in Table 2 to this section, as provided by section 102(f)(6)(C)(ii) of the Act and as adjusted in accordance with the inflation adjustment procedures of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

TABLE 2 TO § 2634.702

Date of violation or assessment	Penalty
Violation occurring before Sept. 29, 1999	$5,000
Violation occurring between Sept. 29, 1999 and Nov. 2, 2015	5,500
Violation occurring after Nov. 2, 2015 and penalty assessed on or before Aug. 1, 2016	5,500
Violation occurring after Nov. 2, 2015 and penalty assessed after Aug. 1, 2016	9,468

§ 2634.703 Misuse of public reports.

The Attorney General may bring a civil action against any person who obtains or uses a report filed under this part for any purpose prohibited by section 105(c)(1) of the Act, as incorporated in § 2634.603(f). The court in which the action is brought may assess against the person a civil monetary penalty in any amount, not to exceed the amounts set forth in Table 1 to this section, as provided by section 105(c)(2) of the Act and as adjusted in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended.

TABLE 1 TO § 2634.703

Date of violation or assessment	Penalty
Violation occurring before Sept. 29, 1999	$10,000
Violation occurring between Sept. 29, 1999 and Nov. 2, 2015	11,000
Violation occurring after Nov. 2, 2016 and penalty assessed on or before Aug. 1, 2016	11,000
Violation occurring after Nov. 2, 2015 and penalty assessed after Aug. 1, 2016	18,936

This remedy will be in addition to any other remedy available under statutory or common law.

§ 2634.704 Late filing fee.

(a) *In general.* In accordance with section 104(d) of the Act, any reporting individual who is required to file a public financial disclosure report by the provisions of this part must remit a late filing fee of $200 to the appropriate agency, payable to the U.S. Treasury, if such report is filed more than 30 days after the later of:

(1) The date such report is required to be filed pursuant to the provisions of this part; or

(2) The last day of any filing extension period granted pursuant to § 2634.201(g).

(b) *Exceptions.* (1) The designated agency ethics official may waive the late filing fee if the designated agency ethics official determines that the delay in filing was caused by extraordinary circumstances. These circumstances include, but are not limited to, the agency's failure to notify a filer of the requirement to file the public financial disclosure report, which made the delay reasonably necessary.

(2) Employees requesting a waiver of the late filing fee from the designated agency ethics official must request the waiver in writing. The designated agency ethics official's determination must be made in writing to the employee with a copy maintained by the agency. The designated agency ethics official may consult with the Office of Government Ethics prior to approving any waiver of the late filing fee.

(c) *Procedure.* (1) Each report received by the agency must be marked with the date of receipt. For any report which has not been received by the end of the period specified in paragraph (a) of this section, the agency will advise the delinquent filer, in writing, that:

(i) Because the financial disclosure report is more than 30 days overdue, a $200 late filing fee will become due at the time of filing, by reason of section 104(d) of the Act and § 2634.704;

(ii) The filer is directed to remit to the agency, with the completed report, the $200 fee, payable to the United States Treasury;

(iii) If the filer fails to remit the $200 fee when filing a late report, it will be subject to agency debt collection procedures; and

(iv) If extraordinary circumstances exist that would justify a request for a fee waiver, pursuant to paragraph (b) of this section, such request and any supporting documentation must be submitted immediately.

(2) Upon receipt from the reporting individual of the $200 late filing fee, the collecting agency will note the payment in its records, and will then forward the money to the U.S. Treasury for deposit as miscellaneous receipts, in accordance with 31 U.S.C. 3302 and Part 5 of Volume 1 of the Treasury Financial Manual. If payment is not forthcoming, agency debt collection procedures may be utilized, which may include salary or administrative offset, initiation of a tax refund offset, or other authorized action.

(d) *Late filing fee not exclusive remedy.* The late filing fee is in addition to other sanctions which may be imposed for late filing. See § 2634.701.

(e) *Confidential filers.* The late filing fee does not apply to confidential filers. Late filing of confidential reports will be handled administratively under § 2634.701(d).

(f) *Date of filing.* The date of filing for purposes of determining whether a public financial disclosure report is filed more than 30 days late under this section will be the date of receipt by the agency, which should be noted on the report in accordance with § 2634.605(a). The 30-day grace period on imposing a late filing fee is adequate allowance for administrative delays in the receipt of reports by an agency.

Subpart H—Ethics Agreements

§ 2634.801 Scope.

This subpart applies to ethics agreements made by any reporting individual under either subpart B or I of this part, to resolve potential or actual conflicts of interest.

§ 2634.802 Requirements.

(a) *Ethics agreement defined.* The term *ethics agreement* will include, for the purposes of this subpart, any oral or written promise by a reporting individual to undertake specific actions in order to alleviate an actual or apparent conflict of interest, such as:

(1) Recusal;

(2) Divestiture of a financial interest;

(3) Resignation from a position with a non-Federal business or other entity;

(4) Procurement of a waiver pursuant to 18 U.S.C. 208(b)(1) or (b)(3); or

(5) Establishment of a qualified blind or diversified trust under the Act and subpart D of this part.

(b) *Time limit.* The ethics agreement will specify that the individual must complete the action which he or she has agreed to undertake within a period not to exceed three months from the date of the agreement (or of Senate confirmation, if applicable). Exceptions to the three-month deadline can be made in cases of unusual hardship, as determined by the Office of Government Ethics, for those ethics agreements which are submitted to it (see § 2634.803), or by the designated agency ethics official for all other ethics agreements.

Example: An official of the ABC Aircraft Company is nominated to a Department of Defense position requiring the advice and consent of the Senate. As a condition of assuming the position, the individual has agreed to divest himself of his ABC Aircraft stock which he recently acquired while he was an officer with the company. However, the Securities and Exchange Commission prohibits officers of public corporations from deriving a profit from the sale of stock in the corporation in which they hold office within six months of acquiring the stock, and directs that any such profit must be returned to the issuing corporation or its stock holders. Since meeting the usual three-month time limit specified in this subpart for satisfying an ethics agreement might entail losing any profit that could be realized on the sale of this stock, the nominee requests that the limit be extended beyond the six-month period imposed by the Commission. Written approval must be obtained from the Office of Government Ethics to extend the three-month period.

§ 2634.803 Notification of ethics agreements.

(a) *Nominees to positions requiring the advice and consent of the Senate.* (1) In the case of a nominee referred to in § 2634.201(c), the designated agency ethics official will include with the report submitted to the Office of Government Ethics any ethics agreement which the nominee has made.

(2) A designated agency ethics official must immediately notify the Office of Government Ethics of any ethics agreement of a nominee which is made or becomes known to the designated agency ethics official after the submission of the nominee's report to the Office of Government Ethics. This requirement includes an ethics agreement made between a nominee and the Senate confirmation committee. The nominee must immediately report to the designated agency ethics official any ethics agreement made with the committee.

(3) The Office of Government Ethics must immediately apprise the designated agency ethics official and the Senate confirmation committee of any ethics agreements made directly between the nominee and the Office of Government Ethics.

(4) Any ethics agreement approved by the Office of Government Ethics during its review of a nominee's financial disclosure report may not be modified without prior approval from the Office of Government Ethics.

(b) *Incumbents and other reporting individuals.* Incumbents and other reporting individuals may be required to enter into an ethics agreement with the designated agency ethics official for the employee's agency. Where an ethics agreement has been made with someone other than the designated agency ethics official, the officer or employee involved must promptly apprise the designated agency ethics official of the agreement.

§ 2634.804 Evidence of compliance.

(a) *Requisite evidence of action taken.* (1) For ethics agreements of nominees to positions requiring the advice and consent of the Senate, evidence of any action taken to comply with the terms of such ethics agreements must be submitted to the designated agency ethics official. The designated agency ethics official will promptly notify the Office of Government Ethics of actions taken to comply with the ethics agreement.

(2) In the case of incumbents and all other reporting individuals, evidence of any action taken to comply with the terms of an ethics agreement must be sent promptly to the designated agency ethics official.

(b) The following materials and any other appropriate information constitute evidence of the action taken:

(1) *Recusal.* A copy of a recusal statement listing and describing the specific matters or subjects to which the recusal applies, a statement of the method by which the agency will enforce the recusal. A recusal statement is not required for a general affirmation that the filer will comply with ethics laws.

Example: A new employee of a Federal safety board owns stock in Nationwide Airlines. She has entered into an ethics agreement to recuse herself from participating in any accident investigations involving that company's aircraft until such time as she can complete a divestiture of the asset. She sends an email to the designated agency ethics official recusing herself from Nationwide Airline matters. She sends an email to her supervisor and subordinates to notify them of the recusal and to request that they do not refer matters involving Nationwide Airlines to her. She also sends a copy of that email to the designated agency ethics official.

(2) *Divestiture or resignation.* Written notification that the divestiture or resignation has occurred.

(3) *Waivers.* A copy of any waivers issued pursuant to 18 U.S.C. 208(b)(1) or (b)(3) and signed by the appropriate supervisory official.

(4) *Blind or diversified trusts.* Information required by subpart D of this part to be submitted to the Office of Government Ethics for its certification of any qualified trust instrument. If the Office of Government Ethics does not certify the trust, the designated agency ethics official and, as appropriate, the Senate confirmation committee should be informed immediately.

§ 2634.805 Retention.

Records of ethics agreements and actions described in this subpart will be maintained by the agency. In addition, copies of such record will be maintained by the Office of Government Ethics with respect to filers whose reports are certified by the Office of Government Ethics.

Subpart I—Confidential Financial Disclosure Reports

§ 2634.901 Policies of confidential financial disclosure reporting.

(a) The confidential financial reporting system set forth in this subpart is designed to complement the public reporting system established by title I of the Act. High-level officials in the executive branch are required to report certain financial interests publicly to ensure that every citizen can have confidence in the integrity of the

Federal Government. It is equally important in order to guarantee the efficient and honest operation of the Government that other, less senior, executive branch employees, whose Government duties involve the exercise of significant discretion in certain sensitive areas, report their financial interests and outside business activities to their employing agencies, to facilitate the review of possible conflicts of interest. These reports assist an agency in administering its ethics program and counseling its employees. Such reports are filed on a confidential basis.

(b) The confidential reporting system seeks from employees only that information which is relevant to the administration and application of criminal conflict of interest laws, administrative standards of conduct, and agency-specific statutory and program-related restrictions. The basic content of the reports required by § 2634.907 reflects that certain information is generally relevant to all agencies. However, depending upon an agency's authorized activities and any special or unique circumstances, additional information may be necessary. In these situations, and subject to the prior written approval of the Director of the Office of Government Ethics, agencies may formulate supplemental reporting requirements by following the procedures of §§ 2634.103 and 2634.601(b).

(c) This subpart also allows an agency to request, on a confidential basis, additional information from persons who are already subject to the public reporting requirements of this part. The public reporting requirements of the Act address Governmentwide concerns. The reporting requirements of this subpart allow agencies to confront special or unique agency concerns. If those concerns prompt an agency to seek more extensive reporting from employees who file public reports, it may proceed on a confidential, nonpublic basis, with prior written approval from the Director of the Office of Government Ethics, under the procedures of §§ 2634.103 and 2634.601(b).

(d) The reports filed pursuant to this subpart are specifically characterized as ''confidential,'' and are required to be withheld from the public, pursuant to section 107(a) of the Act. Section 107(a) leaves no discretion on this issue with the agencies. See also § 2634.604. Further, Executive Order 12674 as modified by Executive Order 12731 provides, in section 201(d), for a system of nonpublic (confidential) executive branch financial disclosure to complement the Act's system of public disclosure. The confidential reports provided for by this subpart contain sensitive commercial and financial information, as well as personal privacy-protected information. These reports and the information which they contain are, accordingly, exempt from being released to the public, under exemptions 3(A) and (B), 4, and 6 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3)(A) and (B), (b)(4), and (b)(6). Additional FOIA exemptions may apply to particular reports or portions of reports. Agency personnel will not publicly release the reports or the information which these reports contain, except pursuant to an order issued by a Federal court, or as otherwise provided under applicable provisions of the Privacy Act (5 U.S.C. 552a), and in the OGE/GOVT–2 Governmentwide executive branch Privacy Act system of records, as well as any applicable agency records system. If an agency statute requires the public reporting of certain information and, for purposes of convenience, an agency chooses to collect that information on the confidential report form filed under this subpart, only the special statutory information may be released to the public, pursuant to the terms of the statute under which it was collected.

(e) Executive branch agencies hire or use the paid and unpaid services of many individuals on an advisory or other less than full-time basis as special Government employees. These employees may include experts and consultants to the Government, as well as members of Government advisory committees. It is important for those agencies that utilize such services, and for the individuals who provide the services, to anticipate and avoid real or apparent conflicts of interest. The confidential financial disclosure system promotes that goal, with special Government employees among those required to file confidential reports.

(f) For additional policies and definitions of terms applicable to both the public and confidential reporting systems, see §§ 2634.104 and 2634.105.

§ 2634.902 [Reserved]

§ 2634.903 General requirements, filing dates, and extensions.

(a) *Incumbents.* A confidential filer who holds a position or office described in § 2634.904(a) and who performs the duties of that position or office for a period in excess of 60 days during the calendar year (including more than 60 days in an acting capacity) must file a confidential report as an incumbent, containing the information prescribed in §§ 2634.907 and 2634.908 on or before February 15 of the following year. This requirement does not apply if the employee has left Government service or has left a covered position prior to the due date for the report. No incumbent reports are required of special Government employees described in § 2634.904(a)(2), but who must file new entrant reports under § 2634.903(b) upon each appointment or reappointment. For confidential filers under § 2634.904(a)(3), consult agency supplemental regulations.

(b) *New entrants.* (1) Not later than 30 days after assuming a new position or office described in § 2634.904(a) (which also encompasses the reappointment or redesignation of a special Government employee, including one who is serving on an advisory committee), a confidential filer must file a confidential report containing the information prescribed in §§ 2634.907 and 2634.908. For confidential filers under § 2634.904(a)(3), consult agency supplemental regulations.

(2) However, no report will be required if the individual:

(i) Has, within 30 days prior to assuming the position, left another position or office referred to in § 2634.904(a) or in § 2634.202, and has previously satisfied the reporting requirements applicable to that former position, but a copy of the report filed by the individual while in that position should be made available to the appointing agency, and the individual must comply with any agency requirement for a supplementary report for the new position;

(ii) Has already filed such a report in connection with consideration for appointment to the position. The agency may request that the individual update such a report if more than six months has expired since it was filed; or

(iii) Is not reasonably expected to perform the duties of an office or position referred to in § 2634.904(a) for more than 60 days in the following 12-month period, as determined by the designated agency ethics official or delegate. That may occur most commonly in the case of an employee who temporarily serves in an acting capacity in a position described by § 2634.904(a)(1). If the individual actually performs the duties of such position for more than 60 days in the 12-month period, then a confidential financial disclosure report must be filed within 15 calendar days after the sixtieth day of such service in the position. Paragraph (b)(2)(iii) of § 2634.903 does not apply to new entrants filing as special Government employees under § 2634.904(a)(2).

(3) Notwithstanding the filing deadline prescribed in paragraph (b)(1) of this section, agencies may at their discretion, require that prospective entrants into positions described in § 2634.904(a) file their new entrant confidential financial disclosure reports prior to serving in such positions, to ensure that there are no insurmountable ethics concerns. Additionally, a special Government employee who has been appointed to serve on an advisory committee must file the required report before any advice is rendered by the employee to the agency, or in no event, later than the first committee meeting.

(c) *Advisory committee definition.* For purposes of this subpart, the term *advisory committee* will have the meaning given to that term under section 3 of the Federal Advisory Committee Act (5 U.S.C. app). Specifically, it means any committee, board, commission, council, conference, panel, task force, or other similar group which is established by statute or reorganization plan, or established or utilized by the President or one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government. Such term includes any subcommittee or other subgroup of any advisory committee, but does not include the Advisory Commission on Intergovernmental Relations, the Commission on Government Procurement, or any committee composed wholly of full-time officers or employees of the Federal Government.

(d) *Extensions—(1) Agency extensions.* The agency reviewing official may, for good cause shown, grant to any employee or class of employees a filing extension or several extensions totaling not more than 90 days.

(2) *Certain service during period of national emergency.* In the case of an active duty military officer or enlisted member of the Armed Forces, a Reserve or National Guard member on active duty under orders issued pursuant to title 10 or title 32 of the United States Code, a commissioned officer of the Uniformed Services (as defined in 10 U.S.C. 101), or any other employee, who is deployed or sent to a combat zone or required to perform services away from the employee's permanent duty station in support of the Armed Forces or other governmental entities following a declaration by the President of a national emergency, the date of filing will be extended to 90 days after the last day of:

(i) The employee's service in the combat zone or away from the employee's permanent duty station; or

(ii) The employee's hospitalization as a result of injury received or disease contracted while serving during the national emergency.

(3) *Agency procedures.* Each agency may prescribe procedures to provide for the implementation of the extensions provided for by this paragraph.

(e) *Termination reports not required.* An employee who is required to file a confidential financial disclosure report is not required to file a termination report upon leaving the filing position.

§ 2634.904 Confidential filer defined.

(a) The term *confidential filer* includes:

(1) Each officer or employee in the executive branch whose position is classified at GS–15 or below of the General Schedule prescribed by 5 U.S.C. 5332, or the rate of basic pay for which is fixed, other than under the General Schedule, at a rate which is less than 120% of the minimum rate of basic pay for GS–15 of the General Schedule; each officer or employee of the United States Postal Service or Postal Rate Commission whose basic rate of pay is less than 120% of the minimum rate of basic pay for GS–15 of the General Schedule; each member of a uniformed service whose pay grade is less than 0–7 under 37 U.S.C. 201; and each officer or employee in any other position determined by the designated agency ethics official to be of equal classification; if:

(i) The agency concludes that the duties and responsibilities of the employee's position require that employee to participate personally and substantially (as defined in §§ 2635.402(b)(4) and 2640.103(a)(2) of this chapter) through decision or the exercise of significant judgment, and without substantial supervision and review, in taking a Government action regarding:

(A) Contracting or procurement;

(B) Administering or monitoring grants, subsidies, licenses, or other federally conferred financial or operational benefits;

(C) Regulating or auditing any non-Federal entity; or

(D) Other activities in which the final decision or action will have a direct and substantial economic effect on the interests of any non-Federal entity; or

(ii) The agency concludes that the duties and responsibilities of the employee's position require the employee to file such a report to avoid involvement in a real or apparent conflict of interest, or to carry out the purposes behind any statute, Executive order, rule, or regulation applicable to or administered by the employee. Positions which might be subject to a reporting requirement under this subparagraph include those with duties which involve investigating or prosecuting violations of criminal or civil law.

Example 1: A contracting officer develops the requests for proposals for data processing equipment of significant value which is to be purchased by his agency. He works with substantial independence of action and exercises significant judgment in developing the requests. By engaging in this activity, he is participating personally and substantially in the contracting process. The contracting officer should be required to file a confidential financial disclosure report.

Example 2: An agency environmental engineer inspects a manufacturing plant to ascertain whether the plant complies with permits to release a certain effluent into a nearby stream. Any violation of the permit standards may result in civil penalties for the plant, and in criminal penalties for the plant's management based upon any action which they took to create the violation. If the agency engineer determines that the plant does not meet the permit requirements, he can require the plant to terminate release of the effluent until the plant satisfies the permit standards. Because the engineer exercises substantial discretion in regulating the plant's activities, and because his final decisions will have a substantial economic effect on the plant's interests, the engineer should be required to file a confidential financial disclosure report.

Example 3: A GS–13 employee at an independent grant making agency conducts the initial agency review of grant applications from nonprofit organizations and advises the Deputy Assistant Chairman for Grants and Awards about the merits of each application. Although the process of reviewing the grant applications entails significant judgment, the employee's analysis and recommendations are reviewed by the Deputy Assistant Chairman, and the Assistant Chairman, before the Chairman decides what grants to award. Because his work is subject to ''substantial supervision and review,'' the employee is not required to file a confidential financial disclosure report unless the agency determines that filing is necessary under § 2634.904(a)(1)(ii).

Example 4: As a senior investigator for a criminal law enforcement agency, an employee often leads investigations, with substantial independence, of suspected felonies. The investigator usually decides what information will be contained in the agency's report of the suspected misconduct. Because he participates personally and substantially through the exercise of significant judgment in investigating violations of criminal law, the investigator should be required to file a confidential financial disclosure report.

(2) Unless required to file public financial disclosure reports by subpart B of this part, all executive branch special Government employees who:

(i) Have a substantial role in the formulation of agency policy;

(ii) Serve on a Federal Advisory Committee; or

(iii) Meet the requirements of section § 2634.904(a)(1).

Example 1: A consultant to an agency periodically advises the agency regarding important foreign policy matters. The consultant must file a confidential report if he is retained as a special Government employee and not an independent contractor.

Example 2: A special Government employee serving as a member of an advisory committee (who is not a private group representative) attends four committee meetings every year to provide advice to an agency about pharmaceutical matters. No compensation is received by the committee member, other than travel expenses. The advisory committee member must file a confidential disclosure report because she is a special Government employee.

(3) Each public filer referred to in § 2634.202 on public disclosure who is required by agency regulations and forms issued in accordance with §§ 2634.103 and 2634.601(b) to file a supplemental confidential financial disclosure report which contains information that is more extensive than the information required in the reporting individual's public financial disclosure report under this part.

(4) Any employee who, notwithstanding the employee's exclusion from the public financial reporting requirements of this part by virtue of a determination under § 2634.203, is covered by the criteria of paragraph (a)(1) of this section.

(b) Any individual or class of individuals described in paragraph (a) of this section, including special Government employees unless otherwise noted, may be excluded from all or a portion of the confidential reporting requirements of this subpart, when the agency head or designee determines that the duties of a position make remote the possibility that the incumbent will be involved in a real or apparent conflict of interest.

Example 1: A special Government employee who is a draftsman prepares the drawings to be used by an agency in soliciting bids for construction work on a bridge. Because he is not involved in the contracting process associated with the construction, the likelihood that this action will create a conflict of interest is remote. As a result, the special Government employee is not required to file a confidential financial disclosure report.

Example 2: An agency has just hired a GS–5 Procurement Assistant who is responsible for typing and processing procurement documents, answering status inquiries from the public, performing office support duties such as filing and copying, and maintaining an on-line contract database. The Assistant is not involved in contracting and has no other actual procurement responsibilities. Thus, the possibility that the Assistant will be involved in a real or apparent conflict of interest is remote, and the Assistant is not required to file.

§ 2634.905 Use of alternative procedures.

Agencies are encouraged to consider whether an alternative procedure would allow the agency to more effectively assess possible conflicts of interest. With the prior written approval of OGE, an agency may use an alternative procedure in lieu of filing the OGE Form 450. The alternative procedure may be an agency-specific form to be filed in place thereof. An agency must submit for approval a description of its proposed alternative procedure to OGE.

Example 1: A nonsupervisory auditor at an agency is regularly assigned to cases involving possible loan improprieties by financial institutions. Prior to undertaking each enforcement review, the auditor reviews the file to determine if she has a conflict of interest. After determining that she has no conflict of interest, she signs and dates a certification which verifies that she has reviewed the file and has made such a determination. She then files the certification with the head of her auditing division at the agency. On the other hand, if she cannot execute the certification, she informs the head of her auditing division. In response, the division will either reassign the case or review the conflicting interest to determine whether a waiver would be appropriate. This alternative procedure, if approved by the Office of Government Ethics in writing, may be used in lieu of requiring the auditor to file a confidential financial disclosure report.

Example 2: To reduce its workload, an agency proposes that employees may file a statement certifying there has been no change in reportable information and no change in the filer's position and duties and attaching the most recent OGE Form 450. This alternative procedure, if approved by the Office of Government Ethics in writing, may be used in lieu of requiring the filer to complete an OGE Form 450.

§ 2634.906 Review of confidential filer status.

The head of each agency, or an officer designated by the head of the agency for that purpose, will review any complaint by an individual that the individual's position has been improperly determined by the agency to be one which requires the submission of a confidential financial disclosure report pursuant to this subpart. A decision by the agency head or designee regarding the complaint will be final.

§ 2634.907 Report contents.

(a) Other than the reports described in § 2634.904(a)(3), each confidential financial disclosure report must comply with instructions issued by the Office of Government Ethics and include on the standardized form prescribed by OGE (see § 2634.601) the information described in paragraphs (b) through (g) of this section for the filer. Each report must also include the information described in paragraph (h) of this section for the filer's spouse and dependent children.

(b) *Noninvestment income.* Each financial disclosure report must disclose the source of earned or other noninvestment income in excess of $1,000 received by the filer from any one source during the reporting period, including:

(1) Salaries, fees, commissions, wages and any other compensation for personal services (other than from United States Government employment);

(2) Any honoraria, including payments made or to be made to charitable organizations on behalf of the filer in lieu of honoraria; and

Note to paragraph (b)(2): In determining whether an honorarium exceeds the $1,000 threshold, subtract any actual and necessary travel expenses incurred by the filer and one relative, if the expenses are paid or reimbursed by the filer. If such expenses are paid or reimbursed by the honorarium source, they will not be counted as part of the honorarium payment.

(3) Any other noninvestment income, such as prizes, scholarships, awards, gambling income or discharge of indebtedness.

Example to paragraphs (b)(1) and (b)(3): A filer teaches a course at a local community college, for which she receives a salary of $3,000 per year. She also received, during the previous reporting period, a $1,250 award for outstanding local community service. She must disclose both.

(c) *Assets and investment income.* Each financial disclosure report must disclose separately:

(1) Each item of real and personal property having a fair market value in excess of $1,000 held by the filer at the end of the reporting period in a trade or business, or for investment or the production of income, including but not limited to:

(i) Real estate;

(ii) Stocks, bonds, securities, and futures contracts;

(iii) Sector mutual funds, sector exchange-traded funds, and other pooled investment funds;

(iv) Pensions and annuities;

(v) Vested beneficial interests in trusts;

(vi) Ownership interest in businesses and partnerships; and

(vii) Accounts receivable.

(2) The source of investment income (dividends, rents, interest, capital gains, or the income from qualified or

excepted trusts or excepted investment funds (see paragraph (i) of this section)), which is received by the filer during the reporting period, and which exceeds $1,000 in amount or value from any one source, including but not limited to income derived from:

(i) Real estate;

(ii) Collectible items;

(iii) Stocks, bonds, and notes;

(iv) Copyrights;

(v) Vested beneficial interests in trusts and estates;

(vi) Pensions;

(vii) Sector mutual funds (see definition at § 2640.102(q) of this chapter);

(viii) The investment portion of life insurance contracts;

(ix) Loans;

(x) Gross income from a business;

(xi) Distributive share of a partnership;

(xii) Joint business venture income; and

(xiii) Payments from an estate or an annuity or endowment contract.

Note to paragraphs (c)(1) and (c)(2): For Individual Retirement Accounts (IRAs), brokerage accounts, trusts, mutual or pension funds, and other entities with portfolio holdings, each underlying asset must be separately disclosed, unless the entity qualifies for special treatment under paragraph (i) of this section.

(3) *Exceptions.* The following assets and investment income are excepted from the reporting requirements of paragraphs (c)(1) and (c)(2) of this section:

(i) A personal residence, as defined in § 2634.105(l);

(ii) Accounts (including both demand and time deposits) in depository institutions, including banks, savings and loan associations, credit unions, and similar depository financial institutions;

(iii) Money market mutual funds and accounts;

(iv) U.S. Government obligations, including Treasury bonds, bills, notes, and savings bonds;

(v) Government securities issued by U.S. Government agencies;

(vi) Financial interests in any retirement system of the United States (including the Thrift Savings Plan) or under the Social Security Act;

(vii) Financial interest in any diversified fund held in any pension plan established or maintained by State government or any political subdivision of a State government for its employees;

(viii) A diversified fund in an employee benefit plan; and

(ix) Diversified mutual funds and unit investment trusts.

Note to paragraphs (c)(3)(vii) through (ix): For purposes of this section, ''diversified'' means that the fund does not have a stated policy of concentrating its investments in any industry, business, single country other than the United States, or bonds of a single State within the United States and, in the case of an employee benefit plan, means that the plan's independent trustee has a written policy of varying plan investments. Whether a fund meets this standard may be determined by checking the fund's prospectus or by calling a broker or the manager of the fund.

Example 1: A filer owns a beach house which he rents out for several weeks each summer, receiving annual rental income of approximately $5,000. He must report the rental property, as well as the city and state in which it is located.

Example 2: A filer's investment portfolio consists of several stocks, U.S. Treasury bonds, several cash bank deposit accounts, an account in the Government's Thrift Savings Plan, and shares in sector mutual funds and diversified mutual funds. He must report the name of each sector mutual fund in which he owns shares, and the name of each company in which he owns stock, valued at over $1,000 at the end of the reporting period or from which he received income of more than $1,000 during the reporting period. He need not report his diversified mutual funds, U.S. Treasury bonds, bank deposit accounts, or Thrift Savings Plan holdings.

(d) *Liabilities.* Each financial disclosure report filed pursuant to this subpart must identify liabilities in excess of $10,000 owed by the filer at any time during the reporting period, and the name and location of the creditors to whom such liabilities are owed, except:

(1) Personal liabilities owed to a spouse or to the parent, brother, sister, or child of the filer, spouse, or dependent child;

(2) Any mortgage secured by a personal residence of the filer or the filer's spouse;

(3) Any loan secured by a personal motor vehicle, household furniture, or appliances, provided that the loan does not exceed the purchase price of the item which secures it;

(4) Any revolving charge account;

(5) Any student loan; and

(6) Any loan from a bank or other financial institution on terms generally available to the public.

Example: A filer owes $2,500 to his mother-in-law and $12,000 to his best friend. He also has a $15,000 balance on his credit card, a $200,000 mortgage on his personal residence, and a car loan. Under the financial disclosure reporting requirements, he need not report the debt to his mother-in-law, his credit card balance, his mortgage, or his car loan. He must, however, report the debt of over $10,000 to his best friend.

(e) *Positions with non-Federal organizations*—(1) *In general.* Each financial disclosure report filed pursuant to this subpart must identify all positions held at any time by the filer during the reporting period, other than with the United States, as an officer, director, trustee, general partner, proprietor, representative, executor, employee, or consultant of any corporation, company, firm, partnership, trust, or other business enterprise, any nonprofit organization, any labor organization, or any educational or other institution.

(2) *Exceptions.* The following positions are excepted from the reporting requirements of paragraph (e)(1) of this section:

(i) Positions held in religious, social, fraternal, or political entities; and

(ii) Positions solely of an honorary nature, such as those with an emeritus designation.

Example 1: A filer holds outside positions as the trustee of his family trust, the secretary of a local political party committee, and the ''Chairman'' of his town's Lions Club. He also is a principal of a tutoring school on weekends. The individual must report his outside positions as trustee of the family trust and as principal of the school. He does not need to report his positions as secretary of the local political party committee or ''Chairman'' because each of these positions is excepted from disclosure.

Example 2: An official recently terminated her role as the managing member of a limited liability corporation upon appointment to a position in the executive branch. The managing member position must be disclosed in the official's new entrant financial disclosure report pursuant to this section.

Example 3: An official is a member of the board of his church. The official does not need to disclose the position in his financial disclosure report.

Example 4: An official is an officer in a fraternal organization that exists for the purpose of performing service work in the community. The official does not need to disclose this position in her financial disclosure report.

Example 5: An official is the ceremonial Parade Marshal for a local town's annual Founders' Day event and, in that capacity, leads a parade and serves as Master of Ceremonies for an awards ceremony at the town hall. The official does not need to disclose this position in her financial disclosure report.

Example 6: An official recently terminated his role as a campaign manager for a candidate for the Office of the President of the United States upon appointment to a noncareer position in the executive branch. The official does not need to disclose the campaign manager position in his financial disclosure report.

Example 7: Immediately prior to her recent appointment to a position in an agency, an official terminated her employment as a corporate officer. In connection with her employment, she served for several years as the corporation's

representative to an incorporated association that represents members of the industry in which the corporation operates. She does not need to disclose her role as her employer's representative to the association because she performed her representative duties in her capacity as a corporate officer.

Example 8: An official holds a position on the board of directors of a local food bank. The official must disclose the position in his financial disclosure report.

(f) *Agreements and arrangements.* Each financial disclosure report filed pursuant to this subpart must identify the parties to, and must briefly describe the terms of, any agreement or arrangement of the filer in existence at any time during the reporting period with respect to:

(1) Future employment (including the date on which the filer entered into the agreement for future employment);

(2) A leave of absence from employment during the period of the filer's Government service;

(3) Continuation of payments by a current or former employer other than the United States Government; and

(4) Continuing participation in an employee welfare or benefit plan maintained by a current or former employer other than the United States Government. Confidential filers are not required to disclose continuing participation in a defined contribution plan, such as a 401(k) plan, to which a former employer is no longer making contributions.

Note to paragraph (f)(4): Even if the agreement is not reportable, the filer must disclose any reportable asset, such as a sector fund or a stock, held in the account.

Example 1: A filer plans to retire from Government service in eight months. She has negotiated an arrangement for part-time employment with a private-sector company, to commence upon her retirement. On her financial disclosure report, she must identify the future employer, and briefly describe the terms of, this agreement and disclose the date on which she entered into the agreement.

Example 2: A new employee has entered a position which requires the filing of a confidential form. During his Government tenure, he will continue to receive deferred compensation from his former employer and will continue to participate in its pension plan. He must report the receipt of deferred compensation and the participation in the defined benefit plan.

Example 3: An employee has a defined contribution plan with a former employer. The employer no longer makes contributions to the plan. In the account, the employee holds shares worth $15,000 in an S&P 500 Index fund and shares worth $7,000 in an U.S. Financial Services fund. The employee does not need to disclose either the agreement to continue to participate in the plan or the S&P 500 Index Fund. The employee must disclose the U.S. Financial Services Fund sector fund.

(g) *Gifts and travel reimbursements.* (1) Each annual financial disclosure report filed pursuant to this subpart must contain a brief description of all gifts and travel reimbursements aggregating more than $375 in value which are received by the filer during the reporting period from any one source, as well as the identity of the source. For travel-related items, the report must include a travel itinerary, the dates, and the nature of expenses provided. Special government employees are not required to report the travel reimbursements received from their non-Federal employers.

(2) *Aggregation exception.* Any gift or travel reimbursement with a fair market value of $150 or less need not be aggregated for purposes of the reporting rules of this section. However, the acceptance of gifts, whether or not reportable, is subject to the restrictions imposed by Executive Order 12674, as modified by Executive Order 12731, and the implementing regulations on standards of ethical conduct.

Note to paragraph (g)(2): The Office of Government Ethics sets these amounts every 3 years using the same disclosure thresholds as those for public financial disclosure filers. In 2014, the reporting threshold was set at $375 and the aggregation threshold was set at $150. The Office of Government Ethics will update this regulation in 2017 and every three years thereafter to reflect the new amount.

(3) *Valuation of gifts and travel reimbursements.* The value to be assigned to a gift or travel reimbursement is its fair market value. For most reimbursements, this will be the amount actually received. For gifts, the value should be determined in one of the following manners:

(i) If the gift is readily available in the market, the value will be its retail price. The filer need not contact the donor, but may contact a retail establishment selling similar items to determine the present cost in the market.

(ii) If the item is not readily available in the market, such as a piece of art, the filer may make a good faith estimate of the value of the item.

(iii) The term ''readily available in the market'' means that an item generally is available for retail purchase.

(4) New entrants, as described in § 2634.903(b), need not report any information on gifts and travel reimbursements.

(5) *Exceptions.* Reports need not contain any information about gifts and travel reimbursements received from relatives (see § 2634.105(o)) or during a period in which the filer was not an officer or employee of the Federal Government. Additionally, any food, lodging, or entertainment received as ''personal hospitality of any individual,'' as defined in § 2634.105(k), need not be reported. See also exclusions specified in the definitions of ''gift'' and ''reimbursement'' at § 2634.105(h) and (n).

Example: A filer accepts a laptop bag, a t-shirt, and a cell phone from a community service organization he has worked with solely in his private capacity. He determines that the value of these gifts is:
Gift 1—Laptop bag: $200
Gift 2—T-shirt: $20
Gift 3—Cell phone: $275

The filer must disclose Gift 1 and Gift 3 because, together, they aggregate more than $375 in value from the same source. He need not aggregate or report Gift 2 because the gift's value does not exceed $150.

(h) *Disclosure rules for spouses and dependent children*—(1) *Noninvestment income.* (i) Each financial disclosure report required by the provisions of this subpart must disclose the source of earned income in excess of $1,000 from any one source, which is received by the filer's spouse during the reporting period. If earned income is derived from a spouse's self-employment in a business or profession, the report must disclose the nature of the business or profession. The filer is not required to report other noninvestment income received by the spouse such as prizes, scholarships, awards, gambling income, or a discharge of indebtedness.

(ii) Each report must disclose the source of any honoraria received by the spouse (or payments made or to be made to charity on the spouse's behalf in lieu of honoraria) in excess of $1,000 from any one source during the reporting period.

Example to paragraph (h)(1): A filer's husband has a seasonal part-time job as a sales clerk at a department store, for which he receives a salary of $1,000 per year, and an honorarium of $1,250 from the state university. The filer need not report her husband's outside earned income because it did not exceed $1,000. She must, however, report the source of the honorarium because it exceeded $1,000.

(2) *Assets and investment income.* Each confidential financial disclosure report must disclose the assets and investment income described in paragraph (c) of this section and held by the spouse or dependent child of the filer.

(3) *Liabilities.* Each confidential financial disclosure report must disclose all information concerning liabilities described in paragraph (d) of this section and owed by a spouse or dependent child.

(4) *Gifts and travel reimbursements.* (i) Each annual confidential financial

disclosure report must disclose gifts and reimbursements described in paragraph (g) of this section and received by a spouse or dependent child which are not received totally independently of their relationship to the filer.

(ii) A filer who is a new entrant as described in § 2634.903(b) is not required to report information regarding gifts and reimbursements received by a spouse or dependent child.

(5) *Divorce and separation.* A filer need not report any information about:

(i) A spouse living separate and apart from the filer with the intention of terminating the marriage or providing for permanent separation;

(ii) A former spouse or a spouse from whom the filer is permanently separated; or

(iii) Any income or obligations of the filer arising from dissolution of the filer's marriage or permanent separation from a spouse.

Example: A filer and her husband are living apart in anticipation of divorcing. The filer need not report any information about her spouse's sole assets and liabilities, but she must continue to report their joint assets and liabilities.

(6) *Unusual circumstances.* In very rare cases, certain interests in property, transactions, and liabilities of a spouse or a dependent child are excluded from reporting requirements, provided that each requirement of this paragraph is strictly met.

(i) The filer must certify without qualification that the item represents the spouse's or dependent child's sole financial interest or responsibility, and that the filer has no knowledge regarding that item;

(ii) The item must not be in any way, past or present, derived from the income, assets or activities of the filer; and

(iii) The filer must not derive, or expect to derive, any financial or economic benefit from the item.

Note to paragraph (h)(6): The exception described in paragraph (6) of this section is not available to most filers. One who prepares or files a joint tax return with a spouse will normally derive a financial or economic benefit from assets held by the spouse, and will also be presumed to have knowledge of such items; therefore one could not avail oneself of this exception after preparing or filing a joint tax return. If the filer and the spouse cohabitate and share household expenses, the filer will be deemed to derive an economic benefit from the item, unless the item is beyond the filer's control.

Example: The spouse of a filer has a managed account with a brokerage firm. The filer knows the account exists but the spouse does not share any information about the holdings and does not want the information disclosed on a financial disclosure statement. The filer must disclose the holdings in the spouse's managed account because the spouse shares in paying expenses (for example, household, vacation, or child related).

(i) *Trusts, estates, and investment funds*—(1) *In general.* (i) Except as otherwise provided in this section, each confidential financial disclosure report must include the information required by this subpart about the holdings of any trust, estate, investment fund or other financial arrangement from which income is received by, or with respect to which a beneficial interest in principal or income is held by, the filer, the filer's spouse, or dependent child.

(ii) Information about the underlying holdings of a trust is required if the filer, filer's spouse, or dependent child currently is entitled to receive income from the trust or is entitled to access the principal of the trust. If a filer, filer's spouse, or dependent child has a beneficial interest in a trust that either will provide income or the ability to access the principal in the future, the filer should determine whether there is a vested interest in the trust under controlling state law. However, no information about the underlying holdings of the trust is required for a nonvested beneficial interest in the principal or income of a trust.

Note to paragraph (i)(1): Nothing in this section requires the reporting of the holdings of a revocable inter vivos trust (also known as a ''living trust'') with respect to which the filer, the filer's spouse or dependent child has only a remainder interest, whether or not vested, provided that the grantor of the trust is neither the filer, the filer's spouse, nor the filer's dependent child. Furthermore, nothing in this section requires the reporting of the holdings of a revocable inter vivos trust from which the filer, the filer's spouse or dependent child receives any discretionary distribution, provided that the grantor of the trust is neither the filer, the filer's spouse, nor the filer's dependent child.

(2) *Qualified trusts and excepted trusts.* (i) A filer should not report information about the holdings of any qualified blind trust (as defined in § 2634.402) or any qualified diversified trust (as defined in § 2634.402).

(ii) In the case of an excepted trust, a filer should indicate the general nature of its holdings, to the extent known, but does not otherwise need to report information about the trust's holdings. For purposes of this part, the term ''excepted trust'' means a trust:

(A) Which was not created directly by the filer, spouse, or dependent child; and

(B) The holdings or sources of income of which the filer, spouse, or dependent child have no specific knowledge through a report, disclosure, or constructive receipt, whether intended or inadvertent.

(3) *Excepted investment funds.* (i) No information is required under paragraph (i)(1) of this section about the underlying holdings of an excepted investment fund as defined in paragraph (i)(3)(ii) of this section, except that the fund itself must be identified as an interest in property and/or a source of income.

(ii) For purposes of financial disclosure reports filed under the provisions of this subpart, an ''excepted investment fund'' means a widely held investment fund (whether a mutual fund, regulated investment company, common trust fund maintained by a bank or similar financial institution, pension or deferred compensation plan, or any other investment fund), if:

(A)*(1)* The fund is publicly traded or available; or

(2) The assets of the fund are widely diversified; and

(B) The filer neither exercises control over nor has the ability to exercise control over the financial interests held by the fund.

(iii) A fund is widely diversified if it does not have a stated policy of concentrating its investments in any industry, business, single country other than the United States, or bonds of a single State within the United States.

Note to paragraph (i)(3): The fact that an investment fund qualifies as an excepted investment fund is not relevant to a determination as to whether the investment qualifies for an exemption to the criminal conflict of interest statute at 18 U.S.C. 208(a), pursuant to part 2640 of this chapter. Some excepted investment funds qualify for exemptions pursuant to part 2640, while other excepted investment funds do not qualify for such exemptions. If an employee holds an excepted investment fund that is not exempt from 18 U.S.C. 208(a), the ethics official may need additional information from the filer to determine if the holdings of the fund create a conflict of interest and should advise the employee to monitor the fund's holdings for potential conflicts of interest.

(j) *Special rules.* (1) Political campaign funds, including campaign receipts and expenditures, need not be included in any report filed under this subpart. However, if the individual has authority to exercise control over the fund's assets for personal use rather than campaign or political purposes, that portion of the fund over which such authority exists must be reported.

(2) With permission of the designated agency ethics official, a filer may attach to the reporting form a copy of a statement which, in a clear and concise fashion, readily discloses all information which the filer would

otherwise have been required to enter on the concerned part of the report form.

(k) For reports of confidential filers described in § 2634.904(a)(3), each supplemental confidential financial disclosure report will include only the supplemental information:

(1) Which is more extensive than that required in the reporting individual's public financial disclosure report under this part; and

(2) Which has been approved by the Office of Government Ethics for collection by the agency concerned, as set forth in supplemental agency regulations and forms, issued under §§ 2634.103 and 2634.601(b) (see § 2634.901(b) and (c)).

§ 2634.908 Reporting periods.

(a) *Incumbents.* Each confidential financial disclosure report filed under § 2634.903(a) must include the information required to be reported under this subpart for the preceding calendar year, or for any portion of that period not covered by a previous confidential or public financial disclosure report filed under this part.

(b) *New entrants.* Each confidential financial disclosure report filed under § 2634.903(b) must include the information required to be reported under this subpart for the following reporting periods:

(1) Noninvestment income for the preceding 12 months;

(2) Assets held on the date of filing. New entrant filers are not required to report assets no longer held at the time of appointment, even if the assets previously produced income before the filers were appointed to their confidential positions;

(3) Liabilities owed on the date of filing;

(4) Positions with non-Federal organizations for the preceding 12 months; and

(5) Agreements and arrangements held on the date of filing.

§ 2634.909 Procedures, penalties, and ethics agreements.

(a) The provisions of subpart F of this part govern the filing procedures and forms for, and the custody and review of, confidential disclosure reports filed under this subpart.

(b) For penalties and remedial action which apply in the event that the reporting individual fails to file, falsifies information, or files late with respect to confidential financial disclosure reports, see subpart G of this part.

(c) Subpart H of this part on ethics agreements applies to both the public and confidential reporting systems under this part.

Subpart J—Certificates of Divestiture

§ 2634.1001 Overview.

(a) *Scope.* 26 U.S.C. 1043 and the rules of this subpart allow an eligible person to defer paying capital gains tax on property sold to comply with conflict of interest requirements. To defer the gains, an eligible person must obtain a Certificate of Divestiture from the Director of the Office of Government Ethics before selling the property. This subpart describes the circumstances when an eligible person may obtain a Certificate of Divestiture and establishes the procedure that the Office of Government Ethics uses to issue Certificates of Divestiture.

(b) *Purpose.* The purpose of section 1043 and this subpart is to minimize the burden that would result from paying capital gains tax on the sale of assets to comply with conflict of interest requirements. Minimizing this burden aids in attracting and retaining highly qualified personnel in the executive branch and ensures the confidence of the public in the integrity of Government officials and decision-making processes.

§ 2634.1002 Role of the Internal Revenue Service.

The Internal Revenue Service (IRS) has jurisdiction over the tax aspects of a divestiture made pursuant to a Certificate of Divestiture. Eligible persons seeking to defer capital gains:

(a) Must follow IRS requirements for reporting dispositions of property and electing under section 1043 not to recognize capital gains; and

(b) Should consult a personal tax advisor or the IRS for guidance on these matters.

§ 2634.1003 Definitions.

For purposes of this subpart:

(a) *Eligible person* means:

(1) Any officer or employee of the executive branch of the Federal Government, except a person who is a special Government employee as defined in 18 U.S.C. 202;

(2) The spouse or any minor or dependent child of the individual referred to in paragraph (1) of this definition; and

(3) Any trustee holding property in a trust in which an individual referred to in paragraph (1) or (2) of this definition has a beneficial interest in principal or income.

(b) *Permitted property* means:

(1) An obligation of the United States; or

(2) *A diversified investment fund.* A diversified investment fund is a diversified mutual fund (including diversified exchange-traded funds) or a diversified unit investment trust, as defined in 5 CFR 2640.102(a), (k) and (u);

(3) Provided, however, a permitted property cannot be any holding prohibited by statute, regulation, rule, or Executive order. As a result, requirements applicable to specific agencies and positions may limit an eligible person's choices of permitted property. An employee seeking a Certificate of Divestiture should consult the appropriate designated agency ethics official to determine whether a statute, regulation, rule, or Executive order may limit choices of permitted property.

§ 2634.1004 General rule.

(a) The Director of the Office of Government Ethics may issue a Certificate of Divestiture for specific property in accordance with the procedures of § 2634.1005 if:

(1) The Director determines that divestiture of the property by an eligible person is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or Executive order; or

(2) A congressional committee requires divestiture as a condition of confirmation.

(b) The Director of the Office of Government Ethics cannot issue a Certificate of Divestiture for property that already has been sold.

Example 1: An employee is directed to divest shares of stock, a limited partnership interest, and foreign currencies. If the sale of these assets will result in capital gains under the Internal Revenue Code, the employee may request and receive a Certificate of Divestiture.

Example 2: An employee of the Department of Commerce is directed to divest his shares of XYZ stock acquired through the exercise of options held in an employee benefit plan. The employee explains that the gain from the sale of the stock will be treated as ordinary income. Because only capital gains realized under Federal tax law are eligible for deferral under section 1043, a Certificate of Divestiture cannot be issued for the sale of the XYZ stock.

Example 3: During her Senate confirmation hearing, a nominee to a Department of Defense (DOD) position is directed to divest stock in a DOD contractor as a condition of her confirmation. Eager to comply with the order to divest, the nominee sells her stock immediately after the hearing and prior to being confirmed by the Senate. Once she is a DOD employee, she requests a Certificate of Divestiture for the stock. Because the Office of Government Ethics cannot issue a Certificate of Divestiture for property that has already been divested, the employee's request for a Certificate of Divestiture must be denied.

§ 2634.1005 How to obtain a Certificate of Divestiture.

(a) *Employee's request to the designated agency ethics official.* An employee seeking a Certificate of Divestiture must submit a written request to the designated agency ethics official at his or her agency. The request must contain:

(1) A full and specific description of the property that will be divested. For example, if the property is corporate stock, the request must include the number of shares for which the eligible person seeks a Certificate of Divestiture;

(2) A brief description of how the eligible person acquired the property;

(3) A statement that the eligible person holding the property has agreed to divest the property; and

(4)(i) The date that the requirement to divest first applied; or

(ii) The date the employee first agreed that the eligible person would divest the property in order to comply with conflict of interest requirements.

(b) *Designated agency ethics official's submission to the Office of Government Ethics.* The designated agency ethics official must forward to the Director of the Office of Government Ethics the employee's written request described in paragraph (a) of this section. In addition, the designated agency ethics official must submit:

(1) A copy of the employee's most recent Incumbent financial disclosure report, or New Entrant report, if an Incumbent report has not been filed, and any subsequent Periodic Transaction reports, as required by this part. If the employee is not required to file a financial disclosure report, the designated agency ethics official must obtain from the employee, and submit to the Office of Government Ethics, a listing of the employee's interests that would be required to be disclosed on a confidential financial disclosure report excluding gifts and travel reimbursements. For purposes of this listing, the reporting period is the preceding 12 months from the date the requirement to divest first applied or the date the employee first agreed that the eligible person would divest the property;

(2) An opinion that describes why divestiture of the property is reasonably necessary to comply with 18 U.S.C. 208, or any other Federal conflict of interest statute, regulation, rule, or Executive order;

(3) If applicable, a statement identifying any factors that, in the opinion of the designated agency ethics official, weigh against the issuance of a certificate of divestiture; and

(4) A brief description of the employee's position or a citation to a statute that sets forth the duties of the position.

(c) *Divestitures required by a congressional committee.* In the case of a divestiture required by a congressional committee as a condition of confirmation, the designated agency ethics official must submit appropriate evidence that the committee requires the divestiture. A transcript of congressional testimony or a written statement from the designated agency ethics official concerning the committee's custom regarding divestiture are examples of evidence of the committee's requirements.

(d) *Divestitures for property held in a trust.* In the case of divestiture of property held in a trust, the employee must submit a copy of the trust instrument, as well as a list of the trust's current holdings, unless the holdings are listed on the employee's most recent financial disclosure report. In certain cases involving divestiture of property held in a trust, the Director may not issue a Certificate of Divestiture unless the parties take actions which, in the opinion of the Director, are appropriate to exclude, to the extent practicable, parties other than eligible persons from benefitting from the deferral of capital gains. Such actions may include, as permitted by applicable State law, division of the trust into separate portfolios, special distributions, dissolution of the trust, or anything else deemed feasible by the Director, in his or her sole discretion.

Example: An employee has a 90% beneficial interest in an irrevocable trust created by his grandfather. His four adult children have the remaining 10% beneficial interest in the trust. A number of the assets held in the trust must be sold to comply with conflicts of interest requirements. Due to State law, no action can be taken to separate the trust assets. Because the adult children have a small interest in the trust and the assets cannot be separated, the Director may consider issuing a Certificate of Divestiture to the trustee for the sale of all of the conflicting assets.

(e) *Time requirements.* A request for a Certificate of Divestiture does not extend the time in which an employee otherwise must divest property required to be divested pursuant to an ethics agreement, or prohibited by statute, regulation, rule, or Executive order. Therefore, an employee must submit his or her request for a Certificate of Divestiture as soon as possible once the requirement to divest becomes applicable. The Office of Government Ethics will consider requests submitted beyond the applicable time period for divestiture. If the designated agency ethics official submits a request to the Office of Government Ethics beyond the applicable time period for divestiture, he must explain the reason for the delay. See §§ 2634.802 and 2635.403 for rules relating to the time requirements for divestiture.

(f) *Response by the Office of Government Ethics.* After reviewing the materials submitted by the employee and the designated agency ethics official, and making a determination that all requirements have been met, the Director will issue a Certificate of Divestiture. The certificate will be sent to the designated agency ethics official who will then forward it to the employee.

§ 2634.1006 Rollover into permitted property.

(a) *Reinvestment of proceeds.* In order to qualify for deferral of capital gains, an eligible person must reinvest the proceeds from the sale of the property divested pursuant to a Certificate of Divestiture into permitted property during the 60-day period beginning on the date of the sale. The proceeds may be reinvested into one or more types of permitted property.

Example 1: A recently hired employee of the Department of Transportation receives a Certificate of Divestiture for the sale of a large block of stock in an airline. He may split the proceeds of the sale and reinvest them in an S&P Index Fund, a diversified Growth Stock Fund, and U.S. Treasury bonds.

Example 2: The Secretary of Treasury sells certain stock after receiving a Certificate of Divestiture and is considering reinvesting the proceeds from the sale into U.S. Treasury securities. However, because the Secretary of the Treasury is prohibited by 31 U.S.C. 329 from being involved in buying obligations of the United States Government, the Secretary cannot reinvest the proceeds in such securities. However, she may invest the proceeds in a diversified mutual fund. See the definition of *permitted property* at § 2634.1003(b).

(b) *Internal Revenue Service reporting requirements.* An eligible person who elects to defer the recognition of capital gains from the sale of property pursuant to a Certificate of Divestiture must follow Internal Revenue Service rules for reporting the sale of the property and the reinvestment transaction.

§ 2634.1007 Cases in which Certificates of Divestiture will not be issued.

The Director of the Office of Government Ethics, in his or her sole discretion, may deny a request for a Certificate of Divestiture in cases where an unfair or unintended benefit would result. Examples of such cases include:

(a) *Employee benefit plans.* The Director will not issue a Certificate of

Divestiture if the property is held in a pension, profit-sharing, stock bonus, or other employee benefit plan and can otherwise be rolled over into an eligible tax-deferred retirement plan within the 60-day reinvestment period.

(b) *Tax-Deferred and Tax-Advantaged Accounts.* The Director will not issue a Certificate of Divestiture if the property is held in an Individual Retirement Account, college savings plan (529 plan), or other tax-deferred or tax-advantaged account (*e.g.,* 401(k), 403(b), 457 plans, etc.), which allow the account holder to exchange the property for permissible property without incurring a capital gain.

(c) *Complete divestiture.* The Director will not issue a Certificate of Divestiture unless the employee agrees to divest all of the property that presents a conflict of interest, as well as other similar or related property that presents a conflict of interest under a Federal conflict of interest statute, regulation, rule, or Executive order. However, any property that qualifies for a regulatory exemption at part 2640 of this chapter need not be divested for a Certificate of Divestiture to be issued.

Example: A Department of Agriculture employee owns shares of stock in Better Workspace, Inc. valued at $25,000. As part of his official duties, the employee is assigned to evaluate bids for a contract to renovate office space at his agency. The Department's designated agency ethics official discovers that Better Workspace is one of the companies that has submitted a bid and directs the employee to sell his stock in the company. Because Better Workspace is a publicly traded security, the employee could retain up to $15,000 of the stock under the regulatory exemption for interests in securities at § 2640.202(a) of this chapter. He would be able to request a Certificate of Divestiture for the $10,000 of Better Workspace stock that is not covered by the exemption. Alternatively, he could request a Certificate of Divestiture for the entire $25,000 worth of stock. If he chooses to sell his stock down to an amount permitted under the regulatory exemption, the Office of Government Ethics will not issue additional Certificates of Divestiture if the value of the stock goes above $15,000 again.

(d) *Property acquired under improper circumstances.* The Director will not issue a Certificate of Divestiture:

(1) If the eligible person acquired the property at a time when its acquisition was prohibited by statute, regulation, rule, or Executive order; or

(2) If circumstances would otherwise create the appearance of a conflict with the conscientious performance of Government responsibilities.

§ 2634.1008 Public access to a Certificate of Divestiture.

A Certificate of Divestiture issued pursuant to the provisions of this subpart is available to the public in accordance with the rules of § 2634.603.

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Part III

Securities and Exchange Commission

17 CFR Part 240
Amendment to Securities Transaction Settlement Cycle; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34–78962; File No. S7–22–16]

RIN 3235–AL86

Amendment to Securities Transaction Settlement Cycle

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') proposes to amend Rule 15c6–1(a) under the Securities Exchange Act of 1934 (''Exchange Act'') to shorten the standard settlement cycle for most broker-dealer transactions from three business days after the trade date (''T+3'') to two business days after the trade date (''T+2''). The proposed amendment is designed to reduce a number of risks, including credit risk, market risk, and liquidity risk and, as a result, reduce systemic risk for U.S. market participants.

DATES: Submit comments on or before December 5, 2016.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number [-] on the subject line; or
- Use the Federal eRulemaking Portal (*http://www.regulations.gov*). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090. All submissions should refer to File Number [-].

To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/proposed.shtml*).

Comments are available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any such materials will be made available on the Commission's Web site. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Jeffrey Mooney, Assistant Director, Susan Petersen, Special Counsel, Andrew Shanbrom, Special Counsel, Office of Clearance and Settlement; Justin Pica, Senior Policy Advisor, Office of Market Supervision; Natasha Vij Greiner, Assistant Chief Counsel, Jonathan Shapiro, Special Counsel, Office of Chief Counsel; at 202–551–5550, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

SUPPLEMENTARY INFORMATION: The Commission is proposing an amendment to Rule 15c6–1 of the Exchange Act under the Commission's rulemaking authority set forth in Sections 15(c)(6), 17A and 23(a) of the Exchange Act (15 U.S.C. 78o(c)(6), 78q–1, and 78w(a) respectively).

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I. Introduction

The Commission originally adopted Exchange Act Rule 15c6–1 in 1993 to establish T+3 as the standard settlement cycle for broker-dealer transactions, and in so doing, effectively shortened the settlement cycle for most securities transactions (with certain exceptions), which at the time was generally five business days after the trade date

(''T+5'').[1] The Commission cited a number of reasons for standardizing and shortening the settlement cycle, which included, among others, reducing credit and market risk exposure related to unsettled trades, reducing liquidity risk among derivatives and cash markets, encouraging greater efficiency in the clearance and settlement process, and reducing systemic risk for the U.S. markets.[2]

The Commission now proposes to amend Exchange Act Rule 15c6–1(a) to further shorten the standard settlement cycle from T+3 to T+2. As discussed in greater detail below, the Commission preliminarily believes that there are a number of reasons supporting shortening the standard settlement cycle to T+2 at this time. As an initial matter, the Commission believes that shortening the standard settlement cycle will result in a further reduction of credit, market, and liquidity risk,[3] and as a result a reduction in systemic risk for U.S. market participants.

Since the Commission adopted Rule 15c6–1 in 1993, the financial markets have expanded and evolved significantly.[4] During this period, the Commission has continued to focus on further mitigating and managing risks in the clearance and settlement process, and how those risks relate to managing systemic risk.[5] The Commission also notes that shortening the standard settlement cycle at this time is consistent with the broader focus by the Commission on enhancing the resilience and efficiency of the national clearance and settlement system and the role that certain systemically important financial market utilities (''FMUs''),[6] particularly central counterparties (''CCPs''), play in concentrating and managing risk.[7] In light of this ongoing focus on further mitigating and managing risks in the clearance and settlement process, the Commission preliminarily believes that a transition to a T+2 settlement cycle would yield important benefits for market participants and the national clearance and settlement system.

The Commission preliminarily has considered the costs and benefits attendant to shortening the standard settlement cycle to T+2 and believes that the proposed amendment to Rule 15c6–1(a) will yield benefits that justify the associated costs. The Commission also preliminarily believes that the case for further shortening the standard settlement cycle at this time is supported by certain progress and efficiencies already achieved by market participants since the Commission's adoption of Rule 15c6–1 in 1993, including significant technological developments. The Commission, however, is sensitive to the effects this proposal could have on a wide range of market participants. Accordingly, in addition to specific requests for comment, the Commission seeks generally input on the economic effects associated with shortening the standard settlement cycle to T+2, including any costs, benefits or burdens, and any effects on efficiency, competition and capital formation.

II. Background

Rule 15c6–1(a) of the Exchange Act prohibits broker-dealers from effecting or entering into a contract for the purchase or sale of a security (other than certain exempted securities)[8] that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.[9] Subject to the exceptions enumerated in the rule, the prohibition in paragraph (a) of Rule 15c6–1 applies to all securities. The definition of the term ''security'' in Section 3(a)(10) of the Exchange Act covers, among others, equities, corporate bonds, unit investment trusts (''UITs''), mutual funds, exchange-traded funds (''ETFs''), American depositary receipts (''ADRs''), security-based swaps, and options.[10] Many of

[1] Securities Transactions Settlement, Exchange Act Release No. 33023 (Oct. 6, 1993), 58 FR 52891, 52893 (Oct. 13, 1993) (''T+3 Adopting Release''). Rule 15c6–1 of the Exchange Act prohibits broker-dealers from effecting or entering into a contract for the purchase or sale of a security (other than an exempted security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the third business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction. 17 CFR 240.15c6–1.

[2] T+3 Adopting Release, 58 FR at 52893.

[3] Credit risk refers to the risk that the credit quality of one party to a transaction will deteriorate to the extent that it is unable to fulfill its obligations to its counterparty on settlement date. Market risk refers to the risk that the value of securities bought and sold will change between trade execution and settlement such that the completion of the trade would result in a financial loss. Securities Transactions Settlement, Exchange Act Release No. 31904 (Feb. 23, 1993), 58 FR 11806, 11809 nn.26–27 (Mar. 1, 1993) (''T+3 Proposing Release''). Liquidity risk describes the risk that an entity will be unable to meet financial obligations on time due to an inability to deliver funds or securities in the form required though it may possess sufficient financial resources in other forms. *See* Standards for Covered Clearing Agencies, Exchange Act Release No. 71699 (Mar. 12, 2014), 79 FR 29508, 29531 (May 22, 2014) (''CCA Proposal'').

[4] *See generally* Concept Release on Equity Market Structure, Exchange Act Release No. 61358 (Jan. 14, 2010), 75 FR 3594 (Jan. 21, 2010).

[5] *See generally* Clearing Agency Standards, Exchange Act Release No. 68080 (Oct. 22, 2012), 77 FR 66220, 66221–22 (Nov. 2, 2012) (''Clearing Agency Standards Adopting Release''); CCA Proposal, 79 FR 29508.

[6] Section 803(6)(A) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') enacted by Title VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (''Dodd-Frank Act''), 12 U.S.C. 5301, et seq., defines ''financial market utility'' or ''FMU'' as any person that manages or operates a multilateral system for the purpose of transferring, clearing, or settling payments, securities, or other financial transactions among financial institutions or between financial institutions and the person. 12 U.S.C. 5462(6)(A). Section 803(6)(B)(i) of the Clearing Supervision Act generally excludes certain persons from the definition of FMU including designated contract markets, registered futures associations, swap or security-based swap data repositories, swap execution facilities, national securities exchanges, and alternative trading systems. 12 U.S.C. 5462(6)(B)(i). The term FMU includes not only U.S. registered clearing agencies but also other types of entities that are not U.S. registered clearing agencies.

[7] *See* Clearing Agency Standards Adopting Release, 77 FR at 66221–22.

[8] Rule 15c6–1(a) does not apply to a contract for an exempted security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills. 17 CFR 240.15c6–1(a). The rule also provides an additional exemption for: (i) Transactions in limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association; (ii) contracts for the purchase and sale of securities that the Commission may from time to time, taking into account then existing market practices, exempt by order; and (iii) contracts for the sale of cash securities that priced after 4:30 p.m. (Eastern Standard Time) that are sold by an issuer to an underwriter pursuant to a firm commitment offering registered under the Securities Act of 1933 (''Securities Act'') or the sale to an initial purchaser by a broker-dealer participating in such offering. 17 CFR 240.15c6–1(b) and (c).

Additionally, as discussed further in the T+3 Adopting Release, the Commission determined not to include transactions in municipal securities within the scope of Rule 15c6–1, with the expectation that the Municipal Securities Rulemaking Board (''MSRB'') would take the lead in implementing three-day settlement of municipal securities by the implementation date of the new rule. The Commission requested a report from the MSRB within six months of the Commission's adoption of Rule 15c6–1 outlining the schedule in which the MSRB intended to implement T+3 in the municipal securities market. T+3 Adopting Release, 58 FR at 52899. MSRB rules that established T+3 as the standard settlement cycle for transactions in municipal securities became operative on June 7, 1995, the same date as Exchange Act Rule 15c6–1. *See* Order Approving MSRB Proposed Rule Change Establishing Three Business Day Settlement Time Frame, Exchange Act Release No. 35427 (Feb. 28, 1995), 60 FR 12798 (Mar. 8, 1995).

[9] Although current Rule 15c6–1 establishes a settlement timeframe of no more than three business days after the trade date, certain types of transactions routinely settle on a settlement cycle shorter than T+3, which is permissible under the rule. *See, e.g.,* note 11 *infra.*

[10] 15 U.S.C. 78c(a)(10). Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010), amended, among other things, the definition of ''security'' under the Exchange Act to encompass security-based swaps. In July 2011, the Commission granted temporary exemptive relief from compliance with certain provisions of the Exchange Act (including Rule 15c6–1) in connection with the revision of the Exchange Act definition of

Continued

these securities (*e.g.,* options, and certain mutual funds) generally settle on a settlement cycle less than T+3 and therefore will not be impacted by the Commission's current proposal to shorten the standard settlement cycle to T+2. Accordingly, the discussion in this release is primarily focused on securities that currently settle on a T+3 standard settlement cycle.[11] However, the Commission seeks comment on whether and the extent to which other securities, as defined in Section 3(a)(10) of the Exchange Act, will be affected by the amendment to Rule 15c6–1(a), as proposed.

A. Overview of the Clearance and Settlement of Securities Transactions

''Clearance and settlement'' refers generally to the activities that occur following the execution of a trade. These post-trade processes are critical to ensuring that a buyer receives securities and a seller receives proceeds in accordance with the agreed-upon terms by the settlement date. The discussion that follows provides a basic description of the clearance and settlement of securities transactions, and is organized in the following manner: (1) An overview of the statutory framework and goals driving the national clearance and settlement system; (2) an introduction to securities clearing agencies and other key market participants in the clearance and settlement process; (3) an overview of the trade settlement process for the U.S. securities markets; (4) a discussion of how the length of the settlement cycle may impact the presence of credit, market, liquidity and systemic risk in the clearance and settlement process; and (5) an overview of ongoing efforts by market participants to shorten the standard settlement cycle.

1. Statutory Framework

The national clearance and settlement system in place today is largely a product of the difficulties experienced in the U.S. securities markets in the late 1960s and early 1970s. As trading volumes increased during that time period, the manual process associated with transferring certificated securities among market participants in a relatively uncoordinated fashion created what came to be known as the ''Paperwork Crisis.'' The Paperwork Crisis nearly brought the securities industry to a standstill and directly or indirectly caused the failure of a large number of broker-dealers.[12] The breakdown in the handling of paper associated with the clearance and settlement of securities transactions threatened to curtail the flow of debt and equity instruments available for public investment and jeopardized the continued operation of the securities markets.[13]

In light of the experiences of the Paperwork Crisis, and with the objectives of improving the operation of the U.S. clearance and settlement system and protecting investors,[14] Congress amended the Exchange Act in 1975 to, among other things, (i) direct the Commission to facilitate the establishment of a national system for the prompt and accurate clearance and settlement of transactions in securities, and (ii) provide the Commission with the authority to regulate those entities critical to the clearance and settlement process.[15] At the same time, Congress empowered the Commission with direct rulemaking authority over broker or dealer activity in making settlements, payments, transfers, and deliveries of securities.[16] Taken together, these provisions provide the Commission with the authority to regulate entities that are critical to the national clearance and settlement system.[17]

Congress reaffirmed its view of the importance of a strong clearance and settlement system in 2010 with the enactment of the Clearing Supervision Act.[18] Specifically, Congress found that the ''proper functioning of the financial markets is dependent upon safe and efficient arrangements for the clearing and settlement of payments, securities, and other financial transactions.'' [19] Under the Clearing Supervision Act, registered clearing agencies providing CCP and central securities depository (''CSD'') services are FMUs.[20] FMUs centralize clearance and settlement activities and enable market participants to reduce costs, increase operational efficiency, and manage risks more effectively. While an FMU can provide many risk management benefits to participants, the concentration of clearance and settlement activity at an FMU has the potential to disrupt the securities markets if the FMU does not effectively manage the risks in its clearance and settlement activities.[21] To address those risks, the Commission has used its authority under the Exchange Act, as supplemented by the authority set forth under the Clearing Supervision Act, to help ensure that the FMUs under its supervision are subject to robust regulatory requirements.[22]

''security'' to encompass security-based swaps. *See* Order Granting Temporary Exemptions Under the Securities Exchange Act of 1934 In Connection With the Pending Revision of the Definition of ''Security'' To Encompass Security-Based Swaps, Exchange Act Release No. 64795 (July 1, 2011), 76 FR 39927 (July 7, 2011). Certain of the exemptions (including the exemption for Rule 15c6–1) are set to expire on February 5, 2017. *See* Order Extending Temporary Exemptions Under the Securities Exchange Act of 1934 In Connection With the Revision of the Definition of ''Security'' To Encompass Security-Based Swaps, Exchange Act Release No. 71485 (Feb. 5, 2014), 79 FR 7731 (Feb. 10, 2014).

[11] In today's environment, ETFs and certain closed-end funds clear and settle on a T+3 basis. Open-end funds (*i.e.,* mutual funds) generally settle on a T+1 basis, except for certain retail funds which typically settle on T+3. Thus, the proposed amendment to Rule 15c6–1(a) would require ETFs, closed-end funds, and mutual funds settling on a T+3 basis to revise their settlement timeframes. *See infra* notes 213 and 214, regarding ETF secondary market trading, including creation or redemption transactions for authorized participants.

[12] *See* U.S. Securities and Exchange Commission, Study of Unsafe and Unsound Practices of Brokers and Dealers, H.R. Doc. No. 92–231 (1971); *see also* Securities Transactions Settlement, Exchange Act Release No. 49405 (Mar. 11, 2004), 69 FR 12922 (Mar. 18, 2004); *see also* S. Rep. No. 94–75, at 4–5 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 183.

[13] *Id.*

[14] *See* 15 U.S.C. 78q–1(a)(1)(A)–(D), which lays out the Congressional findings for Section 17A of the Exchange Act. In particular, Congress found that inefficient clearance and settlement procedures imposed unnecessary costs on investors and those acting on their behalf and that new data processing and communications techniques create the opportunity for more efficient, effective, and safe procedures for clearance and settlement.

[15] 15 U.S.C. 78q–1(a)(2)(A); *see also* S. Rep. No. 94–75, *supra* note 12, at 53. Congress provided the Commission with the authority and responsibility to regulate, coordinate, and direct the operations of all persons involved in processing securities transactions, toward the goal of a national system for the prompt and accurate clearance and settlement of securities transactions. *Id.* at 55.

[16] S. Rep. No. 94–75, at 111. Specifically, Section 15(c)(6) of the Exchange Act prohibits broker-dealers from engaging in or inducing securities transactions in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest and for the protection of investors or to perfect or remove impediments to a national system for the prompt and accurate clearance and settlement of securities transactions, with respect to the time and method of, and the form and format of documents used in connection with, making settlements of and payments for transactions in securities, making transfers and deliveries of securities, and closing accounts. 15 U.S.C. 78o(c)(6).

[17] *See* 15 U.S.C. 78q–1(b)–(c); 15 U.S.C. 78o(c).

[18] *See* 12 U.S.C. 5301, et seq.

[19] 12 U.S.C. 5461(a)(1).

[20] *See supra* note 6.

[21] *See* CCA Proposal, 79 FR at 29587; *see also* Risk Management Supervision of Designated Clearing Agencies, Joint Report to Senate Committees on Banking, Housing, and Urban Affairs and Agriculture, Nutrition, and Forestry, and the House Committees on Financial Services and Agriculture, from the Board of Governors of the Federal Reserve System, Securities and Exchange Commission, and Commodity Futures Trading Commission (July 2011), *https://www.federalreserve.gov/publications/other-reports/files/risk-management-supervision-report-201107.pdf.*

[22] *See, e.g.,* Clearing Agency Standards Adopting Release, *supra* note 5. In addition, on July 18, 2012, the Financial Stability Oversight Council designated as systemically important the following then-registered clearing agencies: Chicago Mercantile Exchange, Inc. (''CME''); The Depository Trust Company (''DTC''); Fixed Income Clearing Corporation (''FICC''); ICE Clear Credit LLC (''ICC'');

2. Participating Entities

a. FMUs—CCPs and CSDs

Clearance and settlement activities in securities markets are supported by an infrastructure that is comprised of entities that perform a variety of different functions. These functions for the U.S. securities markets are performed in most instances by FMUs that are registered clearing agency [23] subsidiaries of The Depository Trust & Clearing Corporation (''DTCC''): NSCC and DTC.

(1) CCPs

A CCP, following trade execution, interposes itself between the counterparties to a trade, becoming the buyer to each seller and seller to each buyer to ensure the performance of open contracts. One critical function of a CCP is to eliminate bilateral credit risk between individual buyers and sellers.

NSCC is the CCP [24] for trades between broker-dealers involving equity securities, corporate and municipal debt, and UITs in the U.S.[25] NSCC facilitates the management of risk among broker-dealers using a number of tools, which include: (1) Novating and guaranteeing trades to assume the credit risk of the original counterparties; (2) collecting clearing fund contributions from members to help ensure that NSCC has sufficient financial resources in the event that one of the counterparties defaults on its obligations; and (3) netting to reduce NSCC's overall exposure to its counterparties.

In novation, when a CCP member presents a contract to the CCP for clearing, the original contract between the buyer and seller is discharged and two new contracts are created, one between the CCP and the buyer and the other between the CCP and the seller. The CCP thereby assumes the original parties' contractual obligations to each other. NSCC attaches its trade guaranty [26] to novated transactions at midnight on T+1.[27] Through novation and the trade guaranty, the two original trading counterparties to the transaction replace their bilateral credit, market and liquidity risk exposure to each other with risk exposure to NSCC.

NSCC collects clearing fund deposits from its members to maintain sufficient financial resources in the event a member or members default on their obligations to NSCC.[28] NSCC's rules also allow NSCC to adjust and collect additional clearing fund deposits as needed to cover the risks present while a member's trades are unsettled. Each member's required clearing fund deposit is calculated at least once daily pursuant to a formula set forth in NSCC's rules,[29] and is designed to provide sufficient funds to cover NSCC's exposure to the member.[30]

Figure 1 below shows NSCC's clearing fund deposits by quarter. As illustrated in Figure 1, the total amount that NSCC collects to mitigate the risks associated with member defaults has varied from roughly $3 to $6.5 billion for the years 2010 through 2015.[31] The majority of these deposits are held in cash, while a much smaller portion is held in highly liquid securities such as U.S. treasury securities.

National Securities Clearing Corporation (''NSCC''); The Options Clearing Corporation (''OCC''). *See* Press Release, U.S. Department of the Treasury, Financial Stability Oversight Council Makes First Designations in Effort to Protect Against Future Financial Crises (July 18, 2012), *https://www.treasury.gov/press-center/press-releases/Pages/tg1645.aspx.* As such, these clearing agencies are also subject to the Clearing Supervision Act. In addition to its authority to regulate clearing agencies, pursuant to Section 17A of the Exchange Act, the Commission is also the supervisory agency, as that term is defined in Section 803(8) of the Clearing Supervision Act, for DTC, FICC, NSCC, and OCC. The CFTC is the supervisory agency for CME and ICE, and the Federal Reserve Bank of New York oversees DTC's banking and trust company activities. The Commission jointly regulates ICC and OCC with the CFTC.

[23] Section 17A(b) of the Exchange Act requires any clearing agency performing the functions of a clearing agency with respect to any security (other than an exempted security) to be registered with the Commission, unless the Commission has exempted such entity from the registration requirements. 15 U.S.C. 78q–1(b)(1). The term ''clearing agency'' is defined broadly to include any person who: (1) Acts as an intermediary in making payments or deliveries or both in connection with transactions in securities; (2) provides facilities for comparison of data respecting the terms of settlement of securities transactions, to reduce the number of settlements of securities transactions, or for the allocation of securities settlement responsibilities; (3) acts as a custodian of securities in connection with a system for the central handling of securities whereby all securities of a particular class or series of any issuer deposited within the system are treated as fungible and may be transferred, loaned, or pledged by bookkeeping entry, without physical delivery of securities certificates (such as a securities depository); or (4) otherwise permits or facilitates the settlement of securities transactions or the hypothecation or lending of securities without physical delivery of securities certificates (such as a securities depository). A clearing agency may provide, among other things, CCP services and CSD services. *See* 15 U.S.C. 78c(a)(23).

[24] In addition to providing CCP services, NSCC provides a number of other non-CCP services to market participants, including, for example, services that support mutual funds, alternative investments and insurance products.

[25] Certain SRO rules (*e.g.,* Financial Industry Regulatory Authority (''FINRA'') Rule 6350B(b) and FINRA Rule 6274(b)) authorize broker-dealer members to settle transactions outside of the facilities of a registered clearing agency, or ''ex-clearing,'' if both parties agree.

[26] Pursuant to Rule 11 and Addendum K to NSCC's Rules and Procedures, NSCC guarantees the completion of CNS settling trades (''NSCC trade guaranty'') that have reached the later of midnight of T+1 or midnight of the day they are reported to NSCC's members. NSCC also guarantees the completion of shortened process trades, such as same-day and next-day settling trades, upon comparison or trade recording processing. *See* NSCC Rules and Procedures, Rule 11, Section 1(c) and Addendum K (as of July 14, 2016) (''NSCC Rules and Procedures''), *www.dtcc.com/legal/rule-and-procedures.*

[27] NSCC has stated that it is currently in the process of seeking regulatory approval to move its trade guaranty forward to the point of trade validation (for locked-in trades) and comparison (for trades compared through NSCC). This initiative is referred to as the ''Accelerated Trade Guaranty'' or ''ATG.'' *See* NSCC, Disclosures under the Principles for Financial Market Infrastructures, at 17 n.11 (Dec. 2015) (''NSCC PFMI Disclosure Framework''), *http://www.dtcc.com/legal/policy-and-compliance.*

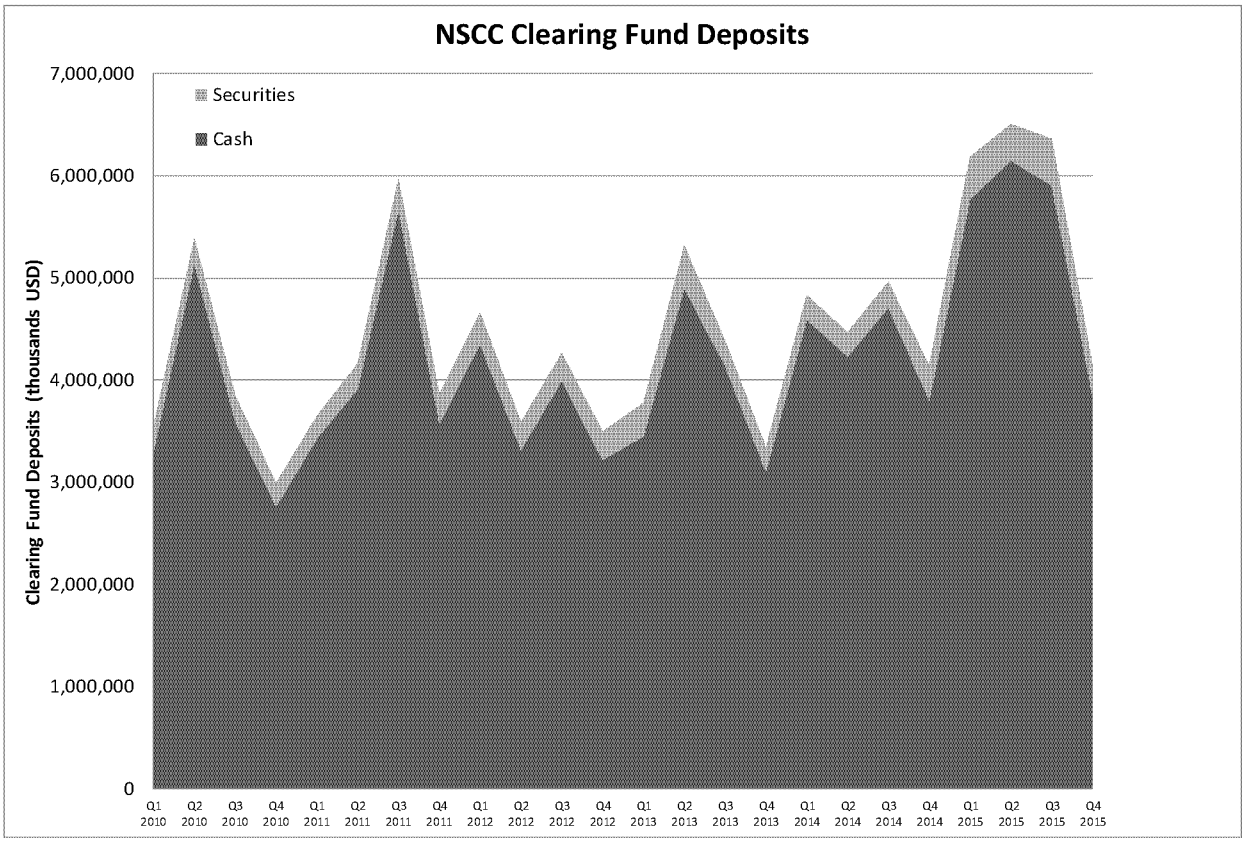
[28] NSCC's clearing fund is comprised of cash, securities, and letters of credit posted by NSCC members to provide NSCC the necessary resources to cover member defaults. The amount and timing of contributions to the clearing fund are determined pursuant to NSCC's rules. *See* NSCC Rules and Procedures, Rules 1 and 4.

[29] *See* NSCC Rules and Procedures, Rule 4 and Procedure XV.

[30] Commission Rules 17Ad–22(b)(1) through (4) require a registered clearing agency that performs CCP services to establish, implement, and maintain policies and procedures reasonably designed to do the following: (1) Measure its credit exposures at least once a day, and use margin requirements to limit its exposures to potential losses from defaults by its participants; (2) use risk-based models and parameters to set margin requirements and to review such requirements at least monthly; (3) maintain sufficient financial resources to withstand a default by the two participant families, if clearing security-based swaps, or one participant family otherwise, to which it has the largest exposure; and (4) provide for an annual model validation process. 17 CFR 240.17Ad 22(b)(1)–(4).

[31] *See* NSCC Quarterly Financial Statements, *http://www.dtcc.com/legal/financial-statements?subsidiary=NSCC&pgs=1.*

Fig 1: Clearing Fund Size



As mentioned above, NSCC also reduces its risk exposure as a CCP through netting. Netting reduces risk in the settlement process by reducing the overall amount of obligations that must be settled. The reduction in the overall amount of unsettled obligations translates into relatively fewer and smaller settlement payments, thereby reducing the cost to trade. Netting also lessens the risk by reducing the number of outstanding unsettled transactions linking market participants, thereby reducing the likelihood that a settlement failure by one market participant will trigger a chain reaction of additional defaults by other market participants. Through the use of NSCC's netting and accounting system, the Continuous Net Settlement System (''CNS''), NSCC nets trades and payments among its participants, reducing the value of securities and payments that need to be exchanged by an average of 97% each day.[32] NSCC accepts trades into CNS [33] for clearing from the nation's major exchanges and other trading venues and uses CNS to net each NSCC member's trades in each security traded that day to a single receive or deliver position for the securities.[34] Throughout the day, cash debit and credit data generated by NSCC's members' activities are recorded, and at the end of the processing day, the debits and credits are netted to produce one aggregate cash debit or credit for each member.[35]

When one of the counterparties does not fulfill its settlement obligations by delivering the required securities, a ''failure to deliver'' occurs in CNS. Failures to deliver may be caused by the NSCC member's failure to receive securities from a customer or counterparty to a previous transaction.[36] For illustration purposes, Figure 2 shows a recent seven-year period of time, in this case, October 23, 2008, through October 23, 2015, with the outstanding failures to deliver as a percentage of the overall shares outstanding for the securities which NSCC clears.[37]

[32] *See* NSCC PFMI Disclosure Framework, *supra* note 27, at 8.

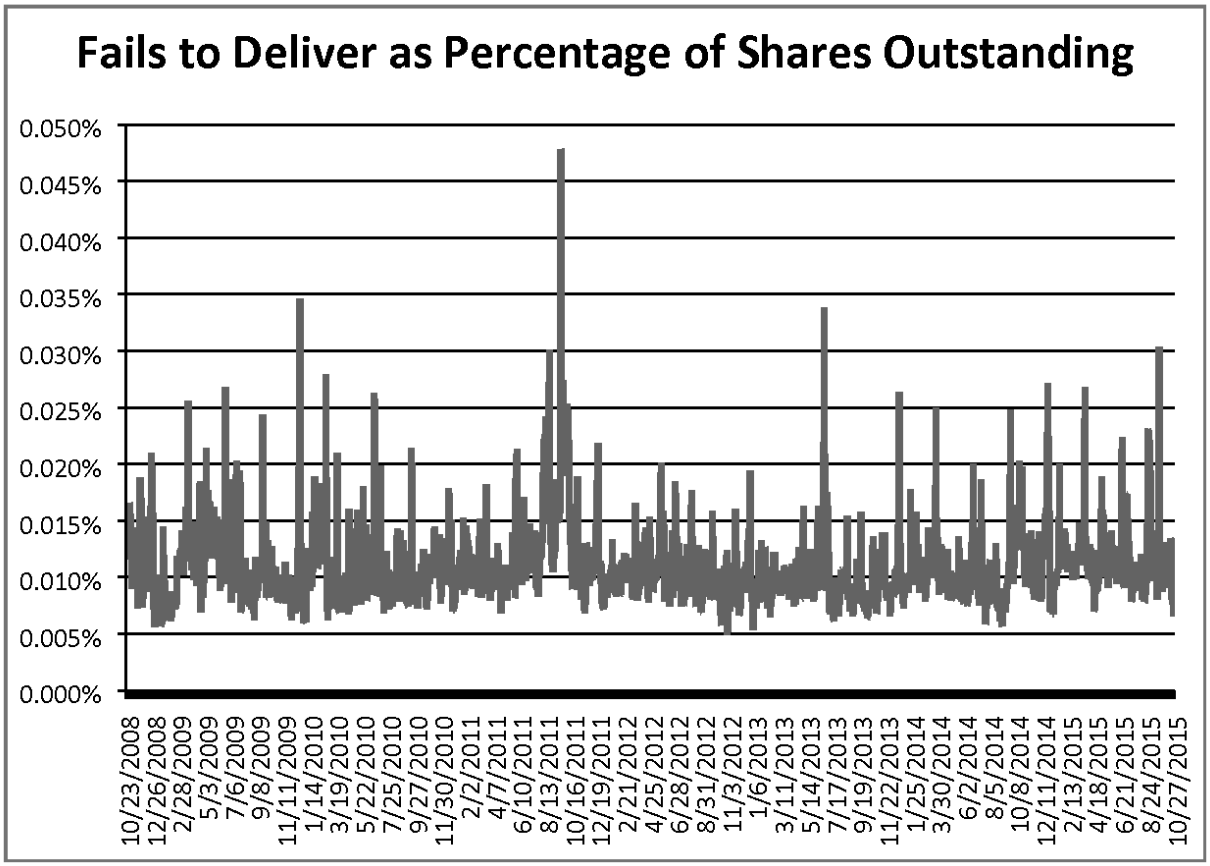
[33] NSCC accepts CNS-eligible securities. To be CNS-eligible, a security must be eligible for book-entry transfer on the books of DTC, and must be capable of being processed in the CNS system. For example, securities may be ineligible for CNS processing due to certain transfer restrictions (*e.g.,* 144A securities) or due to the pendency of certain corporate actions. *See* Rule 1 of NSCC's rules for the definition of CNS-eligible securities, and Rule 3 of NSCC's rules for a list of CNS-eligible securities. NSCC Rules and Procedures, Rules 1 and 3.

[34] In CNS, compared and recorded transactions in CNS-eligible securities that are scheduled to settle on a common settlement date are netted by specific security issue into one net long (*i.e.,* buy) or net short (*i.e.,* sell) position. CNS then nets those positions further with positions of the same specific security issue that remain open after their originally scheduled settlement date, which are generally referred to as ''Fail Positions.'' The result of the netting process is a single deliver or receive obligation for each NSCC member for each specific security issue in which the member has activity on a given day. *See* NSCC Rules and Procedures, Rule 11 and Procedure VII and X.

[35] *See* NSCC PFMI Disclosure Framework, *supra* note 27, at 9.

[36] For more information on NSCC ''failures to deliver,'' *see generally* Office of Investor Education and Advocacy, U.S. Securities and Exchange Commission, Key Points About Regulation SHO (Apr. 8, 2015), *https://www.sec.gov/investor/pubs/regsho.htm.*

[37] NSCC failure-to-deliver data is publicly available on the Commission's Web site at *https://www.sec.gov/foia/docs/failsdata.htm.*



While NSCC provides final settlement instructions to its members each day, the payment for and transfer of securities ownership occurs at DTC. At the conclusion of each trading day, CNS short positions (*i.e.,* obligations to deliver) at NSCC are compared against the long positions held in the NSCC members' DTC accounts to determine security availability.[38] If securities are available, they are transferred from the NSCC member's account at DTC to NSCC's account at DTC, to cover the NSCC member's CNS short positions. CNS long positions (*i.e.,* the right to receive securities owed to the participant) are transferred from the NSCC account at DTC to the accounts of NSCC members at DTC. On settlement date, NSCC submits instructions to DTC to deliver (*i.e.,* transfer) securities positions for each security netted though CNS for each NSCC member holding a long position in such securities. Cash obligations are settled through DTC by one net payment for each NSCC member at the end of the settlement day.

(2) CSDs

A CSD is an entity that holds securities for its participants either in certificated or uncertificated (dematerialized) form so that ownership can be easily transferred through a book entry (rather than the transfer of physical certificates) and provides central safekeeping and other asset services. Additionally, a CSD may operate a securities settlement system, which is a set of arrangements that enables transfers of securities, either for payment or free of payment, and facilitates the payment process associated with such transfers. DTC serves as the CSD and settlement system for most equity securities and a significant number of debt securities held by U.S. market participants.

In its capacity as a CSD, DTC provides custody and book-entry transfer services for the vast majority of securities transactions in the U.S. market involving equities, corporate and municipal debt, money market instruments, ADRs, and ETFs. In accordance with its rules, DTC accepts deposits of securities from its participants[39] (*i.e.,* mostly broker-dealers and banks), credits those securities to the depositing participants' accounts, and effects book-entry transfer of those securities. The securities deposited with DTC are registered in DTC's nominee name and are held in fungible bulk for the benefit of its participants and their customers. Each participant having an interest in the securities of a given issuer credited to its account has a pro rata interest in the securities of that issuer held by DTC. By immobilizing securities (*e.g.,* holding and transferring ownership of securities positions in book-entry form, with DTC's nominee reflected as the registered owner on the issuer's records) and centralizing and automating securities settlements, DTC substantially reduces the number of physical securities certificates transferred in the U.S. markets, which significantly improves operational efficiencies and

[38] *See* NSCC PFMI Disclosure Framework, *supra* note 27, at 106.

[39] NSCC's rules provide for several categories of membership with different levels of access to NSCC's services. This release uses the term ''member'' when referring to an NSCC member that has full access to NSCC's CCP services. *See* NSCC Rules and Procedures, Rule 1, for the definition of the various membership categories. DTC's rules also provide for different categories of membership, including ''participants.'' This release uses the term ''participant'' when referring to a participant of DTC. *See* Rules, By-Laws, and Organizational Certificate of DTC Rule 1 for the definition of various categories of membership.

reduces risk and costs associated with the processing of physical securities certificates. These benefits not only provide efficiencies to DTC and its participants, but to the investing public as well.

In addition to a securities account at DTC, each DTC participant has a settlement account at a clearing bank to record any net funds obligation for end-of-day settlement, whether payment will be due to or from the participant. During the day, debits and credits are entered into the participant's settlement account. The debits and credits arise from DVP transfers and from other events or transactions involving the transfer of funds, such as principal and interest payments distributed to a participant or intraday settlement progress payments by a participant to DTC.[40] Debits and credits in the participant's settlement account are netted intraday to calculate, at any time, a net debit balance or net credit balance, resulting in an end-of-day settlement obligation or right to receive payment. DTC nets debit and credit balances for participants who are also members of NSCC to reduce funds transfers for settlement, and acts as settlement agent for NSCC in this process. Settlement payments between DTC and DTC's participants' settlement banks are made through the National Settlement System of the Federal Reserve System.[41]

b. Matching/ETC Providers—Exempt Clearing Agencies

Matching/ETC Providers electronically facilitate communication among a broker-dealer, an institutional investor, and the institutional investor's custodian to reach agreement on the details of a securities trade.[42] These entities emerged as a result of efforts by market participants to develop a more efficient and automated matching process that continues to be viewed as a necessary step in achieving straight-through processing (''STP'')[43] for the settlement of institutional trades.[44] Currently, there are three entities that have obtained exemptions from registration as a clearing agency from the Commission to operate as Matching/ETC Providers.[45] The current Matching/ETC Providers use two methods, ''Matching'' and ''ETC,'' to facilitate agreement on the trade details among the parties. When the parties reach agreement, it is generally referred to as an ''affirmed confirmation.''

ETC is a process where the Matching/ETC Provider simply provides the communication facilities to enable a broker-dealer and its institutional investor to send messages back and forth that ultimately results in the agreement of the trade details or affirmed confirmation, which is in turn sent to DTC to effect settlement of the trade.[46] Specifically, the Matching/ETC Provider will send the affirmed confirmations to DTC where the DTC participants who will be delivering securities will authorize the trades for automated settlement.[47]

In contrast, ''Matching'' is a process by which the Matching/ETC Provider compares and reconciles the broker-dealer's trade details with the institutional investor's allocation instructions to determine whether the two descriptions of the trade agree. If the trade details and institutional investor's allocation instructions match, an affirmed confirmation is generated, which also is used to effect settlement of the trade. As with ETC, transmission of the affirmed confirmations by the Matching/ETC Provider to DTC facilitates automated trade settlement.[48]

ETC is considered less efficient than Matching because it is an iterative process where each participant has to wait for a trigger before executing the next step in the process and has to manually re-key trade data into several systems, resulting in delay and redundant flows of non-essential data.[49] Moreover, during this process broker-dealers and their institutional investors often rely on internal systems that lack either automation, common message standards, or both, resulting in a lack of synchronized automated data that can cause errors and discrepancies. Matching, in contrast to ETC, is not an iterative process. Rather, matching eliminates the separate step of producing a confirmation for the institutional investor to review and affirm. Currently, Matching/ETC Providers assist many, but not all, market participants in affirming institutional trade details as soon as possible after trade execution, thereby helping to ensure that a trade will clear and settle by the end of the settlement cycle.[50]

c. Market Participants—Investors, Broker-Dealers, and Custodians

A variety of market participants depend on the clearance and settlement services facilitated by the FMUs and Matching/ETC Providers, including but not limited to institutional and retail investors, broker-dealers, and custodians (*e.g.,* banks). Furthermore, the relevant clearance and settlement

[40] As noted above, a CSD operates a securities settlement system that provides for transfers of securities either free of payment or for payment. When a transfer occurs for payment, typically securities settlement systems provide ''delivery versus payment'' or ''DVP,'' whereby the delivery of the security occurs only if payment occurs. The concept of DVP is sometimes referred to as ''DVP/RVP.'' The term ''receive versus payment'' or ''RVP'' is from the perspective of the seller.

[41] *See* NSCC PFMI Disclosure Framework, *supra* note 27, at 9–10.

[42] Electronic trade confirmation (''ETC'') was originally developed by DTC in the early 1970s as an alternative to the use of phone, fax or other manual processes. To facilitate greater use of ETC by market participants to process institutional trades, the Commission approved rule changes filed by several SROs that required the use of ETC for trades involving institutional investors. *See* Exchange Act Release No. 19227 (Nov. 9, 1982), 47 FR 51658, 51664 (Nov. 18, 1982) (order approving confirmation rules for exchanges and securities association).

[43] The Securities Industry Association (which in 2006 merged with The Bond Markets Association to form the Securities Industry Financial Markets Association) has described STP ''as the seamless integration of systems and processes to automate the trade process from end-to-end—trade execution, confirmation, and settlement—without manual intervention or the re-keying of data.'' Securities Industry Association, Glossary of Terms, *reprinted in part in* Kyle L Brandon, *Prime Brokerage: Of Prime Importance to the Securities Industry* (SIA Res. Rep., Vol. VI, No. 4, New York, N.Y.), Apr. 28, 2005, at 25–26, *http://www.sifma.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=21718&libID=5884.*

[44] Securities Industry Association, Institutional Transaction Processing Model, at 3 (May 2002) (''ITPC 2002 White Paper''). The Securities Industry Association's Institutional Transaction Processing Committee (''ITPC'') published its first white paper in December 1999 with a subsequent version released in February 2001. The ITPC 2002 White Paper was published in May 2002.

[45] The Commission issued an interpretive release in 1998 concluding that matching constitutes comparison of data respecting the terms of settlement of securities transactions, and therefore an entity that provides matching services as an intermediary between a broker-dealer and an institutional customer is a clearing agency within the meaning of Section 3(a)(23) of the Exchange Act and is, therefore, subject to the registration requirements of Section 17A. *See* Confirmation and Affirmation of Securities Trades, Exchange Act Release No. 39829 (Apr. 6, 1998), 63 FR 17943, 17946 (Apr. 13, 1998); Clearing Agency Standards, Exchange Act Release No. 68080 (Oct. 22, 2012), 77 FR 66220, 66228 & n.94 (Nov. 2, 2012) (noting the 1998 interpretive release); *see also* 15 U.S.C. 78c(a)(23) (defining the term ''clearing agency''). The Commission has provided exemptions from registering as a clearing agency to certain entities that operate matching and ETC services. *See* Order Granting Exemption from Registration as a Clearing Agency for Global Joint Venture Matching Services-U.S., LLC, Exchange Act Release No. 44188 (Apr. 17, 2001), 66 FR 20494, 20501 (Apr. 23, 2001); Order Approving Applications for an Exemption from Registration as a Clearing Agency for Bloomberg STP LLC and SS&C Techs., Inc., Exchange Act Release No. 76514 (Nov. 24, 2015), 80 FR 75388, 75413 (Dec. 1, 2015).

[46] ITPC 2002 White Paper, *supra* note 44.

[47] *See* Order Approving Proposed Rule Change by The Depository Trust Company To Allow the Inventory Management System To Accept Real-Time and Late Affirmed Trades from Omgeo, Exchange Act Release No. 54701 (Nov. 3, 2006), 71 FR 65854 (Nov. 9, 2006).

[48] *Id.*

[49] ITPC 2002 White Paper, *supra* note 44, at 3.

[50] *See infra* Part III.A.3. for affirmation rates for certain Matching/ETC Providers.

steps that need to be accomplished by the FMUs, Matching/ETC Providers, and financial service firms within the settlement cycle vary depending on whether an investor is an institutional investor or a retail investor.

Institutional investors are entities such as mutual funds, pension funds, hedge funds, bank trust departments, and insurance companies. Transactions involving institutional investors are often more complex than those for and with retail investors due to the volume and size of the transactions, the entities involved in facilitating the execution and settlement of the trade, including Matching/ETC Providers and custodians, and the need to manage certain regulatory or business obligations.[51] Trades involving retail investors are typically smaller in size than institutional trades, and the settlement of retail investor trades generally occurs directly with the investor's or their intermediary's broker-dealer and does not involve a separate custodian bank.

To clear and settle securities transactions directly through a registered clearing agency, the rules of the clearing agencies provide that a broker-dealer or other type of market participant must become a direct member of that clearing agency.[52] Generally broker-dealers that are direct members of clearing agencies are referred to as ''clearing broker-dealers.'' Clearing broker-dealers must comply with the rules of the clearing agency, including but not limited to rules relating to operational and financial requirements. Broker-dealers that submit transactions to a clearing agency through a clearing broker-dealer are generally referred to as ''introducing broker-dealers.'' In general, broker-dealers executing trades on a registered securities exchange are required to clear those transactions through a registered clearing agency.[53] Additionally, pursuant to certain self-regulatory organization (''SRO'') rules, broker-dealers that effect transactions in municipal and corporate debt securities are required to clear and settle those transactions through a registered clearing agency.[54] Broker-dealers executing trades outside the auspices of a trading venue (*e.g.,* on an internalized basis) may clear through a clearing agency, may choose to settle those trades through mechanisms internal to that broker-dealer, or may settle the trades bilaterally.[55] Post-trade processing of securities transactions by broker-dealers generally occurs in the back office and entails the following functions: (1) Order management, which keeps track of the orders that are sent to the various markets and of the subsequent related executions that are received; (2) purchases and sales, which works closely with the appropriate clearing agency to ensure the transactions have been accurately cleared and settled and to reconcile the broker-dealer's position; (3) cashiering, which is responsible for receiving and delivering securities; and (4) asset servicing activities related to the processing of dividends, stock splits, and other corporate actions.

Often, due to regulatory or business obligations, an institutional investor will not use its executing broker-dealer to custody the institutional investors' securities at DTC, but rather will use a custodian bank for the safekeeping and administration of both their securities and cash.[56] The custodian may also provide other administrative services, such as: (1) Acting as an agent or fiduciary; (2) monitoring the purchase and sale of securities by the executing broker-dealers; and (3) collecting dividends and interest.

3. Overview of Trade Settlement Processes

As described further below, the proposed amendment to paragraph (a) of Rule 15c6–1 would prohibit a broker or dealer from entering into a securities contract that settles later than the second business day after the date of the contract unless expressly agreed upon by both parties at the time of the transaction, subject to certain exceptions enumerated in the rule. To provide context for understanding the proposed amendment and the related economic analysis that follows, this section provides an overview of the current state of trade settlement processes under current Rule 15c6–1. Given the differences in the clearance and settlement processes for trades by retail and some institutional investors, the proposed amendment may have differing economic effects on different market participants involved in these transactions. Accordingly, the current clearance and settlement processes are discussed below separately.[57]

a. Retail Investor Trade Settlement Process

Trade comparison, which consists of reporting, comparing, matching, and validating the buy and sell sides of a trade is the first step in the clearance and settlement of retail investor transactions. At the trading venue, such as an exchange or non-exchange trading venue (*e.g.,* alternative trading system or electronic communication network), a buy order is electronically matched against a sell order. If the details of the trade submitted by the counterparties agree (*e.g.,* the security price and quantity), the trade is considered ''locked in'' and then sent from the

[51] The distinction between ''retail investor'' and ''institutional investor'' is made only for the purpose of illustrating the manner in which these types of entities generally clear and settle their securities transactions. For purposes of this release, the term ''retail investor'' includes any entity that settles their securities transactions in a manner described in Part II.A.3.a. Similarly, the term ''institutional investor'' is used to describe any entity that is permitted and chooses to settle their securities transactions in the manner described in Part II.A.3.b.

[52] Due to the financial and operational obligations of entities submitting trades to a clearing agency, all clearing agencies have established specific requirements for initial membership and ongoing participation in the clearing agency. *See, e.g.,* NSCC Rules and Procedures, *supra* note 26, Rules 2A and 2B (discussing initial and ongoing requirements for membership).

[53] *See, e.g.,* FINRA Rules 6350A(a) and 6350B(a) (requiring that FINRA members must clear and settle transactions in ''designated securities'' (*i.e.,* NMS stocks) through the facilities of a registered clearing agency that uses a continuous net settlement system). In addition, FINRA Rule 6274(a) requires that a member must clear and settle transactions ''effected on'' the Alternative Display Facility in ADF-eligible securities (*i.e.,* NMS stocks) that are eligible for net settlement through the facilities of a registered clearing agency that uses a continuous net settlement system. Notwithstanding the requirements in Rules 6350A(a), 6350B(a) and 6274(a), transactions in designated securities and transactions in ADF-eligible securities may be settled ''ex-clearing'' provided that both parties to the transaction agree to the same. *See* FINRA Rules 6350A(b), 6350B(b), 6274(b).

[54] *See* MSRB Rule G–12(f); FINRA Rule 11900.

[55] *See generally* FINRA Rules 6350A, 6350B and 6274.

[56] Section 17(f) of the Investment Company Act of 1940 (the ''Investment Company Act'') and the rules thereunder govern the safekeeping of a registered investment company's assets, and generally provide that a registered investment company must place and maintain its securities and similar instruments only with certain qualified custodians. Section 17(f)(1)(A) of the Investment Company Act permits certain banks to maintain custody of registered investment company assets subject to Commission rules. *See* 15 U.S.C. 80a–17(f).

[57] Although trades in open-ended investment company securities (*i.e.,* mutual funds) are subject to Rule 15c6–1, trades in these securities (other than ETFs and other types of exchange-traded products) are generally not executed in the secondary market, but rather between issuers and their broker-dealer distributors. As a non-CCP service, NSCC administers an electronic communication system, Fund/SERV, that centralizes and standardizes order entry, confirmation, registration and money settlement for mutual fund companies, broker-dealers, banks and trust companies, third party administrators and other intermediaries involved in the purchase and sale of mutual fund shares. Pursuant to NSCC rules, an NSCC member may roll up their daily cash obligation from Fund/SERV transactions into the member's daily net obligations at NSCC. NSCC Rules and Procedures, *supra* note 26, Rules 7, 12 and 52.

trading venue to NSCC.[58] The following is a high level description and illustration of what generally occurs each day following execution of a retail investor trade and submission of the trade to NSCC:

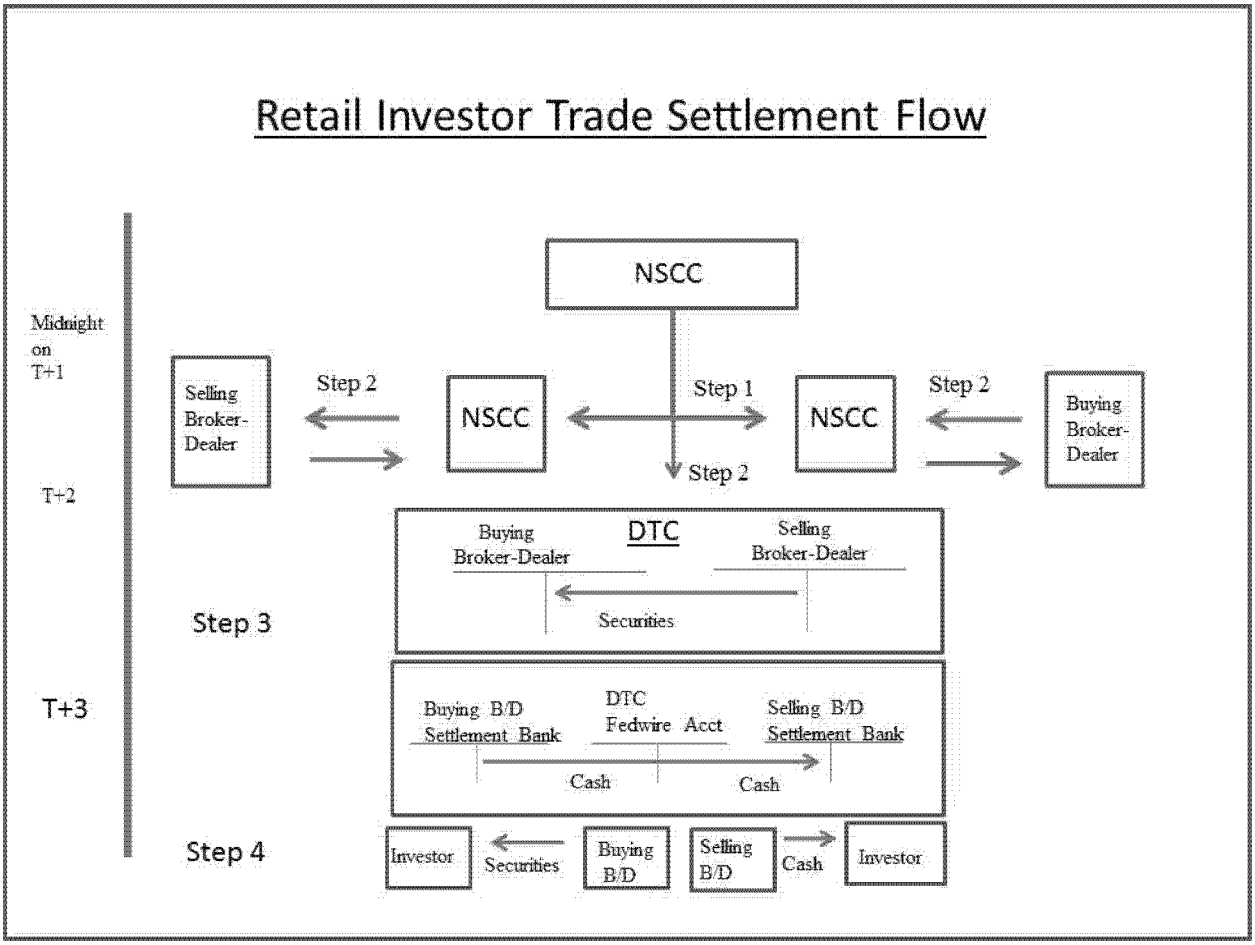
Trade Date—NSCC validates trade data received from the trading venue and confirms receipt of the transaction details by electronically sending communication to NSCC members that are counterparties to the trade. This communication legally commits the members to complete the trade.[59]

T+1—At midnight on T+1, NSCC novates the trade, becoming the buyer to the selling broker-dealer, and the seller to the buying broker-dealer and attaches a trade guaranty.[60] (Step 1)

T+2—NSCC issues a trade summary report to its members with a summary of all securities transactions and cash to be settled the following day, specifically indicating the net positions of securities and the net cash amount owed by the member or to be received by the member. NSCC also sends an electronic instruction to DTC detailing the net positions and cash that need to be settled for each member/participant. (Step 2)

T+3—DTC transfers the securities electronically between the buying and selling broker-dealer accounts at DTC. The participant broker-dealers instruct their settlement banks to send money to, or receive money from, DTC to complete the transaction.[61] (Step 3) Investors receive securities and cash from their respective broker-dealers. (Step 4)

Figure 3: Retail Investor Trade Settlement Flow



[58] Trade comparison can be completed at NSCC, through a trading venue, or through a Qualified Special Representative (''QSR'') (as defined in Rule 1 of NSCC's Rules and Procedures) on behalf of NSCC members, as permitted by clearing agency rules. Currently, over 99% of the trade data received by NSCC is received from a trading venue or QSR on a locked-in basis (*i.e.,* already compared by the marketplace of execution). However, NSCC provides comparison services for transactions in fixed income securities (*i.e.,* corporate and municipal bonds) and for over-the-counter transactions that are not otherwise generally matched through other facilities. NSCC performs its comparison process on the same timeline as locked-in trade submissions. *See* NSCC PFMI Disclosure Framework, *supra* note 27, at 7.

[59] NSCC Rules and Procedures, *supra* note 26, Rule 5, Section 1.

[60] NSCC accepts transactions for clearance on business days. Pursuant to Rule 1 of NSCC's Rules and Procedures, the term ''business day'' means any day on which NSCC is open for business. However, on any business day that banks or transfer agencies in New York State are closed or a qualified securities depository is closed, no deliveries of securities and no payments of money shall be made through NSCC.

[61] Both NSCC and DTC jointly provide all members/participants and their settling banks with reports throughout the day indicating their net debit and net credit amounts for individual members/participants as well as a net-net amount for each settling bank. Each NSCC member is required to select a settling bank to handle the electronic payment or receipt of payments through the Federal Reserve Bank's Fedwire system.

b. Institutional Investor Trade Settlement Process

Institutional trade processing typically starts when an institutional customer or its agent (sometimes referred to as the ''buy side'') places an order to buy or sell securities with its broker-dealer. The broker-dealer will advise the institutional customer of the trade details, who in turn may advise its broker-dealer how the trade should be allocated among its various accounts.[62] The process of verifying the allocation is completed through the confirmation/affirmation procedures described in Part II.A.2.b., which discusses the automated post-trade pre-settlement processing of institutional investor trades.

Institutional investors may choose to trade through an executing broker-dealer that clears and settles its securities transactions though NSCC and DTC. However, depending on the size and complexity of the trade and the number of trading partners involved in the transaction, institutional investors may also choose to avail themselves of processes specifically designed to address the unique aspects of their trades. Specifically, these transactions can be processed on a trade-for-trade basis through a prime broker-dealer and settled on an RVP/DVP basis through DTC[63] and the institutional customer's custodial bank.[64]

The following is a high level description and illustration of what generally occurs each day following execution of an institutional investor trade and submission of the trade to DTC:

Trade Date through T+2—The institutional investor sends to the Matching/ETC Provider, its broker-dealer, and its custodian the allocation information for the trade. (Step 1) The broker-dealer then submits to the Matching/ETC Provider trade data corresponding to each allocation, including settlement instructions and, as applicable, commissions, taxes, and fees. (Step 2)

If the transaction is processed through a matching service, the Matching/ETC Provider compares the institutional investor's allocation information with the broker-dealer's trade data to determine whether the information contained in each field matches. If all required fields match, the Matching/ETC Provider generates a matched confirmation and sends it to the broker-dealer, the institutional investor, and other entities designated by the institutional investor (*e.g.,* the institutional investor's custodian). (Step 3)

If the institutional investor uses the ETC process, instead of comparing the institutional investor's allocation information with the broker's trade data, the Matching/ETC Provider would transmit the information to the broker-dealer and institutional investor so that each party could verify that the trade was executed and allocated correctly and produce an affirmed confirmation.

T+2—After the Matching/ETC Provider creates the matched confirmation (whether by ETC or matching), the matching service submits it to DTC as an ''affirmed confirmation.'' After the affirmed confirmation has been submitted, DTC participants that are delivering securities then authorize the trades for automated settlement. DTC currently processes transactions in real-time from approximately 8:30 p.m. on the night before settlement day (T+2) until 3:30 p.m. on settlement day (T+3) for DVP transactions and until 6:35 p.m. for free of payment transactions.

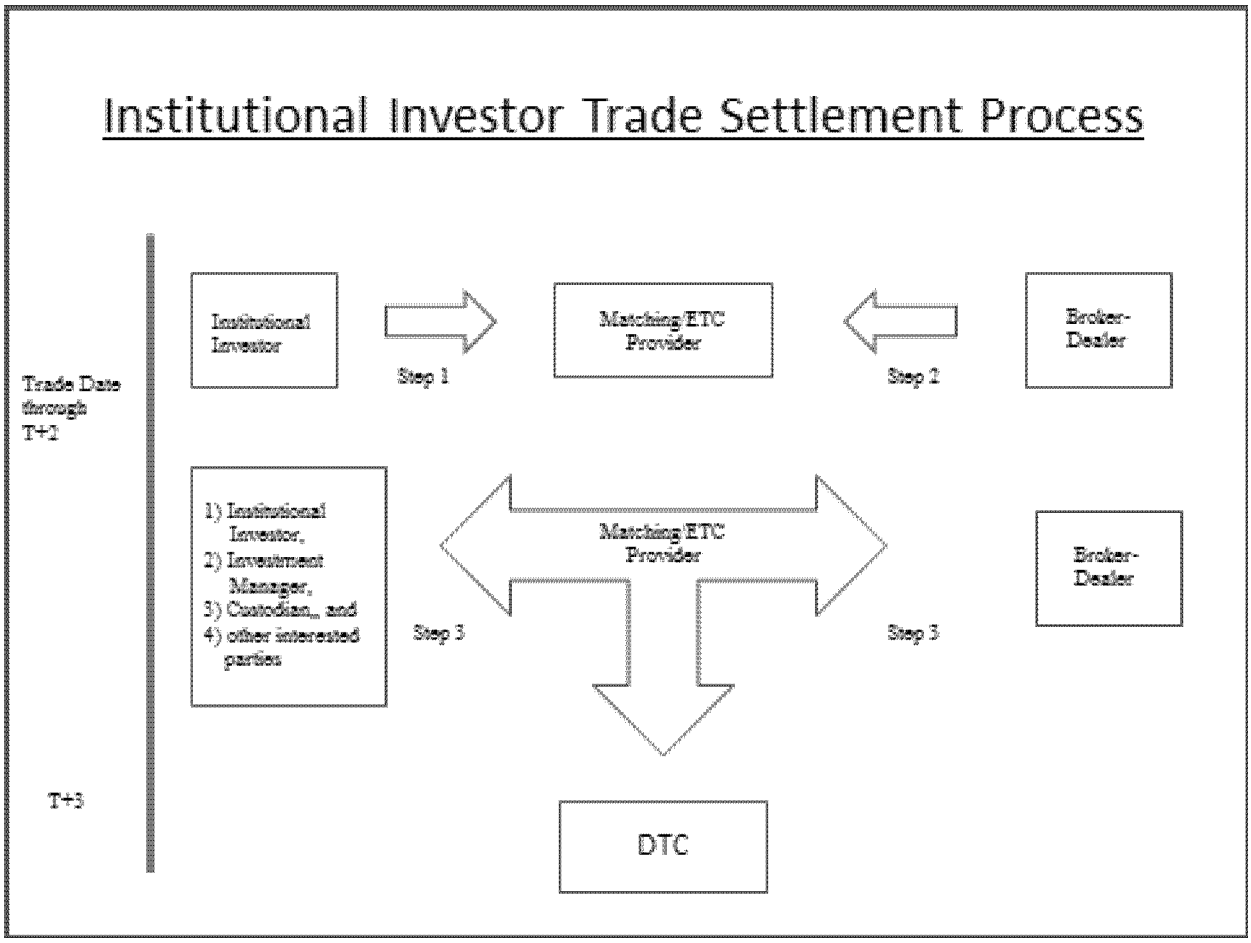
T+3—DTC transfers the securities electronically between the buying and selling broker-dealer accounts at DTC. The participant broker-dealers instruct their settlement banks to send money to, or receive money from, DTC to complete the transaction.

[62] In instances where an institutional investor submits an order on behalf of other parties (*e.g.,* an investment manager on behalf of several mutual funds), the institutional investor will instruct its broker-dealer as to how to allocate the transactions among the underlying entities. The broker-dealer will reply by sending details of, or confirming, each allocation and if correct, the institutional investor will affirm.

[63] DTC operates a DVP settlement system for settlement of securities on a gross basis and settlement of funds on a net basis. Deliveries of securities are subject to DTC's risk management controls, which are designed so that DTC may complete system-wide settlement notwithstanding the failure to settle of its largest participant or affiliated family of participants. *See* DTC, Disclosure under the PFMI Disclosure Framework, at 10 (Dec. 2015), *http://www.dtcc.com/legal/policy-and-compliance.*

[64] Through its ID Net Service, DTC allows its participant broker-dealers to net their institutional investor customer transactions with the broker-dealer's other transactions (including the broker's retail trades) to reduce the aggregate securities movement while still retaining the trade-for-trade settlement between the DTC participant and the custodian bank. This service also allows the banks to maintain their responsibility to pay for only those trades where all the shares are delivered, while at the same time providing brokers with the benefits of netting through NSCC's CNS system.

Figure 4: Institutional Investor Trade Settlement Flow



4. Impact of the Settlement Cycle

The length of the settlement cycle has varying degrees of impact across the range of market participants described above. That impact stems, in large part, from the type of risk exposure each entity brings to the clearance and settlement process and the nature of its processes and systems for operating within the existing framework.

From the perspective of a CCP, such as NSCC, the length of the settlement cycle may affect the CCP's exposure to credit, market and liquidity risk that arises once a transaction has been novated and the CCP takes offsetting (and guaranteed) positions as a substituted counterparty for each of the parties to the original transaction.[65] A CCP takes a number of measures to manage this credit risk to its members, including through financial resource contributions from members and netting down the total outstanding exposure it may have to a particular member. However, the extent to which a CCP must apply these risk mitigation tools depends in large part on the length of time it is exposed to the risk that one or more of its members may default on their settlement obligations, which in turn is driven by the length of the settlement cycle.

The settlement cycle similarly determines the period of time during which a CCP faces market risk following novation. Market risk, as a general matter, can arise for a CCP where a member has defaulted during the settlement cycle, and the CCP faces the risk that the defaulted member's positions and other resources the CCP holds (*i.e.,* defaulted member collateral, such as clearing fund deposits) decline in market value as the CCP seeks to liquidate, transfer, or otherwise dispose of those assets to minimize losses.[66] Finally, the settlement cycle can also impact the amount of liquidity risk a CCP may need to anticipate for purposes of settling an open transaction (the CCP often relies on incoming payments from some members to facilitate payments to other members) or otherwise deploying financial resources to cover losses that may result from a member's default.[67] A DTCC paper published in 2011 notes that shortening the settlement cycle may result in reduced liquidity obligations for NSCC.[68] In addition, that study, which was conducted from October 19, 2010, through August 31, 2011, indicated certain procyclical benefits to a reduced settlement cycle in observing how NSCC clearing fund requirements

[65] *See* CCA Proposal, 79 FR at 29524, which provides an overview discussion of financial risks faced by clearing agencies.

[66] *See id.*

[67] *See id.* Credit and liquidity risk may also be relevant to the functioning of a CSD, given that the CSD will rely on incoming payments or deliveries of securities from certain participants to make payments or deliveries to other participants. Where a CSD participant defaults, or where a CCP or a CSD participant faces liquidity pressure, the CSD itself may need to deploy financial resources to cover the shortfall. For example, the CSD may maintain a participant fund (similar in function to a clearing fund) or have available lines of credit to access in such instances.

[68] DTCC, Proposal to Launch a New Cost-Benefit Analysis on Shortening the Settlement Cycle, at 7 (Dec. 2011) (''DTCC Proposal to Launch a Cost-Benefit Analysis''), *http://www.dtcc.com/en/news/2011/december/01/proposal-to-launch-a-new-cost-benefit-analysis-on-shortening-the-settlement-cycle.aspx.*

would decline if the settlement cycle was shortened.[69] The results of the study are reflected in the tables below.

Settlement cycle	Average daily clearing fund requirement ($MM)
T+3	4,012 (100%)
T+2	3,421 (−15%)
T+1	2,994 (−25%)

According to the study, clearing fund savings (for NSCC's members) resulting from shorter settlement cycles are more pronounced during periods of high volatility.[70] By showing the same data for August 2011, a period of high volatility, the study shows a greater decrease in NSCC's clearing fund requirements.[71]

Settlement cycle	Average daily clearing fund for August 2011 ($MM)
T+3	7,281 (100%)
T+2	5,517 (−24%)
T+1	4,619 (−37%)

NSCC also conducted a study from April 2011 to September 2011 that indicated that shortening the settlement cycle would reduce NSCC's liquidity obligations significantly. According to the study, in a T+2 settlement cycle, NSCC's average liquidity obligations would decline by 20%, thereby reducing members' required clearing fund deposits.[72]

For broker-dealers and investors, the impact of the length of the settlement cycle can be understood in most cases through the perspective of liquidity risk. Over the course of the settlement cycle, broker-dealers and investors will generally seek to manage two forms of liquidity risk—(i) sudden or unexpected liquidity demands that may arise due to the CCP's ongoing management of credit, market and liquidity risk exposure during the settlement cycle,[73] and (ii) the need to timely obtain and deliver cash or securities to settle outstanding trades, as well as using cash or securities to engage in trading activity across other markets with mismatched settlement cycles, such as non-U.S. markets.

Broker-dealers that are CCP members (including broker-dealers that are NSCC members) have financial resource obligations which the CCP may collect for risk management purposes.[74] These financial resource obligations may be at issue where a CCP member defaults and the CCP requires the defaulting member's resources or the other members' mutualized resources to address any credit, market and liquidity risk the CCP faces as it seeks to liquidate, transfer or otherwise dispose of the defaulted positions and related collateral of the defaulting member.[75] These financial resource obligations may also be incurred within a settlement cycle where a CCP seeks additional resources to address potential risk that may increase due to changing or otherwise volatile market conditions that can also be procyclical.[76] In such instances, the CCP member's obligation to make available financial resources to the CCP keys off of the period of time during which the CCP faces the member. Therefore, the length of the settlement cycle can impact the amount and types (*e.g.,* stable, highly liquid assets) of financial resources a CCP may require of its members, which in turn creates liquidity risk exposure and capital costs for the member in terms of obtaining and delivering to the CCP the necessary financial resources in a timely manner.

Further, for NSCC members/DTC participants, the length of the settlement cycle determines the deadline by which cash or securities must be delivered into the member/participant's DTC account for settlement purposes. Thus, a member/participant may face liquidity risk in obtaining (or recalling) from other markets with mismatched settlement cycles the necessary resources to deliver in time for settlement. Similarly, the length of the settlement cycle governs the time when the proceeds of a securities transaction may be made available to the member/participant. A mismatch in timing between the settlement cycle for the securities transaction and the settlement cycle for another market transaction, such as in the derivatives or a non-U.S. market with a different settlement cycle, can lead in turn to liquidity risk for the member in meeting all of its settlement obligations across markets.[77]

Broker-dealers that are not members of a CCP may similarly face certain of the liquidity risks described above because the clearing broker-dealer may pass on related costs through margin charges, as well as other charges and fees (which may, in some cases, be incorporated in the clearing broker-dealer's management of its credit risk to the non-clearing broker-dealer). These costs may also, in turn, be applied to or passed on to both institutional and retail investors by their executing or clearing broker-dealers.[78] For example, an industry study noted that some NSCC members carry the exposure of their customers' open positions during the settlement cycle and that each day's reduction in the settlement cycle could lessen these open exposures by 25%.[79] Therefore, the length of the settlement cycle can potentially affect the size and type of financial resource demands broker-dealers may pass on to investors.

The impact that the length of the settlement cycle may have on the credit, market and liquidity risk exposure faced by market participants can also lead to impacts on systemic risk. First, the length of the settlement cycle will determine the number of unsettled transactions present in the settlement system at any given point in time, and consequently the level of exposure to credit, market and liquidity risks faced by market participants. This attendant credit, market and liquidity risk, in turn, can affect the potential likelihood of a market participant defaulting. In the event of a default of a major market participant, the default may entail losses so large as to create widespread or systemic problems. Further, the default of one member may lead to the default of one or more other members, exacerbating any financial stress a CCP

[69] *See id.* at 8–9.

[70] *See id.*

[71] *See id.*

[72] *See id.* at 7.

[73] In this respect, the liquidity risk can be linked to market risk faced by the CCP and its member arising from the open position between the CCP and the member, as well as any collateral posted by the member to the CCP to cover the CCP's credit risk exposure to the member. Where the market value of these open positions or the posted collateral fluctuates, the CCP may seek additional margin or other financial resources from the member. *See* CCA Proposal, 79 FR 29524.

[74] *See supra* Part II.A.2.a.(1) for additional discussion regarding the use of financial resource requirements for risk management purposes. *See also* NSCC Rules and Procedures, *supra* note 26, Rules 4 and 4(A).

[75] *See* CCA Proposal, 79 FR at 29524.

[76] *See* DTCC, DTCC Recommends Shortening the U.S. Trade Settlement Cycle (Apr. 2014), *http://www.ust2.com/industry-action/.*

[77] For example and as noted earlier, the settlement cycle timeframe for open-end mutual funds that settle through NSCC is generally T+1. However, the settlement cycle timeframe for many underlying portfolio securities held by mutual funds is T+3. Settlement timeframes for securities with non-standard settlements held by these funds may be longer than T+3. This mismatch in timing presents potential liquidity risks for such funds as market participants with respect to the receipt of portfolio proceeds and in satisfying their investor redemption obligations. *See* Investment Company Act Release No. 31835 (Sept. 22, 2015), 80 FR 62273, 62282–83 (Oct. 15, 2015); *see also, e.g.,* PricewaterhouseCoopers LLP, Shortening the Settlement Cycle: The Move to T+2, at 13 n.18 (2015) (''ISC White Paper''), *http://www.ust2.com/pdfs/ssc.pdf.*

[78] For further discussion on the downstream effects of liquidity risk costs, *see infra* Part VI.C.4.

[79] *See* DTCC Proposal to Launch a Cost-Benefit Analysis, *supra* note 68, at 7.

or other market infrastructure may be experiencing because of the default.[80]

As a more general matter, market participants rely on CCPs for prompt clearance and settlement of transactions and the receipt of proceeds from those transactions. Thus, a significant disruption in the clearance and settlement process and transmission of these proceeds could potentially harm other market participants, particularly in instances where market participants in centrally cleared and settled markets are linked through intermediation chains to each other and to participants in uncleared markets (as is the case in the U.S. clearance and settlement system). Shortening the settlement cycle is therefore one of the primary methods for reducing this risk.[81]

5. Post-Rule 15c6–1 Adoption

Since the adoption of Rule 15c6–1, the Commission and various market participants have, as described in greater detail below, explored the possibility of shortening the standard settlement cycle further. Below is a description of these efforts.

a. SIA T+1 Initiative

After the implementation of the T+3 settlement cycle, the Securities Industry Association (''SIA'') led an effort to shorten the settlement cycle to T+1 and implement STP.[82] In 2000, the SIA published its T+1 Business Case Final Report (''SIA Business Case Report'') which concluded that the case for moving to a T+1 settlement cycle in the U.S. was ''strong'' based upon several factors.[83] According to the SIA Business Case Report: (i) The move from T+3 to T+1 would dramatically reduce the settlement risk exposure of the U.S. securities industry; [84] (ii) the transition to a T+1 settlement cycle would enable the U.S. market to continue to maintain its global competitiveness by serving as the catalyst for enhancing the current post-trade processing and settlement process; [85] and (iii) the move to T+1 would serve the interests of U.S. investors by synchronizing the clearance and settlement process across asset classes, thus enabling more fungible, flexible trading and investing.[86]

The SIA Business Case Report also identified ten ''building blocks'' essential to realizing the goal of improving the speed, safety, and efficiency of the trade settlement process, and included a cost benefit analysis for transitioning to T+1.[87] The implementation of these building blocks, the report noted, would ensure that the transition to a T+1 settlement cycle would be accomplished in an orderly and risk-effective manner.[88]

In July 2002, the SIA shifted the principal focus of its initiative from shortening the settlement cycle to achieving industry-wide STP and planned to reconsider the need to pursue a reduction in the settlement cycle in 2004.[89] At that time, the SIA believed more work was needed on improving operational processing to achieve STP before a transition to T+1 could be considered.[90] The SIA's reasoning for this shift in focus stemmed largely from an operational risk concern, observing that while a shorter settlement cycle would be expected to decrease the gross amount of unsettled trades subject to credit or market risk, it could increase operational risk at that time by reducing the time available to correct errors prior to settlement. The SIA therefore argued that the industry priority should be to ensure that a higher amount and rate of trades were affirmed/confirmed on an earlier basis via STP, which in turn would be useful for a later consideration of compressing the settlement cycle in an environment less prone to the likelihood of operational risk.[91]

b. Securities Transaction Concept Release

In March 2004, the Commission published a concept release (''Concept Release'') seeking comment on methods to improve the safety and operational efficiency of the U.S. clearance and settlement system and to help the U.S. securities industry achieve STP.[92] Specifically, the Commission sought comment on, among other things, (i) the benefits and costs of shortening the settlement cycle to a timeframe less than T+3; (ii) whether the Commission should adopt a new rule or the SROs should be required to amend their existing rules to require the completion of the confirmation/affirmation process on trade date (''T+0''); and (iii) reducing the use of physical securities.[93] The purpose of the Concept Release was to build upon the domestic initiatives and continue the exploration of methods to improve the operations of the national clearance and settlement system. The Commission received sixty-three comment letters from a wide variety of commenters, both domestic and international, including but not limited to, broker-dealers, transfer agents, issuers, individual and institutional investors, academics, service providers, and industry associations.[94] While the comments were informative and relevant at the time, technological, operational and regulatory changes in the interim have addressed many of the issues raised by the commenters.

The Commission received thirty-four comment letters expressing a position on shortening the settlement cycle,[95] with the majority of the commenters

[80] *See* T+3 Adopting Release, 58 FR at 52894; *see also* Clearing Agency Standards Adopting Release, 77 FR at 66254 (discussing the need for default procedures to allow the clearing agency to take action resulting from one or more member defaults in order to contain resultant losses and liquidity pressures).

[81] *See* Christopher L. Culp, *Risk Management by Securities Settlement Agents,* 10 J. Applied Corp. Fin. 96 (Fall 1997), *http://www.rmcsinc.com/articles/JACF103.pdf.*

[82] The SIA (which has since merged with other industry groups to form the Securities Industry Financial Markets Association) was a trade association that represented U.S. broker-dealers.

[83] SIA, T+1 Business Case Final Report (July 2000) (''SIA Business Case Report''), *http://www.sifma.org/issues/item.aspx?id=8589939820.*

[84] *Id.* at 1, 7. The SIA Business Case Report did not explicitly define the term ''settlement risk.'' However, the report argued that a move to a T+1 settlement cycle would reduce credit risk exposure and operational risk exposure. *See id.* at 39–41.

[85] *Id.*

[86] *Id.; see also infra* Part VI.D.1. for a discussion of the alternative of shifting to a T+1 settlement cycle.

[87] *See id.* at 2–3. The 10 Building Blocks identified in the report are as follows: (1) Modify internal processes at broker-dealers, asset managers, and custodians to ensure compliance with compressed settlement deadlines; (2) identify and comply with accelerated deadlines for submission of trades to the clearing and settlement systems; (3) amend NSCC's trade guaranty process so that guaranty is provided on trade date; (4) report trades to clearing corporations in locked-in format and revise clearing corporations' output; (5) rewrite CNS processes at NSCC to enhance speed and efficiency; (6) reduce reliance on checks and use alternative means of payment, such as automatic debits allowed by the National Automated Clearing House Association; (7) immobilize securities shares prior to conducting transactions; (8) revise the prospectus delivery rules and procedures for initial public offerings; (9) develop industry matching utilities and linkages for all asset classes; and (10) standardize reference data and move to standardized industry protocols for broker-dealers, asset managers, and custodians.

[88] *Id.* at 2.

[89] Press Release, SIA, SIA Board Endorses Program to Modernize Clearing and Settlement Process for Securities, STP Connections (July 18, 2002) (statement from the SIA Board of Directors endorsing straight-through processing); *see also* Letter from Jeffrey C. Bernstein, Chairman, SIA STP Steering Committee, SIA (June 16, 2004) (commenting on the Commission's 2004 Securities Transaction Settlement Concept Release, Exchange Act Release No. 49405 (Mar. 11, 2004), 69 FR 12922, 12923 (Mar. 18, 2004)).

[90] *Id.* at 3.

[91] *Id.* at 7.

[92] Securities Transactions Settlements, Exchange Act Release No 49405 (Mar. 11, 2004), 69 FR 12922 (Mar. 18, 2004).

[93] *Id.*

[94] The comment letters submitted pursuant to the Commission's request for comment in the Concept Release are available at *https://www.sec.gov/rules/concept/s71304.shtml.*

[95] Letters from Bruce Barrett (Mar. 13, 2004); David Patch (Mar. 13, 2004, and May 18, 2004);

either: (i) Supporting shortening the settlement cycle to a timeframe less than T+3 (primarily T+1); (ii) supporting implementation of STP prior to shortening the settlement cycle; (iii) supporting implementation of STP in lieu of shortening the settlement cycle (in part because STP would derivatively drive shorter cycles) or (iv) expressing no opinion on either T+1 or STP, but rather discussing the need to address other post trade processing issues (*e.g.,* streamlining the institutional transactional processing model, using RVP/DVP processing for both retail and institutional trades, addressing fails in the clearance and settlement system, and dematerializing securities certificates in the U.S. settlement cycle) prior to a regulatory mandate to shorten the U.S. settlement cycle.[96] The comment letters that supported the implementation of a T+1 settlement cycle noted the benefits of a shortened settlement cycle, including reducing risks, reducing costs, improving efficiencies, and making accurate information more quickly available to investors. Several of the commenters also noted that T+1 would remove systemic risk and enable clients to have accurate information about their assets with finality the next trading day.[97] Several commenters based their general support on the view that currently available technology (as it existed in 2004) would support a T+1 or T+0 settlement cycle,[98] or that the operating costs of real time software would be dramatically lower than the staff it would replace.[99] One of these commenters stated that even if the current technology facilitating ''real time settlement'' was not currently cost effective, it would be in the future as technology develops and advances.[100] If real time settlement were feasible, this commenter noted, the market architecture would make sure that the securities and cash were available in good deliverable form for instant settlement before the execution of the trade, thereby eliminating failures to deliver or pay for securities, as well as totally eliminate systemic and counterparty risk.[101]

Of the thirty-four comments on shortening the settlement cycle, fourteen commenters expressed a preference to defer a decision on changing the settlement cycle until the industry could implement STP or other complementary processes.[102] Reasons for deferring the decision varied, but generally focused on the need for additional information or additional time for the industry to implement STP successfully.[103] Some of these commenters also raised concerns about the costs associated with implementation of a shorter settlement cycle and regulatory costs that may arise

Robert Goldberg, President, e3m Investments Inc. (Apr. 5, 2004); James J. Angel, Ph.D., CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University (Apr. 9, 2004); Michael Sweeney, Vice President, Custody Services, Sumitomo Trust & Banking, Co. (USA) (May 20, 2004); James Nesfield (May 23, 2004); Martin Wilson (May 27, 2004); Sennett Kirk (May 27, 2004); Adam J. Bryan, President and CEO, Omgeo LLC (June 4, 2004); David G. Tittsworth, Executive Director, Investment Counsel Association of America (June 11, 2004); Michael Atkin, Vice President and Director, Financial Information Services Division, Software & Information Industry Association (June 13, 2004); Donald J. Kenney, Chairman, President, and Chief Executive Officer, EquiServe, Inc. (June 14, 2004); Jeff Potter, Vice President, The Northern Trust Company (June 14, 2004); John T. W. Pace, President, Cape Securities, Inc. (June 14, 2004); Thomas Sargant, President, Regional Municipal Operations Association (June 14, 2004); Steven G. Nelson, President and Chairman of the Board, Continental Stock Transfer & Trust Company (June 15, 2004); Will DuMond, Metropolitan College of New York—School of Business (June 15, 2004); Diane M. Butler, Director—Transfer Agency & International Operations, Investment Company Institute (June 16, 2004); Fionnuala Martin, STP Program Manager, BMO Nesbitt Burns (June 16, 2004); Frank DiMarco, Merrill Lynch & Co., Inc., Chair, STP Steering Committee, The Bond Market Association (June 16, 2004); Ian Gilholey, The Canadian Depository for Securities Limited (June 16, 2004); Jeffrey C. Bernstein, Chairman, SIA STP Steering Committee, SIA (June 16, 2004); Kevin R. Smith, Chair, ISITC–IOA (North America) (June16, 2004); Michael J. Alexander, Senior Vice President, Charles Schwab & Co., Inc. (June 16, 2004); Michael O'Conor, Chairman, Global Steering Committee and Peter Randall, Executive Director, FIX Protocol Limited (June 16, 2004); Norman Eaker, Principal, Edward Jones (June 16, 2004); W. Leo McBlain, Chairman and Thomas J. Jordan, Executive Director, Financial Information Forum (June 16, 2004); Jill M. Considine, Chairman and Chief Executive Officer, The Depository Trust and Clearing Corporation (June 23, 2004); Margaret R. Blake, Counsel to the Association, and Dan W. Schneider, Counsel to the Association, The Association of Global Custodians (June 28, 2004); Ed Morgan (Mar. 31, 2006); Jim Mulkey (June 10, 2006); Charles V. Rossi, President, The Securities Transfer Association (June 15, 2006); and Gene Finn (July 25, 2012, and Aug. 2, 2012).

[96] Letters from Robert Goldberg, President, e3m Investments Inc. (Apr. 5, 2004); James J. Angel, Ph.D., CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University (Apr. 9, 2004); James Nesfield (May 23, 2004); Adam J. Bryan, President and CEO, Omgeo LLC (June 4, 2004); Donald J. Kenney, Chairman, President, and Chief Executive Officer, EquiServe, Inc. (June 14, 2004); Diane M. Butler, Director—Transfer Agency & International Operations, Investment Company Institute (June 16, 2004); Fionnuala Martin, STP Program Manager, BMO Nesbitt Burns (June 16, 2004); Frank DiMarco, Merrill Lynch & Co., Inc., Chair, STP Steering Committee, The Bond Market Association (June 16, 2004); Jeffrey C. Bernstein, Chairman, SIA STP Steering Committee, SIA (June 16, 2004); Kevin R. Smith, Chair, ISITC–IOA (North America) (June 16, 2004); Michael J. Alexander, Senior Vice President, Charles Schwab & Co., Inc. (June 16, 2004); Norman Eaker, Principal, Edward Jones (June 16, 2004); W. Leo McBlain, Chairman and Thomas J. Jordan, Executive Director, Financial Information Forum (June 16, 2004); Jill M. Considine, Chairman and Chief Executive Officer, The Depository Trust and Clearing Corporation (June 23, 2004); Margaret R. Blake, Counsel to the Association, and Dan W. Schneider, Counsel to the Association, The Association of Global Custodians (June 28, 2004); Ed Morgan (Mar. 31, 2006); Jim Mulkey (June 10, 2006); Charles V. Rossi, President, The Securities Transfer Association (June 15, 2006); and Gene Finn (July 25, 2012, and Aug. 2, 2012).

[97] Letters from Robert Goldberg, President, e3m Investments Inc. (Apr. 5, 2004); and Fionnuala Martin, STP Program Manager, BMO Nesbitt Burns (June 16, 2004).

[98] Letters from Robert Goldberg, President, e3m Investments Inc. (Apr. 5, 2004); James J. Angel, Ph.D., CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University (Apr. 9, 2004); James Nesfield (May 23, 2004); and Jim Mulkey (June 10, 2006).

[99] Letter from Robert Goldberg, President, e3m Investments Inc. (Apr. 5, 2004).

[100] James J. Angel, Ph.D., CFA, Associate Professor of Finance, McDonough School of Business, Georgetown University (Apr. 9, 2004).

[101] *Id.*

[102] Letters from Adam J. Bryan, President and CEO, Omgeo LLC (June 4, 2004); David G. Tittsworth, Executive Director, Investment Counsel Association of America (June 11, 2004); Jeff Potter, Vice President, The Northern Trust Company (June 14, 2004); Thomas Sargant, President, Regional Municipal Operations Association (June 14, 2004); Charles V. Rossi, President, The Securities Transfer Association (June 15, 2004); Frank DiMarco, Merrill Lynch & Co., Inc., Chair, STP Steering Committee, The Bond Market Association (June 16, 2004); Ian Gilholey, The Canadian Depository for Securities Limited (June 16, 2004); Jeffrey C. Bernstein, Chairman, SIA STP Steering Committee, SIA (June 16, 2004); Michael J. Alexander, Senior Vice President, Charles Schwab & Co., Inc. (June 16, 2004); Michael O'Conor, Chairman, Global Steering Committee and Peter Randall, Executive Director, FIX Protocol Limited (June 16, 2004); Norman Eaker, Principal, Edward Jones (June 16, 2004); W. Leo McBlain, Chairman and Thomas J. Jordan, Executive Director, Financial Information Forum (June 16, 2004); Jill M. Considine, Chairman and Chief Executive Officer, The Depository Trust and Clearing Corporation (June 23, 2004); and Margaret R. Blake, Counsel to the Association, and Dan W. Schneider, Counsel to the Association, The Association of Global Custodians (June 28, 2004).

[103] Letters from Adam J. Bryan, President and CEO, Omgeo LLC (June 4, 2004); David G. Tittsworth, Executive Director, Investment Counsel Association of America (June 11, 2004); Jeff Potter, Vice President, The Northern Trust Company (June 14, 2004); Thomas Sargant, President, Regional Municipal Operations Association (June 14, 2004); Charles V. Rossi, President, The Securities Transfer Association (June 15, 2004); Frank DiMarco, Merrill Lynch & Co., Inc., Chair, STP Steering Committee, The Bond Market Association (June 16, 2004); Ian Gilholey, The Canadian Depository for Securities Limited (June 16, 2004); Jeffrey C. Bernstein, Chairman, SIA STP Steering Committee, SIA (June 16, 2004); Michael J. Alexander, Senior Vice President, Charles Schwab & Co., Inc. (June 16, 2004); Michael O'Conor, Chairman, Global Steering Committee and Peter Randall, Executive Director, FIX Protocol Limited (June 16, 2004); Norman Eaker, Principal, Edward Jones (June 16, 2004); W. Leo McBlain, Chairman and Thomas J. Jordan, Executive Director, Financial Information Forum (June 16, 2004); Jill M. Considine, Chairman and Chief Executive Officer, The Depository Trust and Clearing Corporation (June 23, 2004); and Margaret R. Blake, Counsel to the Association, and Dan W. Schneider, Counsel to the Association, The Association of Global Custodians (June 28, 2004).

from the switch to T+1.[104] One commenter, in particular, noted that a regulatory mandate for a shortened settlement cycle was not warranted by the SIA's cost benefit analysis and thought a better approach would be to encourage the development of market-driven initiatives to promote advances in STP.[105]

c. Current Efforts To Shorten the Settlement Cycle in the U.S.

Since the publication of the SIA Business Case Report in 2000 and the publication of the Concept Release in 2004, the Commission and market participants have continued to consider the possibility of further shortening the settlement cycle while observing significant changes in the securities industry with respect to post-trade processes and technology. Below is a discussion of a number of recent significant industry initiatives that have considered the question of whether and when to further shorten the standard settlement cycle and that have informed the Commission's proposal.

(1) BCG Study

In May 2012, DTCC commissioned a study to examine and evaluate the necessary investments and resulting benefits associated with a shortened settlement cycle for U.S. equities and corporate and municipal bonds.[106] The study, which was conducted by the Boston Consulting Group (''BCG'') and published in October 2012, analyzed the costs, benefits, opportunities and challenges associated with shortening the settlement cycle in the U.S. securities markets to either T+1 or T+2, respectively.[107]

The scope of BCG's analysis included U.S. equities, corporate bonds, and municipal bonds settling at DTC.[108] The study covered clearing and settlement processes at various types of market participants (*e.g.,* broker-dealers, buy-side firms, and custodian banks), in addition to processes closely related to clearance and settlement (such as corporate action processing and securities lending) and specific situations (such as post-trade processes for cross-border transactions involving securities lending in the U.S.).[109]

The BCG Study did not advocate any specific approach to shortening the settlement cycle, but noted that moving to a T+2 settlement cycle would be significantly less costly and take less time to implement than either an immediate or gradual transition to T+1, while still delivering significant benefits.[110]

The BCG Study noted that market participants were aware that a T+2 settlement cycle could be accomplished through mere compression of timeframes and corresponding rule changes but that implementing a transition to T+2 without certain building blocks or enablers would limit the amount of savings that would be realized across the industry.[111] In particular, BCG identified the following T+2 enablers: (i) Migration to trade data matching; [112] (ii) a cross-industry settlement instruction solution; (iii) dematerialization of physical securities; (iv) ''access equals delivery'' [113] for all products,[114] and (v) increased penalties for fails.[115] The study further concluded that T+1 could be built on the aforementioned T+2 enablers but would also require infrastructure for near-real-time trade processing, and transforming securities lending and foreign buyer processes.[116]

In addition, BCG noted that acceleration of retail client funding processes ''may'' need to take place to enable T+1 settlement.[117] Finally, BCG identified certain changes it believed that regulators, including the Commission, DTCC, FINRA, the MSRB, and NYSE, would need to make to their rules to enable a shorter settlement cycle.[118] These changes included, among others, amending Exchange Act Rule 15c6–1.[119]

Based on the foregoing, in April 2014, DTCC recommended shortening the U.S. trade settlement cycle for equities, municipal bonds, and unit investment trusts to T+2 and stated it would work with the industry to establish an implementation timeline.[120] Once achieved, DTCC recommended a pause and further assessment of industry readiness and appetite for a future move to T+1.[121] The recommendation was based on: (1) Results from risk studies that measure exposure and NSCC's liquidity needs; (2) the results of the BCG Study; (3) input from industry associations; and (4) one-on-one interviews with more than 50 firms across the securities industry, which helped DTCC define behavioral and system changes required to shorten the settlement cycle.[122]

(2) Industry Steering Committee and Industry Planning

In October 2014, DTCC, in collaboration with the Investment Company Institute (''ICI''), the Securities Industry and Financial Markets Association (''SIFMA''), and other market participants, formed an Industry Steering Group (''ISC'') and an industry working group to facilitate the transition to a T+2 settlement cycle for U.S. trades in equities, corporate and municipal bonds, and UITs.[123] The impetus for moving to a T+2 settlement cycle, as stated by the ISC, was to (i) reduce credit and liquidity risks to the industry and investors, (ii) reduce operational risk; (iii) reduce liquidity costs and free up capital for broker-dealers by reducing the required NSCC clearing fund contributions; (iv) enable investors to gain quicker access to funds and securities following a trade

[104] *See, e.g.,* Letter from Michael J. Alexander, Senior Vice President, Charles Schwab & Co., Inc. (June 16, 2004).

[105] Letter from David G. Tittsworth, Executive Director, the Investment Counsel Association of America (June 11, 2004) (commenting on the Concept Release).

[106] *See* DTCC Proposal to Launch a Cost-Benefit Analysis, *supra* note 68.

[107] The Boston Consulting Group, Cost Benefit Analysis of Shortening the Settlement Cycle, (Oct. 2012) (''BCG Study''), *http://www.dtcc.com/~/media/Files/Downloads/WhitePapers/CBA_BCG_Shortening_the_Settlement_Cycle_October2012.pdf.* The BCG Study also noted a ''T+0'' settlement cycle (*i.e.,* settlement on trade date) ''was ruled out as infeasible for the industry to accomplish at this time, given the exceptional changes required to achieve it and weak support across the industry.'' Id. at 8. The BCG Study notes that a T+0 settlement cycle would result in major challenges with processes such as such as trade reconciliation and exception management, securities lending and transactions with foreign counterparties (especially where time zones are least aligned). Id. at 20. Moreover, the BCG Study concluded that payment systems utilized for final settlement would also need to be significantly altered to enable transactions late into the day. *Id.* For further discussion on the BCG Study and some of the study's limitations, *see infra* Part VI.C.5.a.

[108] *Id.* at 13.

[109] *Id.*

[110] *Id.* at 8–11, 29–44.

[111] *Id.* at 9.

[112] This migration would essentially entail a mandated ''match to settle.'' Mandated ''match to settle'' would require institutional trades to be matched before settlement at DTC could occur. *See* BCG Study, *supra* note 107, at 65.

[113] In 2005, the Commission adopted Securities Act Rule 172, which, with certain exclusions, provides an ''access equals delivery'' model that permits final prospectus delivery obligations to be satisfied by the filing of the final prospectus with the Commission, rather than delivery of the prospectus to purchasers. *See* Securities Offering Reform, Exchange Act Release No. 52056 (July 19, 2005), 70 FR 44722, 44783–85 (Aug. 3, 2005).

[114] BCG Study, at 9, 64–68.

[115] BCG Study, at 9, 69–70.

[116] *Id.* at 9, 70–72.

[117] *Id.* at 25.

[118] *Id.* at 26, 50, 68–69.

[119] *Id.* at 50, 68. *See also, infra* Part III.B. for a discussion of the impact of other Commission rules.

[120] *See* DTCC Recommends Shortening the U.S. Trade Settlement Cycle, *supra* note 76.

[121] *Id.* at 2.

[122] *Id.*

[123] Press Release, DTCC, Industry Steering Committee and Working Group Formed to Drive Implementation of T+2 in the U.S. (Oct. 2014), *http://www.dtcc.com/news/2014/october/16/ust2.aspx.*

execution, and better protect investors from the risk of a broker-dealer default between trade date and settlement date; (v) reduce operational costs; and (vi) increase global harmonization.[124]

In June 2015, PricewaterhouseCoopers LLP, in conjunction with the ISC, published a white paper,[125] which included certain ''industry-level requirements'' and ''sub-requirements'' that the ISC believed would be required for a successful migration to a T+2 settlement cycle to occur. The ISC White Paper also included an implementation timeline that targeted the transition to T+2 by the end of the third quarter of 2017.

Deloitte & Touche LLP, in conjunction with the ISC, published the *T+2 Industry Implementation Playbook* (''T+2 Playbook'') in December 2015, which sets forth the requested implementation timeline with milestones and dependencies, as well as detailing ''remedial activities'' that impacted market participants should consider to prepare for migration to the T+2 settlement cycle.[126] Each of the remedial activities identified in the T+2 Playbook reference specific industry-level requirements and sub-requirements that were identified in the ISC White Paper.

Consistent with the ISC White Paper, the timeline provided in the T+2 Playbook targeted the third quarter of 2017 for completing the migration to a T+2 settlement cycle.[127] In addition to providing an implementation schedule, the T+2 Playbook was intended to serve as an industry resource for individual firms as they make the necessary changes to procedures and technology for transition to a T+2 settlement cycle.[128]

(3) Investor Advisory Committee Recommendations

In February 2015, the Commission's Investor Advisory Committee (''IAC'')[129] issued a public statement noting that shortening the settlement cycle will mitigate operational and systemic risk, as well as ''reduce credit, liquidity, and counterparty exposure risks,'' which will benefit both the securities industry and individual investors.[130] In its recommendation, the IAC stated that it ''strongly endorsed the direction of the recommendation by DTCC'' to shorten the settlement cycle to T+2, but recommended implementing a T+1 settlement cycle (rather than a T+2 settlement cycle), noting that retail investors would significantly benefit from a T+1 settlement cycle.[131] In the event that a T+2 standard settlement cycle is pursued, the IAC recommended that the Commission work with industry participants to create a clear plan for moving to T+1 shortly thereafter.[132]

B. Transition to T+2 in Non-U.S. Securities Markets

As market participants have worked to develop plans to shorten the standard settlement cycle in the U.S. to T+2, several non-U.S. securities markets have already shifted to a T+2 settlement cycle, and certain other non-U.S. securities markets have announced plans to transition to a T+2 settlement cycle.[133] These efforts to transition to a T+2 settlement cycle in markets outside the U.S. have been driven in part by considerations specific to the needs of the particular geographic region or market structure, as well as certain considerations identified by policy makers, market participants, and industry experts as to how shortening the settlement cycle to T+2 would reduce risk in the relevant market and increase the operational efficiency of post-trade processes. The Commission preliminarily believes that many of the reasons motivating efforts in other jurisdictions to shorten the settlement cycle to T+2 are, in principle, similar to those identified by the Commission in this proposal.

For example, national markets in the European Union (''EU'') moved to a harmonized settlement cycle of T+2[134] to both achieve a successful integration of settlement infrastructures across the EU as well as realize perceived benefits a shorter settlement cycle would bring in reducing counterparty credit risk (and associated market and liquidity risks), greater automation of back-office processes and reduced collateral requirements, and reduced costs for market participants.[135]

Australia and New Zealand transitioned to a T+2 settlement cycle in March 2016. Industry support in those markets was predicated on the widespread agreement that shortening the settlement cycle to T+2 would reduce counterparty, credit and operational risks, increase market liquidity, reduce CCP margin requirements and reduce capital requirements for broker-dealers and their clients.[136] In addition, the major Australian and New Zealand exchanges acknowledged the existence of a global

[124] *Id.*

[125] ISC White Paper, *supra* note 77.

[126] Deloitte & Touche LLP & ISC, T+2 Industry Implementation Playbook (Dec. 2015), *http://www.ust2.com/pdfs/T2-Playbook-12-21-15.pdf.* For a further discussion on the T+2 Playbook, *see infra* Part VI.C.5.b.

[127] *Id.* at 8.

[128] *Id.* at 16.

[129] Section 911 of the Dodd-Frank Act established the IAC to advise the Commission on regulatory priorities, the regulation of securities products, trading strategies, fee structures, the effectiveness of disclosure, and initiatives to protect investor interests, and to promote investor confidence and the integrity of the securities marketplace. *See* 15 U.S.C. 78pp. The Dodd-Frank Act authorizes the IAC to submit findings and recommendations for review and consideration by the Commission. *Id.*

[130] Investor Advisory Committee, U.S. Securities and Exchange Commission, Recommendation of the Investor Advisory Committee: Shortening the Settlement Cycle in U.S. Financial Markets (Feb. 12, 2015), *http://www.sec.gov/spotlight/investor-advisory-committee-2012/settlement-cycle-recommendation-final.pdf.*

[131] *Id.* According to the IAC, moving to a T+1 settlement cycle, matching the settlement cycle that already exists for treasuries and mutual funds, would greatly reduce systemic risk and benefit investors. *See also* Committee on Payment and Settlement Systems, Technical Committee of the International Organization of Securities Commissions, Recommendations for Securities Settlement Systems (Nov. 2001), at 4, 10, *http://www.bis.org/cpmi/publ/d46.pdf* (recommending that the benefits and costs of a settlement cycle shorter than T+3 should be evaluated).

[132] *Id.*

[133] In addition to the non-U.S. markets that have moved to a T+2 settlement cycle, certain non-U.S. markets are on a settlement cycle shorter than T+2, including Israel, Chile, and Saudi Arabia, which are on a T+0 cycle, and China, which is on a T+1 cycle.

[134] Prior to the so-called ''big bang'' migration to a T+2 settlement cycle on October 6, 2014, the standard settlement cycle for exchange-traded shares was T+3 in all European securities markets except Germany, Slovenia and Bulgaria, which already operated on a T+2 settlement cycle. The 29 national markets that moved to a T+2 settlement cycle on October 6, 2014 were: Austria, Belgium, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Iceland, Italy, Ireland, the Netherlands, Latvia, Lichtenstein, Lithuania, Luxembourg, Malta, Norway, Poland, Portugal, Romania, Slovakia, Spain (certain fixed income trades only), Sweden, Switzerland, and the United Kingdom. *See also,* ''A very smooth transition to T+2'', European Central Securities Depositories Association (Oct. 2014), *http://ecsda.eu/archives/3793* (discussing the European markets transition from T+3 to T+2 settlement cycle).

[135] *See* European Commission, Commission Staff Working Document Impact Assessment COD 2012/0029 (Mar. 7, 2012), *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012SC0022&from=EN; see also* CESAME II Harmonization of Settlement Cycles Working Group (''CESAME II''), The Case for Harmonizing Settlement Cycles (Oct. 5, 2010), *http://ec.europa.eu/internal_market/financial-markets/docs/cesame2/subgroup/20100921_case_en.pdf;* CESAME II, The Role of Settlement Cycles in Corporate Actions Processing (Oct. 5, 2010), *http://ec.europa.eu/internal_market/financial-markets/docs/cesame2/subgroup/20100921_hsc_role_en.pdf.*

[136] *See ASX Ltd.,* Shortening the Settlement Cycle in Australia: Transitioning to T+2 for Cash Equities (Feb. 25, 2014), *http://www.asx.com.au/documents/public-consultations/T2_consultation_paper.PDF; see also* NZX Ltd., Shortening of the Settlement Cycle: The Move to T+2 (Nov. 12, 2014), *https://nzx.com/files/static/cms-documents/FINAL%20T%202%20Consultation%20Paper%2012%20November%202014.pdf;* GBST Holding Ltd. & Stockbrokers Association of Australia, Introducing T+2 for the Australian Equities Market (Jan. 30, 2014), *http://www.gbst.com/wp-content/uploads/2016/02/GBST-SAA-Tplus2-in-Australia-Whitepaper.pdf.*

move toward shortened settlement cycles and the importance of international harmonization with respect to shortened settlement cycles.[137] Japanese and Canadian policy makers, regulators and market participants are also considering a transition to a T+2 settlement cycle,[138] with Canadian market participants of the view that, given the interconnectedness between the Canadian and U.S. securities markets, a transition in Canada to a T+2 settlement cycle should occur at the same time such a transition is achieved in the U.S. markets.[139]

III. Discussion

A. Proposal

1. Current Rule 15c6–1

The Commission's adoption of Exchange Act Rule 15c6–1 created a standard settlement cycle for broker-dealer transactions.[140] The Commission took this step in part because it believed that implementing faster settlement of securities transactions and improving the clearance and settlement process would better protect investors.[141] Rule 15c6–1(a) provides that, unless otherwise expressly agreed by the parties at the time of the transaction, a broker-dealer is prohibited from entering into a contract for the purchase or sale of a security (other than an exempted security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the third business day after the date of the contract.[142] Rule 15c6–1(a) covers all securities except for the exempted securities enumerated in paragraph (a)(1) of the rule. The Commission extended application of Rule 15c6–1(a) to the purchase and sale of securities issued by investment companies (including mutual funds),[143] private-label mortgage-backed securities, and limited partnership interests that are listed on an exchange.[144] The rule also allows a broker-dealer to agree that settlement will take place in more or less than three business days, provided that such an agreement is express and reached at the time of the transaction.[145]

Rule 15c6–1(b) provides an exclusion for contracts involving the purchase or sale of limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association. In recognition of the fact that the Commission may not have identified all situations or types of trades where settlement on T+3 would be problematic, paragraph (b) of the rule also provides that the Commission may exempt by order additional types of trades from the requirements of the T+3 settlement timeframe, either unconditionally or on specified terms and conditions, if the Commission determines that such an exemption is consistent with the public interest and the protection of investors.[146]

Pursuant to Rule 15c6–1(b), the Commission has granted an exemption for securities that do not generally trade in the U.S.[147] Under this exemptive order, all transactions in securities that do not have transfer or delivery facilities in the U.S. are exempt from the scope of Rule 15c6–1. Furthermore, if less than 10% of the annual trading volume in a security that has U.S. transfer or deliver facilities occurs in the U.S., the transaction in such security will be exempt from the rule unless the parties clearly intend T+3 settlement to apply. In addition, an ADR is considered a separate security from the underlying security. Thus, if there are no transfer facilities in the U.S. for a foreign security but there are transfer facilities for an ADR receipt based on such foreign security, under the order, only the foreign security will be exempt from Rule 15c6–1. The Commission has also granted an exemption for contracts for the purchase or sale of any security issued by an insurance company (as defined in Section 2(a)(17) of the Investment Company Act[148]) that is funded by or participates in a ''separate account'' (as defined in Section 2(a)(37) of the Investment Company Act[149]), including a variable annuity contract or a variable life insurance contract, or any other insurance contract registered as a security under the Securities Act.[150]

Rule 15c6–1(c) provides a T+4 settlement cycle in firm commitment underwritings for securities that are priced after 4:30 p.m. Eastern time.[151] Specifically, paragraph (c) states that the three-day settlement requirement in paragraph (a) does not apply to contracts for the sale of securities that are priced after 4:30 p.m. Eastern time on the date that such securities are priced and that are sold by an issuer to an underwriter pursuant to a firm commitment offering registered under the Securities Act or sold to an initial purchaser by a broker-dealer participating in such offering provided that the broker or dealer does not effect or enter into a contract for the purchase or sale of those securities that provides for payment of funds and delivery of securities later than the fourth business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

Rule 15c6–1(d) provides that, for purposes of paragraphs (a) and (c) of the rule, parties to a contract shall be deemed to have expressly agreed to an alternate date for payment of funds and

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[137] *See ASX Ltd.,* Shortening the Settlement Cycle in Australia: Transitioning to T+2 for Cash Equities (Feb. 25, 2014), *http://www.asx.com.au/documents/public-consultations/T2_consultation_paper.PDF; see also* NZX Ltd., Shortening of the Settlement Cycle: The Move to T+2 (Nov. 12, 2014), *https://nzx.com/files/static/cms-documents/FINAL%20T%202%20Consultation%20Paper%2012%20November%202014.pdf.*

[138] *See* Japan Securities Dealers Association, Move to T+2 Settlement in Japan, *http://www.jsda.or.jp/en/activities/research-studies/files/t2_en_cyukan_201603.pdf; see also* Canadian Securities Administrators, Staff Notice 24–312 (Apr. 2, 2015), *http://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20150402_24-312_t2-settlement.htm.*

[139] *See* Canadian Securities Administrators, Staff Notice 24–312 (Apr. 2, 2015), *http://www.osc.gov.on.ca/en/SecuritiesLaw_sn_20150402_24-312_t2-settlement.htm.*

[140] *See* T+3 Adopting Release, 58 FR 52891; *see also* Securities Transactions Settlement, Exchange Act Release No. 34952 (Nov. 9, 1994), 59 FR 59137 (Nov. 16, 1994) (extending effective date for Rule 15c6–1 from June 1, 1995 to June 7, 1995).

[141] *See* T+3 Adopting Release, 58 FR 52891.

[142] 17 CFR 240.15c6–1(a).

[143] The Commission applied Rule 15c6–1 to broker-dealer contracts for the purchase and sale of securities issued by investment companies, including mutual funds, because the Commission recognized that these securities represented a significant and growing percentage of broker-dealer transactions. *See* T+3 Adopting Release, 58 FR at 52900.

[144] With regard to limited partnerships, the Commission excluded non-listed limited partnerships due to complexities related to processing the trades in these securities and the lack of an active secondary market. In contrast, the Commission included listed limited partnerships primarily to ensure exclusion of these securities would not unnecessarily contribute to the bifurcation of the settlement cycle for listed securities generally. *See* T+3 Adopting Release, 58 FR at 52899.

[145] 17 CFR 240.15c6–1(a).

[146] 17 CFR 240.15c6–1(b).

[147] *See* Securities Transactions Settlement, Exchange Act Release No. 35750 (May 22, 1995), 60 FR 27994, 27995 (May 26, 1995) (granting exemption for certain transactions in foreign securities).

[148] 15 U.S.C. 80a–2(a)(17).

[149] 15 U.S.C. 80a–2(a)(37).

[150] *See* Securities Transactions Settlement, Exchange Act Release No. 35815 (June 6, 1995), 60 FR 30906, 30907 (June 12, 1995) (granting exemption for transactions involving certain insurance contracts). Certain insurance contracts, including variable annuity contracts and variable life insurance contracts, have been deemed to be securities under the Securities Act. *SEC* v. *Variable Annuity Life Ins. Co. of America,* 359 U.S. 65 (1959) (variable annuity contracts are ''securities'' which must be registered with the Commission under the Securities Act); Adoption of Rule 3c–4 under the Investment Company Act of 1940, Exchange Act Release No. 9972, 1 SEC Docket 17 (Jan. 31, 1973) (a public offering of variable life insurance contracts involved an offering of securities required to be registered under the Securities Act).

[151] 17 CFR 240.15c6–1(c).

delivery of securities at the time of the transaction for a contract for the sale for cash of securities pursuant to a firm commitment offering if the managing underwriter and the issuer have agreed to such date for all securities sold pursuant to such offering and the parties to the contract have not expressly agreed to another date for payment of funds and delivery of securities at the time of the transaction.[152]

2. Proposed Amendment to Rule 15c6–1 to Shorten the Standard Settlement Cycle to T+2

The Commission proposes to amend Rule 15c6–1(a) to prohibit a broker-dealer from effecting or entering into a contract for the purchase or sale of a security (other than an exempted security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the second business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.[153]

3. Reasons to Transition from T+3 to T+2

As previously discussed, the length of the settlement cycle can impact the nature and level of risk exposure for various market participants.[154] The Commission preliminarily believes that the proposal to shorten the standard settlement cycle from three days to two days would potentially offer market participants (*e.g.,* CCPs, broker-dealers, custodians, and investors) significant benefits through the reduction of exposure to credit, market, and liquidity risk, as well as related reductions to systemic risk. Assuming current levels of trading activity remain constant, shortening the time period between trade execution and trade settlement decreases the total number of unsettled trades that exists at any point in time, as well as the total market value of all unsettled trades. This reduction in the number and total value of unsettled trades should, in turn, correspond to a reduction in market participants' exposure to credit, market, liquidity and systemic risk arising from those unsettled transactions. The reduction of these risks should, in turn, improve the stability of the U.S. markets, and ultimately enhance investor protection.

In the case of a CCP, fewer unsettled trades and a reduced time period of exposure to such trades will reduce the CCP's credit, market and liquidity risk exposure to its members. As discussed earlier, a CCP, through novation, acts as the counterparty to its members and faces resultant credit risk in that a clearing member, both on behalf of purchasers of securities who may fail to deliver the payment, and on behalf of sellers of securities who may fail to deliver the securities. In each case, the CCP is required to meet its obligation to its members, which in respect of the buyer is to deliver securities, and in respect of the seller is to deliver cash.

The CCP also faces market risk where, during the settlement cycle, a member defaults and the CCP may be forced to liquidate open positions of the defaulting member and any financial resources of the member it may hold (*i.e.,* collateral) to cover losses and expenses in adverse market circumstances. For example, if the market value of the securities has increased in the interim between trade date and settlement date, the CCP may be forced to obtain the replacement securities in the market at a higher price.

Finally, the CCP can face liquidity risks during the settlement cycle when a member defaults, resulting in the CCP deploying financial resources to meet the CCP's end-of-day settlement obligations.[155] In each instance, the amount and period of risk to which the CCP is exposed is a function of the length of the settlement cycle, and therefore shortening the settlement cycle should reduce the CCP's overall exposure to those risks.

The Commission preliminarily believes that shortening the standard settlement cycle to T+2 will also result in related reductions in liquidity risk for broker-dealers that are CCP members, and by extension introducing broker-dealers and investors that clear their trades through CCP members.[156] As noted earlier, a CCP may take a number of measures to manage the risks its members present, including through member financial resource contributions and netting down the total outstanding exposure of a particular member. However, the extent to which a CCP must apply these risk mitigation tools is dictated by the amount of unsettled trades that remain outstanding as well as the time during which the CCP remains exposed to these risks. Thus, by reducing the amount of unsettled trades and the period of time during which the CCP is exposed to such trades, the Commission preliminarily anticipates a reduction in financial resource obligations for CCP members. This anticipated benefit to CCP members should have, in turn, a positive impact on the liquidity risks and costs faced by broker-dealers and investors. First, it should reduce the amount of financial resources that CCP member broker-dealers may have to provide for the CCP's risk management process, both on an ordinary course basis as well as in less predictable or procyclical instances where adverse general market conditions or a CCP member default results in a sudden liquidity demand by the CCP for additional financial resources from market participants.[157] This reduction in the potential need for financial resources should, in turn, reduce the liquidity costs and capital demands clearing broker-dealers face in the current environment.

Second, this anticipated reduction in CCP financial resource demands on its members may, in turn, result in reduced margin charges and other fees that clearing broker-dealers may pass down to introducing broker-dealers, institutional investors and retail investors, thereby reducing trading costs and freeing up capital for deployment elsewhere in the markets by those entities. Third, a shorter settlement cycle should enable market participants to gain quicker access to funds and securities following trade execution, which should further reduce liquidity risks and financing costs faced by market participants who may use those proceeds to transact in other markets,

[152] 17 CFR 240.15c6–1(d).

[153] Rule 15c6–1(a) provides that the payment of funds and delivery of securities (other than certain securities exempted) must occur no later than T+3, unless otherwise expressly agreed to by the parties at the time of the transaction. At the time that Rule 15c6–1(a) was adopted, the Commission stated its belief that usage of this provision ''was intended to apply only to unusual transactions, such as seller's option trades that typically settle as many as sixty days after execution as specified by the parties to the trade at execution.'' T+3 Adopting Release, 58 FR at 52902. The Commission preliminarily believes that use of this provision should continue to be applied in limited cases to ensure that the settlement cycle set by Rule 15c6–1(a) remains a standard settlement cycle.

[154] For a more detailed discussion on risk, *see supra* Part II.A.4.

[155] The costs associated with deploying such resources are ultimately borne by the CCP members, both in the ordinary course of the CCP's daily risk management process and in the event of an extraordinary event where members may be subject to additional liquidity assessments. As discussed earlier, these costs may be passed on through the CCP members to broker-dealers and investors.

[156] *See supra* note 77 (discussing mutual fund settlement timeframes and related liquidity risk, which may be exacerbated during times of stress). The Commission preliminarily believes that shortening settlement timeframes for portfolio securities to T+2 will assist in reducing liquidity and other risks for funds that must satisfy investor redemption requests subject to shorter settlement timeframes (*e.g.,* T+1).

[157] *See supra* Part II.A.4. for a discussion regarding procyclicality. *See also* DTCC Recommends Shortening the U.S. Trade Settlement Cycle, *supra* note 76.

including the derivatives markets and non-U.S. markets, that operate on a mismatched settlement cycle. Similarly, by more closely aligning and harmonizing the settlement cycles across markets, the rule would reduce the degree and period of time during which market participants are exposed to credit, market and liquidity risk arising from unsettled transactions.

The Commission also preliminarily believes that the reduction in credit, market and liquidity risks described above should reduce systemic risk. Because of the procyclicality of financial resource and other liquidity demands by CCPs and other market participants during times of market volatility and stress, efforts to reduce these liquidity demands through a shorter settlement cycle are expected to reduce systemic risk.[158] As the Commission noted in adopting Rule 15c6–1 in 1993, reducing the total volume and value of outstanding obligations in the settlement pipeline at any point in time will better insulate the financial sector from the potential systemic consequences of serious market disruptions.[159] The Commission believes these views are even more apt today given the increasing interconnectivity and interdependencies among markets and market participants.[160] In addition, reducing the period of time during which a CCP is exposed to credit, market and liquidity risk should enhance the overall ability of the CCP to serve as a source of stability and efficiency in the national clearance and settlement system, thereby reducing the likelihood that disruptions in the clearance and settlement process will trigger consequential disruptions that extend beyond the cleared markets.[161]

Lastly, the Commission preliminarily believes that significant advances in technology and substantive changes in market infrastructures and operations that have occurred since 1993, and which we believe are widely assimilated into market practices, provide a basis to accommodate a further reduction in the standard settlement cycle to two days. For example, the market has improved the confirmation/affirmation and matching process through the emergence and integration of Matching/ETC Providers into the national clearance and settlement infrastructure. According to statistics published by DTCC in 2011 regarding affirmation rates achieved through industry utilization of a certain Matching/ETC Provider, on average, 45% of trades were affirmed on trade date, while 90% were affirmed on T+1, and 92% were affirmed by noon on T+2.[162] Additionally, the number of securities immobilized or dematerialized in U.S. markets has continued to substantially increase in recent years.[163]

The Commission notes that progress by market participants in this respect has become particularly evident in recent years. For example, DTCC published in 2011 a report that included a review of the status of the building blocks originally identified in the SIA Business Case Report.[164] According to the DTCC report, many of the impediments identified in the SIA Business Case Report have since been resolved and significant progress has been made toward achieving many of the building blocks. Since that 2011 report was published, the Commission has observed that market participants have begun to accelerate collective progress, largely under the auspices of the ISC, to prepare for a transition to a T+2 settlement cycle.[165]

More recently, the ISC, through its T+2 Playbook, has mapped out the technological and operational changes necessary to support a two day settlement cycle. In many cases, these changes require only incremental modifications to existing market infrastructures and systems and processes. For example, the Commission preliminarily anticipates that a shortened settlement cycle may require incremental increases in utilization by certain market participants of Matching/ETC Providers, with a focus on improving and accelerating affirmation/confirmation processes, as well as relative enhancements to efficiencies in the services and operations of the Matching/ETC Providers themselves. The Commission preliminarily expects that these changes may be necessary in a T+2 environment because certain steps related to the allocation, confirmation, and affirmation of institutional trades will need to occur earlier in the settlement cycle compared to in a T+3 environment.[166] The Commission also notes that market participants have raised a number of additional anticipated benefits that may arise from shortening the settlement cycle to T+2. In particular, the Commission observes that the ISC identified the reduction in operational costs as an additional reason to move to a T+2 settlement cycle at this time.[167]

For all the reasons cited above, the Commission preliminarily believes that it is appropriate to shorten the standard settlement cycle from T+3 to T+2. The Commission, however, seeks public comment on these, and other potential benefits, that may be realized in the current market structure by shortening the standard settlement cycle to T+2.

Notwithstanding the Commission's preliminary expectation of the risk-reducing benefits noted above, the Commission also understands that the standard settlement cycle can have a significant influence upon the activities and operations of a wide range of market participants—from individual investors to financial services professionals to systemically important FMUs, such as certain registered clearing agencies. When the Commission proposed Rule 15c6–1 in 1993, a number of commenters raised for consideration potential costs and burdens that various market participants would have to assume to ensure compliance with an orderly transition

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[158] *See* DTCC Recommends Shortening the U.S. Trade Settlement Cycle, 2, 3, *supra* note 76. *See also, infra* Part VI.C.1.

[159] *See* T+3 Adopting Release, 58 FR at 52894; *see also* ISC White Paper, *supra* note 77 (noting the benefits associated with shortening the settlement cycle); BCG Study, *supra* note 107 (discussing systemic risk).

[160] *See* Clearing Agency Standards Adopting Release, 77 FR at 66254 (discussing the need for default procedures to allow the clearing agency to take action resulting from one or more member defaults in order to contain resultant losses and liquidity pressures). Also, for a discussion on issues related to interconnectivity and interdependence of market participants, *see* DTCC, Understanding Interconnectedness Risks—To Build a More Resilient Financial System (Oct. 2015), *http://www.dtcc.com/news/2015/october/12/understanding-interconnectedness-risks-article.*

[161] *See* CCA Proposal, 79 FR at 29598. Clearing members are often members of larger financial networks, and the ability of a covered clearing agency to meet payment obligations to its members can directly affect its members' ability to meet payment obligations outside of the cleared market. Thus, management of liquidity risk may mitigate the risk of contagion between asset markets.

[162] DTCC Proposal to Launch a Cost-Benefit Analysis, *supra* note 68, at 12.

[163] *See generally* DTCC, Strengthening the U.S Financial Markets: A Proposal to Fully Dematerialize Physical Securities, Eliminating the Cost and Risks They Incur, A White Paper to the Industry, at 1, 3–6 (July 2012), *http://www.dtcc.com/news/2012/july/01/proposal-to-fully-dematerialize-physical-securities-eliminating-the-costs-and-risks-they-incur.*

[164] *See* DTCC Proposal to Launch a Cost-Benefit Analysis, at 12–15.

[165] *See generally* the industry documentation available via the T+2 Settlement Project Web site (*www.UST2.com*) established by the ISC in 2014 as a public information hub for information relating to the T+2 initiative, including details pertaining to the progress being made to move toward a T+2 settlement cycle by the ISC and working groups. *See also, infra* Part VI.C.5.a. for a discussion of the impact of technological improvements on costs estimates to comply with a shorter standard settlement cycle.

[166] *See generally* BCG Study, *supra* note 107.

[167] *See* Press Release, DTCC, Industry Steering Committee and Working Group Formed to Drive Implementation of T+2 in the U.S. (Oct. 2014), *http://www.dtcc.com/news/2014/october/16/ust2.aspx.*

from T+5 to T+3.[168] In adopting the final rule and establishing a standard settlement cycle of T+3, the Commission acknowledged the likelihood of market participant costs and burdens, but ultimately determined, based on consideration of the anticipated benefits and contemporaneous industry initiatives to achieve a T+3 environment, to adopt the rule.[169] In addition, the Commission noted that calibrating the final rule's implementation date to afford market participants sufficient time to prepare for a T+3 environment was an important measure to address commenters' concerns about burdens and costs.[170]

For the purposes of its current proposal, the Commission acknowledges that a transition from a T+3 to T+2 standard settlement cycle, and implementation of the necessary operational, technical, and business changes, will likely result in varying burdens, costs and benefits for a wide range of market participants. According to the BCG Study published in 2012, the total industry investments would be $550 million for a T+2 settlement cycle and nearly $1.8 billion for a T+1 settlement cycle.[171] The Commission has remained mindful and observant of industry initiatives and progress targeted at facilitating an environment where a shortened standard settlement cycle could be achieved in a manner that reduces risk for market participants while also minimizing the likelihood of disruptive burdens and costs.

Having taken these industry initiatives and their relative progress into careful consideration, the Commission preliminarily believes there has been collective progress by market participants sufficient to facilitate a transition to a T+2 environment [172] and believes that this progress will continue, such as through the increased use of the matching services provided by Matching/ETC Providers to achieve STP.[173] Therefore, the Commission preliminarily believes that the risk-reducing benefits described above justify the anticipated burdens and costs of moving to a T+2 settlement cycle at this time.

Accordingly, similar to the approach taken when Rule 15c6–1 was adopted, the Commission anticipates providing a compliance date that would afford market participants sufficient time to complete any outstanding preparations in a manner that minimizes transition risks and avoids disruptive or inefficient burdens and costs. The Commission, however, is seeking public comment on the burdens and costs associated with implementing this proposal.

4. Consideration of Settlement Cycle Shorter than T+2

The Commission recognizes that amending Rule 15c6–1(a) to shorten the standard settlement cycle further than T+2 (*i.e.,* T+1 or T+0) could potentially result in further risk reduction in the national clearance and settlement system, and accordingly seeks input from commenters on a future shortening of the settlement cycle, including relevant factors.[174]

Such potential risk reduction notwithstanding, the Commission preliminarily believes that shortening the standard settlement cycle to T+2 is the appropriate step to take at this time for several reasons. Information from market participants regarding the technologies and processes used to settle securities transactions in the U.S. indicates that a successful transition to a settlement cycle that is shorter than T+2 would comparatively require larger investments by market participants to adopt new systems and processes.[175] In particular, transitioning to a settlement cycle that is shorter than T+2 would require near real-time capabilities for certain settlement processes, such as institutional matching.

Additionally, the lead time and level of coordination by market participants required to implement the changes to technology and post-trade processes that would enable a transition to a T+1 standard settlement cycle could be longer and greater than the time and coordination required to move to a T+2 settlement cycle in the near term.[176] Accordingly, the additional time that market participants may need to transition to T+1 settlement cycle in a coordinated fashion would delay the realization of the expected risk-reducing benefits of shortening the settlement cycle.

Also, movement towards adoption of a standard settlement cycle that is shorter than T+2 at this time may increase funding costs for market participants who rely on the settlement of foreign currency exchange (or ''FX'') transactions to fund securities transactions that settle regular way. Because the settlement of FX transactions occurs on T+2, market participants who seek to fund a cross-border securities transaction with the proceeds of an FX transaction would, in a T+1 or T+0 environment, be required to fund the securities transaction before the FX transaction settled. Finally, the Commission preliminarily believes that shortening the settlement cycle to T+2 would assist market participants with the settlement of cross-border transactions because the U.S. settlement cycle would be harmonized with non-U.S. markets that have already transitioned to a T+2 settlement cycle.[177]

B. Impact on Other Commission Rules

1. General

The Commission has reviewed its existing regulatory framework to consider the potential impact a T+2 standard settlement cycle may have on other Commission rules. Based on this review, the Commission preliminarily believes that no amendments to other Commission rules are required at this time. However, shortening the standard settlement cycle to T+2 could have ancillary consequences for how market participants comply with existing regulatory obligations. In this regard, some Commission rules require market participants to perform certain regulatory obligations on settlement date, within a specified number of business days after the settlement date, or are otherwise keyed off of settlement date. Below are examples, by way of illustration, of such rules. If the standard settlement cycle is shortened by one day, as proposed, market participants will have to perform those regulatory obligations within a shorter time period, and as a result it may become necessary to implement changes to existing internal policies and processes.[178] The Commission requests comment on whether it is necessary to amend or provide interpretive guidance

[168] T+3 Adopting Release, 58 FR at 52895. As discussed more fully in the release, cost issues included, but were not limited to, costs associated with the receipt of confirmations, payments by check, financing costs, interest expenses, and hiring additional personnel.

[169] *Id.*

[170] *Id.* at 52897.

[171] *See* BCG Study, *supra* note 107, at 9, 40. *See also, infra* Part VI.C.5.1.a. for discussion of certain limitations of the BCG Study.

[172] *See supra* note 87 for a list of the ten building blocks identified in the July 2000 SIA Business Case Report.

[173] *See infra* Part VI.A. for a discussion of certain market frictions related to investments required to implement a shorter settlement cycle.

[174] *See infra* Part V for related requests for comment.

[175] *See* BCG Study, *supra* note 107. *See also, infra* Part VI.D.1. for a discussion on the BCG Study in the context of a T+1 settlement cycle alternative.

[176] *See* BCG study, *supra* note 107, at 11, 48–49.

[177] For further discussion regarding the potential benefits of harmonization of settlement cycles for market participants engaging in cross-border transactions, *see infra* Part VI.C.1.

[178] For a discussion of the economic implications of shortening the standard settlement cycle to T+2 on other Commission rules, see Part VI.C.3. of this release.

concerning any other Commission rules that may be impacted by shortening the standard settlement cycle to T+2. The Commission also requests comment on the proposed amended Regulation SHO interpretation set forth below.[179]

2. Regulation SHO

Shortening the standard settlement cycle to T+2 would reduce the timeframes to effect a close-out under Rule 204 of Regulation SHO (''Rule 204'').[180] Rule 204 provides that a participant [181] of a registered clearing agency must deliver securities to a registered clearing agency for clearance and settlement on a long or short sale in any equity security by settlement date, or if a participant has a fail to deliver position, the participant shall, by no later than the beginning of regular trading hours on the applicable close-out date, immediately close-out the fail to deliver position by borrowing or purchasing securities of like kind and quantity.[182] If a fail to deliver position results from a short sale, the participant must close-out the fail to deliver position by no later than the beginning of regular trading hours on the settlement day following the settlement date.[183] Under the current T+3 standard settlement cycle, the close-out for short sales is required by the beginning of regular trading hours on T+4. If a fail to deliver position results from a long sale or bona fide market making activity, the participant must close-out the fail to deliver position by no later than the beginning of regular trading hours on the third consecutive settlement day following the settlement date.[184] Under the current T+3 standard settlement cycle, the close-out for long sales or bona fide market making activity is required by the beginning of regular trading hours on T+6. However, if a T+2 settlement cycle is implemented, the existing close-out requirement for fail to deliver positions resulting from short sales would be reduced from T+4 to T+3 based on the existing definition of settlement date in Rule 204.[185] Similarly, with regard to fail to deliver positions resulting from long sales or bona fide market making activity, the existing close-out requirement would be reduced from T+6 to T+5.

Shortening the standard settlement cycle to T+2 may also impact the application of other provisions in Regulation SHO. Under Rule 200(g) of Regulation SHO,[186] a broker-dealer may only mark a sale as ''long'' if the seller is ''deemed to own'' the security being sold under paragraphs (a) through (f) of Rule 200 [187] and either (i) the security is in the broker-dealer's physical possession or control; or (ii) it is reasonably expected that the security will be in the broker-dealer's possession or control by settlement of the transaction.[188] In the Rule 204 Adopting Release,[189] the Commission stated that ''if a person that has loaned a security to another person sells the security and a bona fide recall of the security is initiated within two business days after trade date, the person that has loaned the security will be 'deemed to own' the security for purposes of Rule 200(g)(1) of Regulation SHO, and such sale will not be treated as a short sale . . . . In addition, a broker-dealer may mark such orders as 'long' sales provided such marking is also in compliance with Rule 200(c) of Regulation SHO.'' [190] Thus, broker-dealers that initiate bona fide recalls [191] on T+2 of loaned securities that sellers are ''deemed to own'' under paragraphs (a) through (f) of Rule 200 may currently mark such orders as ''long.'' [192] The Commission limited this interpretation of Rule 200(g)(1) regarding the marking of sales of loaned securities ''long'' to those in which bona fide recalls are initiated on or before the business day preceding settlement date under the current T+3 settlement cycle because such recalls would likely be delivered, under the industry standard for loaned but recalled securities,[193] within three business days after initiation of a recall. As a result, such recalled securities would be available by T+5 to close-out the fail to deliver on a ''long'' sale, or before the close-out for fails on sales marked ''long'' is otherwise required by Rule 204 (*i.e.,* no later than the beginning of regular trading hours on T+6).

However, if a T+2 standard settlement cycle is implemented, bona fide recalls initiated on T+2 (per footnote 55 in the Rule 204 Adopting Release described above) would likely not be delivered before the close-out requirement for fails on sales marked ''long'' under Rule 204 (*i.e.,* no later than the beginning of regular trading hours on T+5 under a T+2 settlement cycle).[194] Accordingly, the Commission preliminarily believes that it would be appropriate to modify its interpretation to account for a T+2 standard settlement cycle to help ensure that such loaned but recalled securities would be available by T+4 before the

[179] The Commission further notes that certain SRO rules reference Rule 15c6–1 or currently define ''regular way'' settlement as occurring on T+3 and, as such, may need to be amended in connection with shortening the standard settlement cycle to T+2. Further, certain timeframes or deadlines in SRO rules key off of the current settlement date, either expressly or indirectly. In such cases, the SROs may need to amend these rules in connection with shortening the standard settlement cycle to T+2.

[180] 17 CFR 242.204.

[181] For purposes of Regulation SHO, the term ''participant'' has the same meaning as in Section 3(a)(24) of the Exchange Act, 15 U.S.C. 78c(a)(24). *See* Amendments to Regulation SHO, Exchange Act Release No. 60388 (July 27, 2009), 74 FR 38266, 38268 n.34 (July 31, 2009) (''Rule 204 Adopting Release'').

[182] 17 CFR 242.204(a).

[183] *Id.*

[184] *See* 17 CFR 242.204(a)(1) and (a)(3).

[185] *See* 17 CFR 242.204(g)(1).

[186] *See* 17 CFR 242.200(g).

[187] *See* 17 CFR 242.200(a)–(f).

[188] *See* 17 CFR 242.200(g)(1).

[189] *See* Rule 204 Adopting Release, 74 FR at 38270.

[190] *Id.* at 38270 n.55 (citations omitted).

[191] Because a recall must be initiated by no later than the business day preceding the settlement date to be delivered prior to the required Rule 204 close-out, any cancellation or modification of a recall of a security would not constitute a bona fide recall.

[192] In the release adopting the ''naked'' short selling antifraud rule, Rule 10b–21, 17 CFR 240.10b–21, we stated that ''a seller would not be making a representation at the time it submits an order to sell a security that it can or intends to deliver securities on the date delivery is due if the seller submits an order to sell securities that are held in a margin account but the broker-dealer has loaned out the shares pursuant to the margin agreement. Under such circumstances, it would be reasonable for the seller to expect that the securities will be in the broker-dealer's physical possession or control by settlement date.'' *See* ''Naked'' Short Selling Antifraud Rule, Exchange Act Release No. 58774 (Oct. 14, 2008), 73 FR 61666, 61672 (Oct. 17, 2008). Thus, a seller of securities would not be deemed to be deceiving a broker-dealer under Rule 10b–21 if the seller submits a sell order to an executing broker-dealer and informs the executing broker-dealer that the seller's shares are in the physical possession or control of a prime broker, but neither the seller nor the executing broker-dealer knows or has reason to know that the prime broker has loaned out the securities pursuant to a margin agreement. We note that this interpretation, which concerns whether a seller has made a misrepresentation regarding the deliverability of its securities in time for settlement, does not apply to rules other than Rule 10b–21.

[193] *See* Master Securities Loan Agreement (''MSLA''), Paragraph 6.1(a), discussing the termination of a loan of securities (''Unless otherwise agreed, either party may terminate a Loan on a termination date established by notice given to the other party prior to the Close of Business on a Business Day. The termination date established by a termination notice shall be a date no earlier than the standard settlement date that would apply to a purchase or sale of the Loaned Securities (in the case of notice given by Lender) or the noncash Collateral securing the Loan (in the case of a notice given by Borrower) entered into at the time of such notice, which date shall, unless Borrower and Lender agree to the contrary, be (i) in the case of Government Securities, the next Business Day following such notice and (ii) in the case of all other Securities, the third Business Day following such notice''). A sample MSLA can be found at: *http://www.sec.gov/Archives/edgar/data/59440/000095014405003873/g94498exv10w1.htm.*

[194] We note that a participant may not offset the amount of its fail to deliver position with shares that the participant receives or will receive during the applicable close-out date (*i.e.,* during T+4 or T+6, as applicable) but must take affirmative action, by borrowing or purchasing securities of like kind and quantity, at or before the beginning of regular trading hours on the applicable close-out date. *See* Rule 204 Adopting Release, *supra* note 181, 74 FR at 38272.

close-out period for fails on sales marked ''long'' would otherwise be required by Rule 204 (*i.e.,* no later than the beginning of regular trading hours on T+5). Specifically, if a T+2 standard settlement cycle is implemented, a broker-dealer seeking to mark an order ''long'' using this interpretation would need to initiate a bona fide recall of a security on the settlement day before the settlement date (*i.e.,* T+1), provided the seller is also net long under Rule 200(c) of Regulation SHO. Otherwise, the general requirements of Rule 200 of Regulation SHO would govern, and sales of loaned securities could only be marked ''long'' if the seller is ''deemed to own'' the security being sold and either (i) the security is in the broker-dealer's physical possession or control; or (ii) it is reasonably expected that the security will be in the broker-dealer's possession or control by settlement of the transaction.[195]

3. Financial Responsibility Rules Under the Exchange Act

Certain provisions of the Commission's broker-dealer financial responsibility rules [196] reference explicitly or implicitly the settlement date of a securities transaction. For example, paragraph (m) of Exchange Act Rule 15c3–3 uses settlement date to prescribe the timeframe in which a broker-dealer must complete certain sell orders on behalf of customers.[197] As another example, settlement date is incorporated into paragraph (c)(9) of Exchange Act Rule 15c3–1,[198] which explains what it means to ''promptly transmit'' funds and ''promptly deliver'' securities within the meaning of paragraphs (a)(2)(i) and (a)(2)(v) of Rule 15c3–1.[199] Further, the concepts of promptly transmitting funds and promptly delivering securities are incorporated in other provisions of the financial responsibility rules, including paragraphs (k)(1)(iii), (k)(2)(i), and (k)(2)(ii) of Rule 15c3–3,[200] paragraph (e)(1)(A) of Rule 17a–5,[201] and paragraph (a)(3) of Rule 17a–13.[202] The Commission is seeking comment regarding the potential impact that shortening the standard settlement cycle from T+3 to T+2 may have on the ability of broker-dealers to comply with the Commission's financial responsibility rules.

4. Exchange Act Rule 10b–10

Providing customers with confirmations pursuant to Exchange Act Rule 10b–10 serves a significant investor protection function. Confirmations provide customers with a means of verifying the terms of their transactions, alerting investors to potential conflicts of interest with their broker-dealers, acting as a safeguard against fraud, and providing investors a means to evaluate the costs of their transactions and the quality of their broker-dealers' execution.[203]

Rule 10b–10 requires that a broker-dealer send a customer a written confirmation disclosing information relevant to the transaction ''at or before completion'' of the transaction.[204] Generally, Rule 15c1–1 defines ''completion of the transaction'' to mean the time when: (i) A customer is required to deliver the security being sold; (ii) a customer is required to pay for the security being purchased; or (iii) a broker-dealer makes a bookkeeping entry showing a transfer of the security from the customer's account or payment by the customer of the purchase price.[205]

While the confirmation must be sent ''at or before completion'' of the transaction, Commission rules do not require that the customer receive a confirmation prior to settlement. In connection with the adoption of amendments to Rule 15c6–1 in 1993 to establish a T+3 standard settlement cycle, the Commission at that time noted that broker-dealers typically send customer confirmations on the day after trade date. Today, the Commission understands that, while broker-dealers may continue to send physical customer confirmations on the day after trade date, broker-dealers may also send electronic confirmations to customers on trade date. Accordingly, the Commission preliminarily believes that implementation of a T+2 settlement cycle will not create problems with regard to a broker-dealer's ability to comply with the requirement under Rule 10b–10 to send a confirmation ''at or before completion'' of the transaction. Nonetheless, the Commission notes that broker-dealers will have a shorter timeframe to comply with the requirements of Rule 10b–10 in a T+2 settlement cycle.

IV. Compliance Date

The Commission recognizes that the compliance date for the proposed amendment to Rule 15c6–1(a) must allow sufficient time for broker-dealers, clearing agencies, and other market participants to plan for, implement and test the changes to their systems, operations, policies and procedures in a manner that allows for an orderly transition to a T+2 standard settlement cycle, taking into account any burdens on broker-dealers, clearing agencies, institutional and retail investors and others, and any potential disruptions in the securities markets. In addition, the Commission recognizes that a compliance date should provide sufficient time for broker-dealers to address concerns regarding the potential for the transition to a T+2 settlement cycle to inconvenience certain retail investors.[206] As previously mentioned, failure to appropriately implement a transition to T+2 settlement may heighten certain operational risks for the markets.

On the other hand, delaying the transition to a T+2 standard settlement cycle further than is necessary for these activities to occur would delay realization of the benefits that are expected to result from shortening the settlement cycle.

As of March 2016, the industry identified September 5, 2017 as the target date for the transition to a T+2 settlement cycle to occur,[207] and, as noted above, the ISC has proposed a timeline for implementing the necessary industry changes. The September 5, 2017 T+2 implementation date was based on a timeline reflected in the T+2 Playbook, which identified certain regulatory and industry contingencies

[195] *See* 17 CFR 242.200(g).

[196] The term ''financial responsibility rules,'' for purposes of this release, includes any rule adopted by the Commission pursuant to Sections 8, 15(c)(3), 17(a) or 17(e)(1)(A) of the Exchange Act, any rule adopted by the Commission relating to hypothecation or lending of customer securities, or any rule adopted by the Commission relating to the protection of funds or securities. The Commission's broker-dealer financial responsibility rules include Exchange Act Rules 15c3–1 (17 CFR 240.15c3–1), 15c3–3 (17 CFR 240.15c3–3), 17a–3 (17 CFR 240.17a–3), 17a–4 (17 CFR 240.17a–4), 17a–5 (17 CFR 240.17a–5), 17a–11 (17 CFR 240.17a–11), and 17a–13 (17 CFR 240.17a–13).

[197] 17 CFR 240.15c3–3(m).

[198] 17 CFR 240.15c3–1(c)(9).

[199] 17 CFR 240.15c3–1(a)(2)(i), (a)(2)(v).

[200] 17 CFR 240.15c3–3(k)(1)(iii), (k)(2)(i), (k)(2)(ii).

[201] 17 CFR 240.17a–5(e)(1)(A).

[202] 17 CFR 240.17a–13(a)(3).

[203] *See* Confirmation Requirements for Transactions of Security Futures Products Effected in Futures Accounts, Exchange Act Release No. 46471 (Sept. 6, 2002), 67 FR 58302, 58303 (Sept. 13, 2002).

[204] *See* 17 CFR 240.10b–10(a).

[205] *See* 17 CFR 240.15c1–1(b).

[206] A shortened settlement cycle may require, for example, certain retail investors to fund their securities transactions earlier, and may require broker-dealers to educate their customers, update communications, and take other steps to minimize potential burdens on retail investors.

[207] *See* Press Release, ISC, US T+2 ISC Recommends Move to Shorter Settlement Cycle On September 5, 2017 (Mar. 7, 2016), *http://www.ust2.com/pdfs/T2-ISC-recommends-shorter-settlement-030716.pdf.* In this press release, the ISC noted that ''[t]he T+2 implementation date was chosen by the T+2 ISC after careful consideration, input from industry participants and consultation with other markets globally.'' *Id.*

that would have to transpire, including necessary regulatory actions, over a period of approximately a year and a half.[208] If the proposed amendment to Rule 15c6–1(a) is adopted, the Commission then would consider that date as well as other dates in setting a compliance date.[209] The Commission would take into consideration such factors as any investor outreach efforts and other changes that firms may need to undertake to address concerns that the transition may temporarily inconvenience retail investors. The compliance date would be set at an appropriate time to help avoid, in light of the scope of the industry changes that will be required, setting a transition occurring too quickly, which could have negative consequences for the industry and investors, and could result in disruptions to the securities markets.

V. Request for Comment

The Commission is requesting comment regarding all aspects of the proposed amendment to Rule 15c6–1(a) that would shorten the current T+3 standard settlement cycle to T+2 for securities transactions, subject to the exceptions in the rule. The Commission also seeks comment on the particular questions set forth below, and encourages commenters to submit any relevant data or analysis in connection with their answers.

1. The Commission invites commenters to address the merits of the proposed amendment to Rule 15c6–1(a). Is it appropriate to amend Rule 15c6–1 to shorten the standard settlement cycle to T+2? Why or why not?

2. The Commission invites commenters to provide their views on whether the standard settlement cycle should instead be shortened to T+1 or some other shorter settlement cycle. Why or why not?

3. Is the current scope of securities covered by Rule 15c6–1, including the exemptions provided in Rule 15c6–1(a), still appropriate in light of the Commission's proposal to shorten the standard settlement cycle to T+2? Are there any asset classes, securities as defined in Section 3(a)(10) of the Exchange Act, or types of securities transactions for which the proposed amendment to Rule 15c6–1(a) would present compliance problems for broker-dealers? What would be the quantitative and qualitative impacts of maintaining those exemptions?

4. Are there market participants today that agree to settle securities transactions later than T+3? If so, to what extent does this occur and what are the circumstances that motivate these market participants to settle later than T+3? If Rule 15c6–1(a) is amended to shorten the standard settlement cycle from T+3 to T+2, is it anticipated that these market participants would continue to settle securities transactions on a longer settlement cycle and/or is it anticipated that additional market participants would settle securities transactions later than T+2? Conversely, are there circumstances where expedited settlements (on timeframes less than T+3) are conducted, and if so, how often and under what circumstances? What are the circumstances that motivate earlier settlements? If Rule 15c6–1(a) is amended to shorten the standard settlement cycle from T+3 to T+2, how will the proposed amendment affect these expedited settlement decisions?

5. Should the temporary exemptive relief from compliance with Rule 15c6–1 for transactions in security-based swaps be extended? [210] If so, why or why not?

6. Should the Commission consider any amendments to other provisions of Rule 15c6–1 for the purposes of shortening the standard settlement cycle to T+2? If so, which provisions and why?

7. In conjunction with a change to the standard settlement cycle from T+3 to T+2 under Rule 15c6–1(a), should the Commission amend the settlement cycle timeframe under Rule 15c6–1(c) for firm commitment offerings priced after 4:30 p.m. Eastern Time from the current requirement of T+4 to a settlement cycle timeframe shorter than T+4, such as T+3 or T+2? If so, what settlement timeframe would be appropriate for transactions covered by Rule 15c6–1(c)? What would be the impact on risk, costs or operations of retaining the current provision for firm commitment offerings but shortening the settlement cycle to T+2 for regular-way transactions, as proposed? What would be the impact on risk, costs or operations of shortening the settlement cycle for such offerings to a T+3 or T+2 timeframe? Please provide data to the extent feasible on the costs/burdens that might be incurred/borne, and benefits that may be realized, by market participants as a result of shortening settlement cycle for firm commitment offerings priced after 4:30 p.m. Eastern Time.

8. Are the conditions set forth in the Commission's exemptive order for securities traded outside the United States still appropriate? [211] If not, why not? If the exemption should be modified, how should it be modified and why? Are the conditions set forth in the Commission's exemptive order for variable annuity contracts still appropriate? [212] If not, why not? If the exemption should be modified, how should it be modified and why? Are there other securities or types of transactions for which the Commission should consider providing exemptive relief under Rule 15c6–1(b)?

9. Commenters are invited to provide data on the costs/burdens that may be incurred/borne, and benefits that may be realized, by any category of persons as a result of the proposed amendment to Rule 15c6–1(a), including, without limitation, broker-dealers, clearing agencies, custodians, institutional investors, retail investors, and others.

10. Would shortening the standard settlement cycle to T+2 as proposed create difficulties for broker-dealers to comply with the requirements of Rule 15c6–1? Please provide examples.

11. How would retail investors be impacted by new processes that broker-dealers may implement in support of a T+2 standard settlement cycle? For example, would broker-dealers require retail investors to have a funded cash account prior to trade execution? Would shortening the standard settlement cycle to T+2 result in retail investors encountering ongoing costs due to a delay in their ability to make investments? Would shortening the standard settlement cycle to T+2 result in any benefits to retail investors?

12. In addition to the prospective impact on costs/burdens, the Commission seeks comments related to the credit, market, liquidity, legal, and operational risks (increase or decrease) associated with shortening the standard settlement cycle, and in particular, quantification of such risks.

13. What impact, if any, would the proposed amendment to Rule 15c6–1(a) have on market participants who engage in cross-border transactions? To what extent would harmonization of the U.S. settlement cycle with other markets that are on a T+2 settlement cycle result in increased or decreased operational costs to market participants? To what extent

[208] *See* T+2 Industry Playbook, *supra* note 126.

[209] The Commission understands that since the publication of the T+2 Playbook in December 2015, industry planning and preparation for a move to T+2 has continued. In considering an appropriate compliance date, should the Commission determine to adopt the proposed amendment discussed herein, the Commission could take into account the current status of industry preparation at that time, including progress that has occurred since the publication of the T+2 Playbook timeline.

[210] As noted in note 10, *supra,* certain of the exemptions included in the Commission's 2011 exemptive order (including the exemption for Rule 15c6–1) are set to expire on February 5, 2017.

[211] *See supra* note 147 and accompanying text.

[212] *See supra* note 150 and accompanying text.

would harmonization increase or decrease risks associated with cross-border transactions or related transactions, such as financing transactions?

14. What impact, if any, would the proposed amendment to Rule 15c6–1(a) have on market participants who engage in trading activity across various financial product classes, including derivatives and ETPs? [213] For example, would shortening the settlement cycle for ETPs affect the costs, such as net capital charges related to collateral requirements, of creating or redeeming shares in ETPs that hold portfolio securities that are on a different settlement cycle? [214] If so, would such a change in costs affect the efficiency or effectiveness of the arbitrage between an ETP's secondary market price and the value of its underlying assets?

15. To what extent, if any, would a T+2 standard settlement cycle impact the interaction of the creation and redemption process with the clearance and settlement process?

16. What impact, if any, would shortening the standard settlement cycle to T+2 have on the levels of liquidity risk that currently exist as a result of mismatches between the settlement cycles for different markets? For example, would shortening the standard settlement cycle to T+2 reduce the level of liquidity risk mutual funds face as a result of the mismatch between the current T+1 settlement cycle for transactions in open-end mutual fund shares that are settled through NSCC and the T+3 settlement cycle that is applicable to many portfolio securities held by mutual funds?

17. The Commission seeks comment on the status and readiness of the technology and processes in the industry that could support a T+2 or shorter settlement cycle at this time, including data metrics used to substantiate such support. The Commission also seeks comment on the additional costs, including changes to business processes, associated with the transition to T+1 or a shorter standard settlement cycle relative to the costs with respect to a transition to a T+2 standard settlement cycle, as well as any operational or technological obstacles that market participants may need to overcome before such shorter standard settlement cycle could be implemented effectively. In addition, the Commission seeks comment on the additional benefits that may be realized by market participants as a result of shortening the standard settlement cycle to T+1 or a shorter settlement cycle relative to benefits with respect to a T+2 standard settlement cycle, as well as the time that market participants would need to make necessary system changes in support of a transition to a T+1 standard settlement cycle.

18. Which, if any, Commission rules would need to be amended, and is there a need to provide interpretive guidance concerning any Commission rules, to accommodate a T+2 standard settlement cycle? The Commission invites commenters to describe any concerns they may have regarding such prospective changes to Commission rules and/or new interpretive guidance.

19. If a T+2 standard settlement cycle is adopted, the Commission's Regulation SHO marking interpretation would necessitate loaned but recalled securities being recalled on T+1 instead of T+2. What operational issues might arise if this were the case? Would specific operational difficulties arise for persons that lend securities?

20. What impact, if any, would the proposed amendment to Rule 15c6–1(a) have on the ability of broker-dealers to comply with existing requirements under the Commission's financial responsibility rules? In particular, would a T+2 standard settlement cycle or a shorter standard settlement cycle create operational difficulties or other problems for broker-dealers that may impact their ability to comply with the Commission's financial responsibility rules? In addition, would the proposed amendment to Rule 15c6–1(a) increase the costs and burdens that broker-dealers may incur in order to comply with the Commission's financial responsibility rules?

21. Would a T+2 standard settlement cycle create compliance or operational problems with regard to a broker-dealer's ability to meet the requirement under Rule 10b–10 to send a confirmation ''at or before completion'' of the transaction?

22. Would the adoption of a T+2 settlement cycle create any legal or operational concerns for issuers or broker-dealers in their ability to comply with the prospectus delivery obligations under Rule 172? [215]

23. Is the status of the building blocks toward implementing a T+1 settlement cycle, as discussed in the DTCC Proposal to Launch a Cost-Benefit Analysis, accurate and, if not, what efforts would need to be made to advance the building blocks to support a T+2 settlement cycle?

24. What parameters should guide the Commission in identifying an appropriate compliance date for the proposed amendment to Rule 15c6–1? Please provide analysis to support your position. The Commission encourages commenters to include in their responses discussion regarding the implementation date proposed by the ISC (*i.e.,* September 5, 2017). Specifically, the Commission notes that there are a number of milestones and dependencies described in the T+2 Playbook, and solicits comment on the length of the compliance period that would be needed to provide enough lead time for these industry preparations to be completed and ensure an orderly transition from a T+3 to a T+2 settlement cycle.

25. Should the compliance date occur immediately following a weekend (including a holiday weekend), with the view that two or three non-business days would provide additional time for performing any final system changes or testing in anticipation of the transition to a T+2 settlement cycle? If not, which day of the week would be most suitable for the transition to occur? Are there times of the month or year that should be avoided in order to facilitate a successful implementation of the system changes necessary to support a T+2 settlement cycle?

26. A new technology, known as ''blockchain'' or ''distributed ledger'' technology, is being tested in a variety of settings to determine whether it has utility in the securities industry.[216]

[213] ETPs constitute a diverse class of financial products that seek to provide investors with exposure to financial instruments, financial benchmarks, or investment strategies across a wide range of asset classes. ETP trading occurs on national securities exchanges and other secondary markets that are regulated by the Commission under the Exchange Act, making ETPs widely available to market participants, from individual investors to institutional investors, including hedge funds and pension funds. The largest category of ETPs is comprised of ETFs, which are open-end fund vehicles or unit investment trusts that are registered as investment companies under the Investment Company Act. *See* Request for Comment on Exchange-Traded Products, Exchange Act Release No. 75165 (June 12, 2015), 80 FR 34729 (June 17, 2015).

[214] For example, the way a market participant executes a creation or redemption of an ETF share resembles a stock trade in the secondary market. A market participant typically referred to as an ''Authorized Participant'' or ''AP'' submits an order to create or redeem (''CR'') ETF shares much like an investor submits an order to his broker to buy or sell a stock. Also, similar to a stock trade, the CR order settles on a T+3 settlement cycle through NSCC. *See* ICI, ICI Research Perspective Vol. 20 No. 5, 14 (Sept. 2014), *https://www.ici.org/pdf/per20-05.pdf; see also* DTCC, Exchange Traded Fund (ETF) Processing, *http://www.dtcc.com/clearing-services/equities-trade-capture/etf;* DTCC, ETFs and CNS Processing, *https://www.dtcclearning.com/learning/clearance/topics/exchange-traded-funds-etf/about-etf/etfs-and-cns-processing.html.*

[215] For a more detailed discussion regarding Rule 172 and the ''access equals delivery'' model, *see supra* note 113.

[216] *See generally,* DTCC, ''Embracing Disruption, Tapping the Potential of Disrupted Ledgers to

Continued

What utility, if any, would a distributed ledger system or such related technology have in the context of a shortened settlement cycle, and if any, how would it be used? What regulatory actions, if any, would be necessary to facilitate the use of that technology? How would market participants ensure their use of or interaction with such technology would comply and be consistent with federal securities laws and regulations? Please explain.

VI. Economic Analysis

The following economic analysis begins with a discussion of the risks inherent in the settlement cycle and how a reduction in the length of the settlement cycle may impact the management and mitigation of these risks. Next, it discusses market frictions that potentially impair the ability of market participants to shorten the settlement cycle in the absence of a Commission rule. These settlement cycle risks and market frictions frame our analysis of the rule's benefits and costs in later sections. The Commission preliminarily believes that the proposed amendment to Rule 15c6–1(a) ameliorates these market frictions and thus reduces the risks inherent in settlement.

This discussion of the economic effects of the proposed amendment to Rule 15c6–1(a) begins with a baseline of current practices. The economic analysis then discusses the likely economic effects of the proposed amendment, such as the costs and benefits of the proposed amendment as well as its effects on efficiency, competition, and capital formation.[217] The Commission has, where possible, attempted to quantify the economic effects expected to result from this proposal. In many cases, and as noted below in further detail, the Commission is unable to quantify the economic effects of the proposed amendment to Rule 15c6–1(a) and solicits comment, including estimates and data from interested parties, that could help it form useful estimates of the economic effects of the proposed amendment.

A. Background

The proposed amendment to Rule 15c6–1(a) would prohibit a broker-dealer from effecting or entering into a contract for the purchase or sale of a security (other than an exempted security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the second business day after the date of the contract unless otherwise expressly agreed to by both parties at the time of the transaction, subject to certain exceptions provided in the rule. In its analysis of the economic impacts of the proposal, the Commission has considered the risks that market participants, including broker-dealers, clearing agencies, and institutional and retail investors are exposed to during the settlement cycle and how those risks change with the length of the settlement cycle.

The settlement cycle spans the length of time between when a trade is executed and when cash and securities are delivered to the seller and buyer, respectively. During this period of time, each party to a trade faces the risk that its counterparty may fail to meet its obligations to deliver cash or securities. When a counterparty defaults or fails to meet its obligations to deliver cash or securities, the trade must be closed-out. Regardless of whether the non-defaulting party chooses to enter into a new transaction as a result of the failed trade, it is likely to bear costs as a result of counterparty default. For example, a party that chooses to enter into a new transaction must find a new counterparty to contract with and must trade at a price that may not be the same as the price of the original trade.[218] The length of the settlement cycle influences this risk in two ways: (i) Through its effect on counterparty exposures to price volatility, and (ii) through its effect on the value of outstanding obligations.

First, additional time allows asset prices to move further away from the price of the original trade. For example, if daily asset returns are statistically independent, then the variance of prices over t days is equal to t multiplied by the daily variance of asset returns. Thus when daily returns are independent and daily variance of returns is constant, the variance of returns increases linearly in the number of days.[219] In other words, the more days that elapse between when a trade is executed and when a counterparty defaults, the larger the variance of prices will be, and the more likely it will be that the difference between execution price and the price ultimately paid will be larger. For example, if a buyer whose counterparty fails decides to enter into a new transaction to buy the same security, the buyer faces the risk that the price of the security will have deviated from the price of the original transaction. The price change could be positive or negative, but in the event of a price increase, the buyer must pay more than the original execution price; in the event of a price decrease, the buyer may buy the security for less than the original execution price.[220]

Second, the length of the settlement cycle directly influences the quantity of transactions awaiting settlement. For example, assuming no change in transaction volumes, the volume of unsettled trades under a T+2 settlement cycle is two-thirds the volume of unsettled trades under T+3 settlement cycle. Thus, counterparties would have to enter into a new transaction, or otherwise close out two-thirds the number of trades in a T+2 standard settlement cycle due to counterparty defaults than in a T+3 standard settlement cycle. This means that for a given adverse move in prices, the financial losses resulting from counterparty default will be two-thirds as large under a T+2 standard settlement cycle than under a T+3 standard settlement cycle.

Market participants manage and mitigate settlement risk in a number of specific ways that are discussed in Part II.A. of this release. Generally, these

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Improve the Post-Trade Landscape,'' (Jan. 2016), *https://www.gpo.gov/fdsys/pkg/FR-2015-12-31/pdf/2015-32755.pdf. See also* Nasdaq, ''Building on the Blockchain'' (Mar. 23, 2016), *http://business.nasdaq.com/marketinsite/2016/Building-on-the-Blockchain.html* (discussing the future use of Blockchain technology in the markets); Matthew Leising, ''Blockchain Potential for Markets Grabs Exchange CEOs' Attention'', Bloomberg Business (Nov. 4, 2015), *http://www.bloomberg.com/news/articles/2015-11-04/futures-market-ceos-says-blockchain-shows-serious-potential* (discussing financial services industry's interest in blockchain technology).

[217] Section 3(f) of the Exchange Act requires the Commission, when engaging in rulemaking that requires the Commission to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. 15 U.S.C. 78c(f). Further, Section 23(a)(2) of the Exchange Act requires the Commission, when adopting rules under the Exchange Act, to consider the impact that any new rule would have on competition, and provides that the Commission shall not adopt any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act. 15 U.S.C. 78w(a)(2).

[218] As described above, in its role as a CCP, NSCC becomes counterparty to both initial parties to a transaction. In the case of cleared transactions, while each initial party is not exposed to the risk that their original counterparty defaults, both are exposed to the risk of CCP default. Similarly, the CCP is exposed to the risk that either initial party defaults.

[219] More generally, because total variance over multiple days is equal to the sum of daily variances and variables related to the correlation between daily returns, total variance increases with time so long as daily returns are not highly negatively correlated. *See, e.g.,* Morris H. DeGroot, *Probability and Statistics* 216 (Addison-Wesley Publishing Co. 1986).

[220] Similarly, a seller whose counterparty fails faces similar risks with respect to the security, albeit in opposite directions.

methods entail costs to market participants. In some cases, these costs may be explicit. For instance, broker-dealers may explicitly charge customers for providing them with the implicit option to default on payment or delivery obligations. Other costs are implicit, such as the opportunity cost of assets posted as collateral, or limitations on the amount of credit that broker-dealers are willing to provide to their customers.

By shortening the standard settlement cycle, each trade will be subject to credit and market risk for a shorter amount of time, allowing for less time between trade execution and settlement for the transactions to generate losses. In addition, a shorter standard settlement cycle would reduce liquidity risks that could arise between derivative and cash markets by allowing investors to obtain the proceeds of securities transactions sooner. These are risks that affect all market participants, are difficult to diversify away, and require resources to manage and mitigate. CCPs and clearing members require participants to post financial resources in order to secure members' obligations to deliver cash and securities to the CCP. To the extent that collateral is posted to CCPs and clearing members for the purposes of mitigating the risks of the clearance and settlement process, that may represent an allocative inefficiency.

This allocative inefficiency could take on several forms. First, financial resources that are used to mitigate the risks of the clearance and settlement process could have been put to alternative uses, such as investment in less liquid assets. Second, assets that are valuable because they are particularly suited to meeting financial resource obligations may have been better allocated to market participants that hold these assets for their fundamental risk and return characteristics. These allocative inefficiencies may reduce capital formation. Reducing the financial risks associated with the overall clearance and settlement process would thereby reduce the amount of collateral required to mitigate these risks, which would reduce the costs that market participants bear to manage and mitigate these risks and the allocative inefficiencies that may stem from risk management practices.[221] Hence, the Commission preliminarily believes that these benefits generally provide securities market participants with incentives to shorten the settlement cycle.

However, the Commission acknowledges that certain market frictions may prevent securities markets from shortening the settlement cycle in the absence of regulatory intervention. The Commission has considered two key market frictions related to investments required to implement a shorter settlement cycle. The first is a coordination problem that arises when some of the benefits of actions taken by market participants are only realized when other market participants take a similar action. For example, absent regulatory intervention such as the proposed amendment to Rule 15c6–1(a), if a particular institutional investor makes a technological investment necessary to reduce the time it requires to match and allocate trades while its clearing broker-dealers do not, the institutional investor cannot fully realize the benefits of its investment, as the settlement process is limited by the capabilities of the clearing agency for trade matching and allocation. More generally, when each market participant must bear the costs of an upgrade in order for the entire market to enjoy a benefit, the result is a coordination problem, where each market participant is reluctant to make the necessary investments until it can be sure that others will also do so. In general, these coordination problems may be resolved if all parties can credibly commit to the necessary infrastructure investments. Regulatory intervention is one possible way of coordinating market participants to undertake the investments necessary to support a shorter settlement cycle. Such intervention could come through Commission rulemaking or through a coordinated set of SRO rule changes.

In addition to coordination problems, a second market friction related to the settlement cycle involves situations where one market participant's investments result in benefits for other market participants. For example, if a market participant invests in a technology that reduces the error rate in its trade matching, not only does it benefit from fewer errors, but its counterparties and other market participants may also benefit from more robust trade matching. However, because market participants do not necessarily take into account the benefits that may accrue to other market participants (also known as ''externalities'') when market participants choose the level of investment in their systems, the level of investment in technologies that reduce errors might be less than efficient for the entire market. More generally, underinvestment may result because each participant only takes into account its own costs and benefits when choosing which infrastructure improvements or investments to make, and does not take into account the costs and benefits that may accrue to its counterparties, other market participants, or other financial markets.

Moreover, because market participants that incur similar costs to enable a move to a shorter settlement cycle may nevertheless experience different levels of economic benefits, there is likely heterogeneity across market participants in the demand for a shorter settlement cycle. This heterogeneity may exacerbate coordination problems and underinvestment. Market participants that do not expect to receive direct benefits from settling transactions earlier may lack incentives to invest in infrastructure to support a shorter settlement cycle and thus could make it difficult for the market as a whole to realize the overall risk reduction that the Commission preliminarily believes a shorter settlement cycle may bring.

For example, the level and nature of settlement risk exposures vary across different types of market participants. A market participant's characteristics and trading strategies can influence the level of settlement risk it faces. For example, large market participants will generally be exposed to more settlement risk than small market participants because they trade in larger volume. However, large market participants also trade across a larger variety of assets and may face less idiosyncratic risk in the event of counterparty default if the portfolio of trades that would have to be remade is diversified.[222] As a corollary, a market participant who trades a single security in a single direction against a given counterparty may face more idiosyncratic risk in the event of counterparty failure than a market participant who trades in both directions with that counterparty.

Further, the extent to which a market participant experiences any economic benefits that may stem from a shortened standard settlement cycle likely depends on the market participant's relative bargaining power. While large intermediaries, such as clearing broker-dealers, may experience direct benefits

[221] *See infra* Part VI.B. for further discussion of financial resources collected to mitigate and manage financial risks; *see also, infra* Part VI.C. for more information about risk reduction.

[222] *See* Ananth Madhavan, Morris Mendelson & Junius W. Peake, *Risky Business: The Clearance and Settlement of Financial Transactions,* (Wharton Sch. Rodney L. White Ctr. for Fin. Research, Working Paper No. 40–88, 1988); *see also* John H. Cochrane, *Asset Pricing* (Princeton University Press rev. ed. 2009), at 15 (defining the idiosyncratic component of any payoff as the part that is uncorrelated with the discount factor).

from a shorter settlement cycle as a result of being required to post less collateral with a CCP, if they do not effectively compete for customers through fees and services as a result of market power, they may pass only a portion of these cost savings through to their customers.[223]

In light of the above, the Commission preliminarily believes that the proposed amendment to Rule 15c6–1(a), which would shorten the standard settlement cycle from T+3 to T+2 may mitigate the market frictions of coordination and underinvestment described above. The Commission preliminarily believes that by mitigating these market frictions, the transition to a shorter standard settlement cycle will reduce the risks inherent in the clearance and settlement process.

The shorter standard settlement cycle might also have an impact on the level of operational risk that exists in the U.S. clearance and settlement system as a result of existing clearance and settlement processes. By shortening the settlement cycle by one day, market participants involved in a securities transaction will have one less day to resolve any errors that might occur in the clearance and settlement process. As a result, tighter operational timeframes and linkages required under a shorter standard settlement cycle might introduce new fragility that could impact financial market participants, specifically an increased risk that operational issues could impact transaction processing and related securities settlement.[224]

Market participants may incur initial costs for the investments necessary to comply with a shorter standard settlement cycle.[225] However, these costs may differ across market participants and these differences may exacerbate coordination problems. First, differences in operational costs across clearing agency members may be driven by member transaction volume, and so the extent to which many of the upgrades necessary for a T+2 standard settlement cycle are optimal for a member to adopt unilaterally may depend on its transaction volume. For example, certain upgrades necessary for a T+2 standard settlement cycle may result in economies of scale, where large clearing members are able to comply with the proposed amendment to Rule 15c6–1(a) at a lower per transaction cost than smaller members. As a result, larger members might take a short time to recover their initial costs for upgrades; smaller members with lower transaction volumes might take longer to recover their initial cost outlays and might be more reluctant to make the upgrades in the absence of the proposed amendment.

In addition, the Commission acknowledges that the upgrades necessary to implement a shorter standard settlement cycle may produce indirect economic effects. We analyze some of these indirect effects, such as the impact on competition and third-party service providers, in the following section. However, other indirect effects, such as the ancillary benefits and costs mentioned in the BCG Study,[226] of investments and changes to market practices that enhance the speed and efficiency of the settlement process, but which are unrelated to a shorter standard settlement cycle, are not within the scope of the economic analysis of this release.

B. Baseline

In order to perform its analysis of the likely economic effects of the proposed amendment to Rule 15c6–1(a), as well as the proposed amendment's effects on efficiency, competition, and capital formation, the Commission uses as its baseline the clearance and settlement process as it exists at the time of this proposal. In addition to the current process that is described in Part II.A.3., the baseline includes rules adopted by the Commission, including rules governing the clearance and settlement system, SRO rules,[227] as well as rules adopted by regulators in other jurisdictions to regulate securities settlement in those jurisdictions.[228] The following section discusses several additional elements of the baseline that are relevant for the economic analysis of the proposed amendment to Rule 15c6–1(a) because they are related to the financial risks faced by market participants that clear and settle transactions and the specific means by which market participants manage these risks.

1. Clearing Agencies

As discussed above, one way NSCC mitigates the credit, market, and liquidity risk it assumes through its novation and guaranty of trades is via multilateral netting of the delivery and payment obligations across clearing members. By offsetting these obligations, NSCC reduces the aggregate market value of securities and cash it must deliver to clearing members after the trade is novated and the trade guaranty attaches. While netting reduces NSCC's settlement obligations by an average of 97% on each day, it does not fully eliminate the risk posed by unsettled trades because NSCC is still responsible for payments or deliveries on trades it cannot fully net. NSCC reported clearing an average of approximately $872 billion each day during the fourth quarter of 2015,[229] suggesting an average net settlement obligation of approximately $26.2 billion each day.[230] Based on these estimates, and given that, under current practices, NSCC's trade guaranty attaches at midnight on T+1, the average notional value of unsettled trades approaches $52.3 billion.[231]

The aggregate settlement risk faced by NSCC is also a function of the probability of clearing member default. NSCC manages the risk of clearing member default by imposing certain financial responsibility requirements on its members. For example, as of 2015, broker-dealer members of NSCC that are not municipal securities brokers and do not intend to clear and settle transactions for other broker-dealers must have excess net capital over the minimum net capital requirement imposed by the Commission in the amount of $500,000.[232] Further, each NSCC member is subject to ongoing membership requirements, including a requirement to furnish NSCC with assurances of the member's financial responsibility and operational capability, including, but not limited to, periodic reports of its financial and operational condition.[233]

In addition to managing the risk of member default, clearing agencies also take steps to mitigate the risks generated by member default. For example, in the normal course of business, CCPs are not exposed to market or liquidity risk because they expect to receive every security from a seller they are obligated to deliver to a buyer and they expect to

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[223] *See infra* Parts VI.C.1. and VI.C.2.

[224] For example, the ability to compute an accurate net asset value (''NAV'') within the settlement timeframe is a key component for settlement of ETF transactions. *See, e.g.,* Barrington Partners, An Extraordinary Week: Shared Experiences from Inside the Fund Accounting Systems Failure of 2015, at 10 (Nov. 2015), *http://www.mfdf.org/images/uploads/blog_files/SharedExperiencefromFASystemFailure2015.pdf.*

[225] *See infra* Part VI.C.2.

[226] *See* BCG Study, *supra* note 107, at 8.

[227] *See supra* note 179.

[228] *See supra* Part II.B.

[229] *See* NSCC, Q4 2015 Fixed Income Clearing Corporation and NSCC Quantitative Disclosure for Central Counterparties, at 14 (Mar. 2016), *http://www.dtcc.com/legal/policy-and-compliance.*

[230] Calculated as $872 billion × 3% = $26.16 billion.

[231] Calculated as $26.16 billion × 2 days between attachment of the trade guaranty and settlement on T+3 = $52.32 billion.

[232] *See* NSCC Rules and Procedures, *supra* note 26, Rule 2A, Section 1A, and Addendum B, Section 1.B.1.

[233] *See, e.g., id.,* Rule 15, Section 2.

receive every payment from a buyer that they are obligated to deliver to a seller. However, when a clearing member defaults, the CCP can no longer expect the defaulting member to deliver securities or make payments. CCPs mitigate this risk by requiring clearing members to make contributions of financial resources to the CCP. The level of financial resources CCPs require clearing members to post may be based on, among other things, the market and liquidity risk of a member's portfolio, the correlation between the assets in the member's portfolio and the member's own default probability, and the liquidity of the collateral assets.

2. Market Participants—Investors, Broker-Dealers, and Custodians

As discussed in Part II.A.3., broker-dealers serve both retail and institutional customers. Aggregate statistics from the Board of Governors of the Federal Reserve System suggest that at the end of 2015, U.S. households held approximately 39% of the value of corporate equity outstanding, and 50% of the value of mutual fund shares outstanding, which provide a general picture of the share of holdings by retail investors.[234]

In the fourth quarter of 2015, approximately 4,100 broker-dealers filed FOCUS Reports [235] with FINRA. These firms varied in size, with median assets of approximately $700,000 and average assets of nearly $1 billion dollars. Approximately 30 broker-dealers held 80% of the assets of broker-dealers overall, indicating a high degree of concentration in the industry. Of the 4,100 filers, 186 reported self-clearing public customer accounts, while 1,497 reported acting as an introducing broker and sending orders to another broker-dealer for clearing. Broker-dealers that identified themselves as self-clearing broker-dealers, on average, had higher total assets than broker-dealers that identified themselves as introducing broker-dealers. While the decision to self-clear may be based on many factors, this evidence is consistent with the argument that there may currently be high barriers to entry for providing clearing services as a broker-dealer.

Clearing broker-dealers face liquidity risks as they are obligated to make payments to clearing agencies on behalf of customers who purchase securities. As discussed in more detail below, from the perspective of clearing broker-dealers, customers have an option to default on their payment obligations, particularly when the price of a purchased security declines during the settlement cycle.[236] Therefore, clearing broker-dealers take measures to reduce the risks posed by their customers. For example, clearing broker-dealers may require customers to contribute financial resources in the form of margin to margin accounts, to pre-fund purchases in cash accounts, or may restrict the use of unsettled funds. These measures are in many ways analogous to measures taken by clearing agencies to reduce and mitigate the risks posed by their clearing members. In addition, clearing broker-dealers may also mitigate the risks posed by customers by charging higher transaction fees that reflect the value of the customer's option to default, thereby causing customers to internalize the cost of the default options inherent in the settlement process.[237] While not directly reducing the risk posed by customers to clearing members, these higher transaction fees at least allocate to customers the direct expected costs of customer default.

Another way the settlement cycle may affect transaction prices is related to the use of funds during the settlement cycle. To the extent that buyers may use the cash to purchase securities during the settlement cycle for other purposes, they may derive value from the length of time it takes to settle a transaction. Testing this hypothesis, studies have found that sellers demand compensation for the benefit that buyers receive from deferring payment during the settlement cycle and that this compensation is incorporated in equity returns.[238]

The settlement process also exposes investors to certain risks. The length of the settlement cycle sets the minimum amount of time between when an investor places an order to sell securities and when the customer can expect to have access to the proceeds of that sale. Investors take this into account when they plan transactions to meet liquidity needs. For example, under T+3 settlement, investors who experience liquidity shocks, such as unexpected expenses that must be met within two days, could not rely on obtaining funding solely through a sale of securities because the proceeds of the sale would be available in three days, at the earliest, and not two. One possible strategy to deal with such a shock under T+3 settlement would be to borrow cash on day two to meet payment obligations on day two and repay the loan on day three with the proceeds from a sale of securities, incurring the cost of one day of interest on the short-term loan. Another strategy that investors may use is to hold financial resources to insure themselves from liquidity shocks.

3. Investment Companies

As noted above,[239] shares issued by investment companies settle on different timeframes. ETFs and certain closed-end funds generally settle on T+3. By contrast, mutual funds generally settle on a T+1 basis, except for certain retail funds which settle on T+3. Mutual funds that settle on a T+1 basis currently face liquidity risk as a result of a mismatch between the timing of mutual fund transaction order settlements and the timing of fund portfolio security transaction order settlements. Mutual funds may manage these particular liquidity needs by, among other methods, using cash reserves, back-up lines of credit, or interfund lending facilities to provide cash to cover the settlement mismatch.[240] As of the end of 2015, there were 9,156 open-end funds (excluding money market funds, but including ETFs).[241] The assets of these funds were approximately $14.95 trillion.[242] Within these figures, there were 1,521 ETFs with $2.1 trillion in assets.[243]

Under Section 22(e) of the Investment Company Act, an open-end fund is required to pay shareholders who tender shares for redemption within seven days

[234] *See* Board of Governors of the Federal Reserve System, Statistical Release Z.1 Financial Accounts of the United States, Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts, at tables L.223 and L.224 (First Quarter 2016), *http://www.federalreserve.gov/releases/z1/20151210/z1.pdf.*

[235] FOCUS Reports, or ''Financial and Operational Combined Uniform Single'' Reports, are monthly, quarterly, and annual reports that broker-dealers generally are required to file with the Commission and/or SROs pursuant to Exchange Act Rule 17a–5, 17 CFR 240.17a–5.

[236] *See id.*

[237] *See infra* Part VI.C.2. and Part VI.C.4.

[238] *See* Victoria Lynn Messman, *Securities Processing: The Effects of a T+3 System on Security Prices* (May 2011) (Ph.D. dissertation, University of Tennessee—Knoxville), *http://trace.tennessee.edu/utk_graddiss/1002/;* Josef Lakonishok & Maurice Levi, *Weekend Effects on Stock Returns: A Note,* 37 J. Fin. 883 (1982), *https://www.jstor.org/stable/pdf/2327716.pdf;* Ramon P. DeGennaro, *The Effect of Payment Delays on Stock Prices,* 13 J. Fin. Res. 133 (1990), *http://onlinelibrary.wiley.com/doi/10.1111/j.1475-6803.1990.tb00543.x/abstract.*

[239] *See supra* note 11.

[240] *See* Open-End Fund Liquidity Risk Management Programs; Swing Pricing; Re-Opening of Comment Period for Investment Company Reporting Modernization Release, Investment Company Act Release No. 31835 (Sept. 22, 2015), 80 FR 62274, 62285 n.100 (Oct. 15, 2015).

[241] *See* ICI, 2015 Investment Company Fact Book (2016), at 176, 183 (''2016 ICI Fact Book''), *http://www.ici.org/pdf/2016_factbook.pdf.*

[242] *See id.* at 174, 182.

[243] *See id.* at 182–83.

of their tender.[244] In addition to this requirement, as a practical matter open-end funds that are sold through broker-dealers meet redemptions within three days because broker-dealers are subject to Rule 15c6–1(a). Furthermore, Rule 22c–1 under the Investment Company Act,[245] the ''forward pricing'' rule, requires funds, their principal underwriters, and dealers to sell and redeem fund shares at a price based on the current NAV next computed after receipt of an order to purchase or redeem fund shares, even though cash proceeds from purchases may be invested or fund assets may be sold in subsequent days in order to satisfy purchase requests or meet redemption obligations.

4. The Current Market for Clearance and Settlement Services

As described in Part II.A.2., two affiliated entities, NSCC and DTC, facilitate clearance and settlement activities in U.S. securities markets in most instances. There is limited competition in the provision of the services that these entities provide. NSCC is the CCP for trades between broker-dealers involving equity securities, corporate and municipal debt, and UITs for the U.S. market. DTC is the CSD that provides custody and book-entry transfer services for the vast majority of securities transactions in the U.S. market involving equities, corporate and municipal debt, money market instruments, ADRs, and ETFs. There is also limited competition in the provision of Matching/ETC services—three entities that have obtained exemptions from registration as a clearing agency from the Commission to operate as Matching/ETC Providers.[246]

Broker-dealers compete to provide services to retail and institutional customers. Based on the large number of broker-dealers, there is likely a high degree of competition among broker-dealers. However, the markets that broker-dealers serve may be segmented along lines relevant for the analysis of competitive impacts of the proposed amendment to Rule 15c6–1(a). As noted above, the set of broker-dealers that indicate they clear public customer accounts by self-clearing tends to be smaller than the set of broker-dealers that indicate they do so by introducing and not self-clearing. This could mean that introducing broker-dealers compete more intensively for customers than clearing broker-dealers. Further, clearing broker-dealers must meet requirements set by NSCC and DTC, such as financial responsibility requirements and clearing fund requirements. These requirements may represent barriers to entry for clearing broker-dealers, limiting competition among these entities.

Competition for customers impacts how the costs associated with the clearance and settlement process are allocated among market participants. In managing the expected costs of risks from their customers and the costs of compliance with SRO and Commission rules, clearing broker-dealers decide what fraction of these costs to pass through to their customers in the form of fees and margin requirements, and what fraction of these costs to bear themselves. The level of competition that a clearing broker-dealer faces for customers will dictate the extent to which it is able to exercise market power in passing through these costs to their customers; a clearing broker-dealer with little competition for customers is likely to pass on a majority of its costs to its customers, while one with heavy competition is likely to choose to bear the cost internally to avoid losing market share.

In addition, several factors impact the current levels of efficiency and capital formation in this market. First, at a general level, market participants occupying various positions in the clearance and settlement system must post or hold liquid financial resources, and the level of these resources is a function of the length of the settlement cycle. For example, NSCC collects clearing fund contributions from members to ensure that it has sufficient financial resources in the event that one of its members defaults on its obligations to NSCC. As discussed above, the length of the settlement cycle is one determinant of the size of NSCC's exposure to clearing members. As another example, mutual funds may manage liquidity needs by, among other methods, using cash reserves, back-up lines of credit, or interfund lending facilities to provide cash. These liquidity needs, in turn, are related to the mismatch between the timing of mutual fund transaction order settlements and the timing of fund portfolio security transaction order settlements.

Holding liquid assets solely for the purpose of mitigating counterparty risk or liquidity needs that arise as part of the settlement process could represent an allocative inefficiency, as discussed above, both because firms that are required to hold these assets might prefer to put them to alternative uses and because these assets may be more efficiently allocated to other market participants who value them for their fundamental risk and return characteristics rather than for their collateral value. To the extent that intermediaries bear costs as a result of inefficient allocation of collateral assets, these may be reflected in transaction costs.

The settlement cycle may also have more direct impacts on transaction costs. As noted above, clearing broker-dealers may charge higher transaction fees to reflect the value of the customer's option to default and these fees may cause customers to internalize the cost of the default options inherent in the settlement process. However, these fees also make transactions costly and may, at the margin, influence the willingness of market participants to efficiently share risks or to supply liquidity to securities markets. Taken together, inefficiencies in the allocation of resources and risks across market participants may serve to impair capital formation.

Finally, market participants may make processing errors in the clearance and settlement process.[247] Industry participants have commented that a lack of automation and manual processing have led to processing errors. Although some of these errors may be resolved within the settlement cycle and not result in a failed trade, those that are not may result in failed trades, which appear in the failure to deliver data above.[248] Further, market participants may incorporate the likelihood that processing errors result in delays in payments or deliveries into securities prices.[249] Although errors and the correction of errors are a part of current market practices in a clearance and settlement system, the Commission does not have data available to estimate the rate of processing errors and the time needed to correct these processing errors, but invites commenters to provide relevant qualitative and quantitative information to inform our analysis of these errors.

[244] *See* 15 CFR 270.80a–22(e).

[245] 17 CFR 270.22c–1.

[246] *See supra* note 45.

[247] *See, e.g.,* Omgeo, Mitigating Operational Risk and Increasing Settlement Efficiency through Same Day Affirmation (SDA), at 12 (Oct. 2010), *http://www.omgeo.com/page/sda_whitepaper.*

[248] *See supra* Part II.A.2(1); *see also* Statement by The Depository Trust & Clearing Corporation, U.S. Securities and Exchange Commission, Securities Lending and Short Sales Roundtable, at 3 (Sept. 30, 2009), *https://www.sec.gov/comments/4-590/4590-32.pdf.*

[249] *See* Messman, *supra* note 238.

C. Analysis of Benefits, Costs, and Impact on Efficiency, Competition, and Capital Formation

1. Benefits

The proposed amendment is likely to yield benefits associated with the reduction of risk in the settlement cycle. By shortening the settlement cycle, the proposed amendment would reduce both the aggregate market value of all unsettled trades and the amount of time that CCPs or the counterparties to a trade may be subject to market and credit risk from an unsettled trade.[250] First, holding transaction volumes constant, the market value of transactions awaiting settlement at any given point in time under a T+2 settlement cycle will be approximately one third lower than under a T+3 settlement cycle. In addition, given that most trades are novated and guaranteed by NSCC at midnight on T+1, unsettled trades are currently guaranteed for two days. Shortening the settlement cycle by one day would reduce the time that unsettled transactions are guaranteed by NSCC by approximately one half. Using the risk mitigation framework described in Part VI.B.1., based on published statistics from the last quarter of 2015 [251] and holding average dollar volumes constant, the aggregate notional value of unsettled transactions at NSCC would fall from nearly $52.3 billion to approximately $26.2 billion.[252]

Second, a market participant that experiences counterparty default and enters into a new transaction under a T+3 settlement cycle is exposed to more market risk than would be the case under a T+2 settlement cycle. As a result, market participants that are exposed to market, credit, and liquidity risks would be exposed to less risk under a T+2 settlement cycle. This reduction in risk may also extend to mutual fund transactions conducted with broker-dealers that currently settle on a T+3 basis.[253] To the extent that these transactions currently give rise to counterparty risk exposures between mutual funds and broker-dealers, these exposures may decrease as a consequence of a shorter settlement cycle.

The Commission notes that industry participants have suggested further benefits of a T+2 standard settlement cycle relative to a T+3 standard settlement cycle as a result of reduced procyclicality of counterparty exposures and clearing fund requirements, and presented an analysis consistent with such benefits.[254] These benefits depend on the assumptions that underlie models of counterparty exposures and clearing fund requirements.

A portion of the savings by intermediaries from less costly risk management under a T+2 standard settlement cycle relative to a T+3 standard settlement cycle may flow through to investors. Intermediaries such as broker-dealers may mitigate settlement risks through collateral requirements on their customers in the form of securities or cash. Such protection is likely to require less collateral to manage settlement risks when settlement cycles are shorter. To the extent that lower collateral needs result in lower collateral requirements, investors may be able to profitably redeploy financial resources once used to satisfy collateral requirements by, for example, converting them into less-liquid assets that offer higher returns in exchange for bearing additional liquidity risk.

Industry participants might also individually benefit through reduced clearing fund deposit requirements. In 2012, the BCG Study estimated that cost reductions related to reduced clearing fund contributions would amount to $25 million per year.[255] In addition, a shorter settlement cycle might reduce liquidity risk by allowing investors to obtain the proceeds of their securities transactions sooner. Reduced liquidity risk may be a benefit to individual investors, but it may also reduce the volatility of securities markets by reducing liquidity demands in times of adverse market conditions, potentially reducing the correlation between market prices and the risk management practices of market participants.[256]

In addition, the harmonization of settlement cycles may reduce the need for some market participants engaging in cross-border and cross-asset transactions to hedge risks stemming from mismatched settlement cycles, resulting in additional benefits. For example, under the current T+3 settlement cycle, a market participant selling a security in U.S. equity markets to fund a purchase of securities in European markets would face a one day lag between settlement in Europe and settlement in the U.S. The participant could choose between bearing an additional day of market risk in the European trading markets by delaying the purchase by a day, or funding the purchase of European shares with short-term borrowing. Additionally, because the FX market has a T+2 settlement cycle,[257] the participant would also be faced with a choice between bearing an additional day of currency risk due to the need to purchase Euros as part of the transaction, or to incur the cost related to hedging away this risk in the forward market. Synchronization of settlement cycles across U.S. equity markets, currency markets, and European equity markets and other markets would remove the need for market participants to bear additional risk or incur costs related to borrowing or hedging risks.

The benefits of harmonized settlement cycles may also accrue to mutual funds. As described above,[258] transactions in mutual fund shares typically settle on a T+1 basis even when transactions in their portfolio securities settle on a T+3 basis. As a result, there is a two-day mismatch between when these funds make payments to shareholders that redeem shares and when they receive cash proceeds for portfolio securities they sell. This mismatch represents a source of liquidity risk for mutual funds. Shortening the settlement cycle by one day will reduce the length of this mismatch. As a result, mutual funds that settle on a T+1 basis may be able to reduce the size of cash reserves or the size of back up credit facilities that some currently use to manage liquidity risk from the mismatch in settlement cycles.

The Commission preliminarily believes that these benefits are unlikely to be substantially mitigated by the exceptions to Rule 15c6–1(a) discussed in Part III.A.1. Market participants that rely on Rule 15c6–1(b) in order to transact in limited partnership interests that are not listed on an exchange or for which quotations are not disseminated through an automated quotation system of a registered securities association are likely to continue to make use of that exception under the proposed amendment to Rule 15c6–1(a). Similarly, market participants involved

[250] *See supra* Part III.A.3.

[251] *See* Q4 2015 Fixed Income Clearing Corporation and NSCC Quantitative Disclosure for Central Counterparties, *supra* note 229, at 14.

[252] *See supra* note 230. Calculated as $52.32 billion/2 days = $26.16 billion.

[253] *See supra* note 11 and Part VI.B.3, and *infra* Part VI.C.1.

[254] *See* DTCC Recommends Shortening the U.S. Trade Settlement Cycle, *supra* note 76, at 2–3.

[255] *See* BCG Study, *supra* note 107, at 10.

[256] *See* Peter F. Christoffersen & Francis X. Diebold, *How Relevant is Volatility Forecasting for Financial Risk Management?,* 82 Rev. Econ. & Stat. 12 (2000), *http://www.mitpressjournals.org/doi/abs/10.1162/003465300558597#.V6xeL_nR-JA.* The paper shows that volatility can be predicted in the short run, and concludes that short run forecastable volatility would be useful for risk management practices.

[257] *See, e.g.,* John W. McPartland, *Foreign exchange trading and settlement: Past and present,* The Federal Reserve Bank of Chicago, Essays on Issues No. 223 (Feb. 2006), *https://www.chicagofed.org/~/media/publications/chicago-fed-letter/2006/cflfebruary2006-223-pdf.pdf.*

[258] *See supra* note 9 and Part VI.B.3.

in offerings that currently settle by the fourth business day under Rule 15c6–1(c) will likely continue to settle by T+4. There may be transactions covered by Rules 15c6–1(b) and (c) that in the past did not make use of these exceptions because they settled within three business days, but that may require use of these exceptions under the proposed amendment because they require more than two days to settle. However, these markets are opaque and the Commission does not have data on transactions in these categories that currently settle within three days but that might make use of this exception under the proposed amendment. In addition, market participants involved in transactions which now voluntarily settle in two days or less may experience fewer risk reduction benefits as a result of the proposed amendment to Rule 15c6–1(a) than market participants that currently settle in the standard three business days.

Finally, the extent to which different types of market participants experience any benefits that stem from the proposed amendment to Rule 15c6–1(a) may depend on their market power. As shown in the discussion and diagrams above,[259] the clearance and settlement system involves a number of intermediaries that provide a range of services between the ultimate buyer and seller of a security. Those market participants that have a greater ability to negotiate with customers or service providers may be able to retain a larger portion of the operational cost savings from a shorter settlement cycle than others, as they may be able to use their market power to avoid passing along the cost savings to their clients.

2. Costs

The Commission preliminarily believes that compliance with a T+2 standard settlement cycle will involve initial fixed costs to update systems and processes.[260] While the Commission does not have all of the data necessary to form its own estimates of the costs of updates to systems and processes, the Commission has used inputs provided by industry studies discussed in this release to quantify these costs to the extent possible in Part VI.C.5.

The operational cost burdens associated with the proposed amendment to Rule 15c6–1(a) for different market participants might vary depending on each participant's degree of direct or indirect inter-connectivity to the clearance and settlement process, regardless of size.[261] For example, market participants that internally manage more of their own post-trade processes will directly incur more of the upfront operational costs associated with the proposed amendment to Rule 15c6–1(a), because they must directly undertake more of the upgrades and testing necessary for a T+2 standard settlement cycle. As mentioned in Part II.A.2.c., other market participants might outsource the clearance and settlement of their transactions to third-party providers of back-office services. The exposures to the operational costs associated with shortening the standard settlement cycle will be indirect to the extent that third-party service providers pass through the costs of infrastructure upgrades to their customers. The degree to which customers bear operational costs depends on their bargaining position relative to third-party providers. Large customers with market power may be able to avoid internalizing these costs, while small customers in a weaker negotiation position relative to service providers may bear the bulk of these costs.

Further, changes to initial and ongoing operational costs may make some self-clearing market participants alter their decision to continue internally managing the clearance and settlement of their transactions. Entities that currently internally manage their clearance and settlement activity may prefer to restructure their businesses to rely instead on third-party providers of clearance and settlement services that may be able to amortize the initial fixed cost of upgrade across a much larger volume of transaction activity.

The way that different market participants are likely to bear costs as a result of the proposed amendment to Rule 15c6–1(a) may also vary based on their business structure. For example, a shorter standard settlement cycle will require payment for securities that settle regular-way by T+2 rather than T+3 (subject to the exceptions in the rule). Generally, regardless of current funding arrangements between investors and broker-dealers, removing a day between execution and settlement would mean that broker-dealers could choose between requiring investors to fund the purchase of securities one day earlier while extending the same level of credit they do under T+3 settlement, or providing an additional day of funding to investors. In other words, broker-dealers could pass through some of the costs of a shorter standard settlement cycle by imposing the same shorter cycle on investors, or they could pass these costs on to investors by raising transactions fees to compensate for the additional day of funding the broker-dealer may choose to provide. The extent to which these costs get passed through to customers may depend on, among other things, the market power of the broker-dealer. At most, the broker-dealer might pass through the entire initial investment cost to its customers, while if the broker-dealer faces perfect competition for its customers, the broker-dealer may not pass along any of these costs to its customers.[262]

However, broker-dealers that predominantly serve retail investors may experience the burden of an earlier payment requirement differently from broker-dealers with more institutional clients or large custodian banks because of the way retail investors fund their accounts. Retail investors may find it difficult to accelerate payments associated with their transactions, which may cause broker-dealers who are unwilling to extend additional credit to retail investors to instead require that these investors pre-fund their transactions.[263] These broker-dealers may also experience costs unrelated to funding choices. For instance, retail investors may require additional or different services such as education regarding the impact of the shorter standard settlement cycle.

At the same time, some market participants may face lower implementation costs as a result of their current business structure and practices. As mentioned earlier, 2011 DTCC affirmation data show that, on average, 45% of trades were affirmed on trade date, while 90% were affirmed on T+1.[264] In addition, market participants that trade in markets that have already implemented a T+2 settlement cycle may face lower costs in transitioning to a T+2 cycle in the U.S., as many of the systems and process improvements may already have been adopted in order to support settlement in other markets.

Finally, a shorter settlement cycle may result in higher costs associated with liquidating a defaulting member's position, as a shorter horizon may result

[259] *See supra* Part II.A.3. for diagrams of retail and institutional trade settlement flow.

[260] Industry estimates have suggested some updates to systems and processes might yield operational cost savings after the initial update. *See infra* Part VI.C.5.a. for industry estimates of the costs and benefits of the proposed amendment to Rule 15c6–1(a).

[261] *See infra* Part VI.C.5.b. for more detail of the specific operational cost burdens that each type of market participant may incur.

[262] *See supra* Part VI.C.1. for more on the impact of broker-dealer market power. *See infra* Part VI.C.5.b.3. for quantitative estimates of the costs to broker-dealers.

[263] *See infra* Part VI.C.5.b.(3) for more on retail investors and their broker-dealers.

[264] *See supra* Part VI.C.5(5) for discussion of foreign broker-dealers.

in larger price impacts, particularly for less liquid assets. For example, when a clearing member defaults, NSCC is obligated to fulfill its trade guaranty with the defaulting member's counterparty. One way it accomplishes this is by liquidating assets from clearing fund contributions from clearing members. However, the liquidation of assets in a short period of time may have an adverse impact on the price of an asset. Shortening the standard settlement cycle from three days to two days would reduce the amount of time that NSCC would have to liquidate its assets, which may exacerbate the price impact of liquidation.

3. Economic Implications Through Other Commission Rules

In Part 0., the Commission noted that the proposed amendment to Rule 15c6–1(a), by shortening the standard settlement cycle, could have ancillary consequences for how market participants comply with existing regulatory obligations that relate to the settlement timeframe. The Commission also provided illustrative examples of specific Commission rules that include such requirements or are otherwise are keyed-off of settlement date, including Regulation SHO,[265] and certain provisions included in the Commission's financial responsibility rules.[266]

Financial markets and regulatory requirements have evolved significantly since the Commission adopted Rule 15c6–1 in 1993. Market participants have responded to these developments in diverse ways, including implementing a variety of systems and processes, some of which may be unique to the market participant and its business, and some of which may be integrated throughout the market participant's operations. Because of the broad variety of ways in which market participants currently satisfy regulatory obligations pursuant to Commission rules, in most circumstances it is difficult to identify with precision those practices that market participants will need to change in order to meet these other obligations. Under these circumstances, and without additional information, the Commission is unable to provide an estimate of these ancillary economic consequences. The Commission invites commenters to provide quantitative and qualitative information about these potential economic consequences.

In certain cases, based on information about current market practices, the Commission preliminarily believes that the proposed amendment to Rule 15c6–1(a) is unlikely to change the means by which market participants comply with existing regulatory requirements. For example, under the proposed amendment, broker-dealers will have a shorter timeframe to comply with the customer confirmation requirements of Rule 10b–10. However, it is the Commission's understanding that broker-dealers typically send physical customer confirmations on the day after trade date and many broker-dealers send electronic confirmations to customers on trade date. The Commission preliminarily believes that because of the lack of ancillary consequences in these cases, market participants are unlikely to bear additional costs to comply with these requirements under a shorter standard settlement cycle.

In certain cases, however, the proposed amendment may incrementally increase the costs associated with complying with other Commission rules where those rules potentially require broker-dealers to engage in purchases of securities. Two examples of these types of rules are Regulation SHO and the Commission's financial responsibility rules. In most instances, Regulation SHO governs the timeframe in which a ''participant'' of a registered clearing agency must close out a fail to deliver position by purchasing or borrowing securities. Similarly, some of the Commission's financial responsibility rules relate to actions or notifications that reference the settlement date of a transaction. For example, Rule 15c3–3(m) [267] uses settlement date to prescribe the timeframe in which a broker-dealer must complete certain sell orders on behalf of customers. As noted above, settlement date is also incorporated into paragraph (c)(9) of Rule 15c3–1,[268] which explains what it means to ''promptly transmit'' funds and ''promptly deliver'' securities within the meaning of paragraphs (a)(2)(i) and (a)(2)(v) of Rule 15c3–1. As explained above, the concepts of promptly transmitting funds and promptly delivering securities are incorporated in other provisions of the financial responsibility rules.[269] Under the proposed amendment to Rule 15c6–1(a), the timeframes included in these rules will be one day closer to the trade date.

The Commission preliminarily believes that shortening these timeframes will not materially affect the costs that broker-dealers are likely to incur to meet their Regulation SHO obligations and obligations under the Commission's financial responsibility rules after the settlement date. Nevertheless, the Commission acknowledges that a shorter settlement cycle could affect the processes by which broker-dealers manage the likelihood of incurring these obligations. For example, broker-dealers may currently have in place inventory management systems that help them avoid failing to deliver securities by T+3. Broker-dealers may incur incremental costs in order to update these systems to support a shorter settlement cycle.

In cases where market participants will need to adjust the way in which they comply with other Commission rules, the magnitude of the costs associated with these adjustments is difficult to quantify. As noted above, market participants employ a wide variety of strategies to meet regulatory obligations. For example, broker-dealers may ensure that they have securities available to meet their obligations by using inventory management systems or they may choose instead to borrow securities. An estimate of costs is further complicated by the possibility that market participants could change their compliance strategies as a result of shortening the standard settlement cycle.

The Commission invites commenters to provide quantitative and qualitative information about the impact of the proposed amendment to Rule 15c6–1(a) on the costs associated with compliance with other Commission rules.

4. Effect on Efficiency, Competition, and Capital Formation

A shorter settlement cycle might improve the efficiency of the clearance and settlement process through several channels. The Commission preliminarily believes that the primary effect that a shorter settlement cycle would have on the efficiency of the settlement process would be a reduction in the credit, market, and liquidity risks that broker-dealers, CCPs, and other market participants are subject to during the standard settlement cycle. A shorter standard settlement cycle will generally reduce the volume of unsettled transactions that could potentially pose settlement risk to counterparties. By shortening the period between trade execution and settlement, trades can be

[265] 17 CFR 242.200 *et seq.*

[266] *See supra* Part III.B.3.

[267] 17 CFR 240.15c3–3(m).

[268] 17 CFR 240.15c3–1(c)(9).

[269] *See, e.g.,* 17 CFR 240.15c3–1(a)(2)(i), (a)(2)(v); 17 CFR 240.15c3–3(k)(1)(iii), (k)(2)(i), (k)(2)(ii); 17 CFR 240.17a–5(e)(1)(A); 17 CFR 240.17a–13(a)(3).

settled with less aggregate risk to counterparties or the CCP. A shorter standard settlement cycle may also decrease liquidity risk by enabling market participants to access the proceeds of their transactions sooner, which may reduce the cost market participants incur to handle idiosyncratic liquidity shocks (*i.e.,* liquidity shocks that are uncorrelated with the market). That is, because the time interval between a purchase/sale of securities and payment is reduced by one day, market participants with immediate payment obligations that they could cover by selling securities would be required to obtain short-term funding for one less day.[270] As a result of reduced cost associated with covering their liquidity needs, market participants may, under particular circumstances, be able to shift assets that would otherwise be held as liquid collateral towards more productive uses, improving allocative efficiency.[271]

In addition, a shorter standard settlement cycle may increase price efficiency through its effect on credit risk exposures between financial intermediaries and their customers. In particular, a prior study noted that certain intermediaries that transact on behalf of investors, such as broker-dealers, may be exposed to the risk that their customers default on payment obligations when the price of purchased securities declines during the settlement cycle.[272] As a result of the option to default on payment obligations, customers' payoffs from securities purchases resemble European call options and, from a theoretical standpoint, can be valued as such. Notably, the value of European call options are increasing in the time to maturity [273] suggesting that the value of call options held by customers who purchase securities is increasing in the length of the settlement cycle. In order to compensate itself for the call option that it writes, an intermediary may include the cost of these call options as part of its transaction fee and this cost may become a component of bid-ask spreads for securities transactions. By reducing the value of customers' option to default by reducing the option's time to maturity, a shorter standard settlement cycle may reduce transaction costs in U.S. securities markets. In addition, to the extent that any benefit buyers receive from deferring payment during the settlement cycle is incorporated in securities returns,[274] the proposed amendment may reduce the extent to which these returns deviate from returns consistent with changes to fundamentals.

As discussed in more detail above, the Commission preliminarily believes that the proposed amendment to Rule 15c6–1(a) will likely require market participants to incur costs related to infrastructure upgrades and will likely yield benefits to market participants, largely in the form of reduced financial risks related to settlement. As a result, the Commission preliminarily believes that the proposed amendment to Rule 15c6–1(a) could affect competition in a number of different, and potentially offsetting, ways.

The prospective reduction in financial risks related to shortening the standard settlement cycle may represent a reduction in barriers to entry for certain market participants. Reductions in the financial resources required to cover an NSCC member's clearing fund requirements that result from a shorter standard settlement cycle could encourage financial firms that currently clear transactions through NSCC clearing members to become clearing members themselves. Their entry into the market could promote competition among clearing members at NSCC. Furthermore, if a reduction in settlement risks results in lower transaction costs for the reasons discussed above, market participants that were, on the margin, discouraged from supplying liquidity to securities markets due to these costs could choose to enter the market for liquidity suppliers, increasing competition.

At the same time, the Commission acknowledges that the process improvements required to enable a shorter standard settlement cycle could adversely affect competition. Among clearing members, where such process improvements might be necessary to comply with the shorter standard settlement cycle required under the proposed amendment to Rule 15c6–1(a), the cost associated with compliance might create barriers to entry, because new firms will incur higher fixed costs associated with a shorter standard settlement cycle if they wish to enter the market. Clearing members might choose to comply by upgrading their systems and processes or may choose instead to exit the market for clearing services. The exit of clearing members could have negative consequences for competition between clearing members. Clearing activity tends to be concentrated among larger broker-dealers.[275] Clearing member exit could result in further concentration and additional market power for those clearing members that remain.

Alternatively, some current clearing members may choose to comply by ceasing to be clearing members and instead outsourcing their operational needs to third-party service providers. Use of third-party service providers may represent a reasonable response to the operational costs associated with the proposed amendment to Rule 15c6–1(a). To the extent that third-party service providers are able to spread the fixed costs of compliance across a larger volume of transactions than their clients, the Commission preliminarily believes that the use of third-party service providers might impose a smaller compliance cost on clearing members, including smaller broker-dealers, than if these firms directly bore the costs of compliance. The Commission preliminarily believes that this impact may stretch beyond just clearing members. The use of third-party service providers may mitigate the extent to which the proposed amendment to Rule 15c6–1(a) raises barriers to entry for broker-dealers. Because these barriers to entry may have adverse effects on competition between clearing members, we preliminarily believe that the use of third-party service providers may mitigate the adverse effects of the proposed amendment to Rule 15c6–1(a) on competition between broker-dealers.

Existing market power may also affect the distribution of competitive impacts stemming from the proposed amendment to Rule 15c6–1(a) across different types of market participants. While, as noted above, reductions in settlement risk could promote competition among clearing members and liquidity suppliers, these groups may benefit to differing degrees, depending on the extent to which they are able to capture the benefits of a shortened standard settlement cycle. For example, clearing brokers tend to be larger than other broker-dealers,[276] and may generally be able to appropriate more of the savings from clearing fund deposit reductions for themselves if they have market power relative to their customers by passing only a small portion of savings through to their customers through fees or transactions costs. However, those that predominantly serve retail investors may be in a better bargaining position

[270] *See supra* Part VI.B.2.

[271] *See supra* Part VI.A. for more on collateral and allocative efficiency.

[272] *See* Madhavan et al., *supra* note 222.

[273] All other things equal, an option with a longer time to maturity is more likely to be in the money given that the variance of the underlying security's price at the exercise date is higher.

[274] *See supra* Part Part VI.B.2.

[275] *See id.*

[276] *Id.*

relative to those that predominantly serve institutional investors, and therefore may capture more of the benefits stemming from the proposed amendment to Rule 15c6–1(a). Broker-dealers that serve retail investors may similarly be able to use their market power relative to their customers to retain more of the clearing fund deposit reduction as profits by maintaining their transaction costs and fees instead of passing these through to their customers. Institutional investors may be in a relatively better bargaining position by virtue of their large size and may be more likely to successfully negotiate lower fees or transaction costs and share in the savings associated with lower clearing fund deposits.

Finally, a shorter standard settlement cycle might also improve the capital efficiency of the clearance and settlement process, which would promote capital formation in U.S. securities markets and in the financial system generally.[277] A shorter standard settlement cycle would reduce the amount of time that collateral must be held for a given trade, thus freeing the collateral to be used elsewhere earlier. For a given quantity of trading activity, collateral would be committed to clearing fund deposits for a shorter amount of time. The greater collateral efficiency promoted by a shorter settlement cycle might also indirectly promote capital formation for market participants in the financial system in general, because the improved capital efficiency of a shorter settlement cycle means that a given amount of collateral can support a larger amount of economic activity.

5. Quantification of Direct and Indirect Effects of a T+2 Settlement Cycle

As mentioned previously, several industry groups have released cost estimates for compliance with a shorter standard settlement cycle, including the SIA, the ISC, and BCG. However, only the BCG Study performed a cost-benefit analysis of a T+2 standard settlement cycle. We first summarize the cost estimates in the BCG Study in the subsection immediately below and then, in the following subsections, we provide our own evaluation of these estimates as part of our discussion of the potential direct and indirect compliance costs related to the proposed amendment to Rule 15c6–1(a). In addition, the Commission encourages commenters to provide additional information to help quantify the economic effects that we are currently unable to quantify due to data limitations.

a. Industry Estimates of Costs and Benefits

The BCG Study concluded that the transition to a T+2 settlement cycle would cost approximately $550 million in incremental initial investments across industry constituent groups,[278] which would result in annual operating savings of $170 million and $25 million in annual return on reinvested capital from clearing fund reductions.[279]

The BCG Study also estimated that the average level of required investments per firm could range from $1 to 5 million, with large institutional broker-dealers incurring the largest amount of investments on a per-firm basis, and buy side firms at the lower end of the spectrum.[280] The investment costs for ''other'' entities, including DTCC, Omgeo, service bureaus, RIAs and non-self-clearing broker-dealers totaled $70 million for the entire group. Within this $70 million, DTCC and Omgeo were estimated to have a compliance cost of $10 million each. The operational cost savings per entity ranged from $30–55 million per year, with broker-dealers serving retail investors saving the largest absolute amount, and buy side firms saving the least. Custodian banks were estimated to save approximately $40 million per year.[281]

The BCG Study also estimated the annual clearing fund reductions resulting from reductions in clearing firms' clearing funds requirements to be $25 million per year. The study estimated this by considering the reduction in clearing fund requirements and multiplied it by the average Federal Funds target rate for the 10-year period up until 2008 (3.5%). The BCG Study also estimated the value of the risk reduction in buy side exposure to the sell side. The implied savings were estimated to be $200 million per year, but these values were not included in the overall cost-benefit calculations.

Several factors limit the usefulness of the BCG Study's estimates of potential costs and benefits of the proposed amendment to Rule 15c6–1(a). First, technological improvements, such as the increased use of computers and automation in post-trade processes, that have been made since 2012, when the report was first published, may have reduced the cost of the upgrades necessary to comply with a shorter settlement cycle. While this may, in turn, reduce the costs associated with the proposed amendment, it may also reduce the scope of investments required by the proposed amendment,[282] as a larger portion of market participants may have already adopted many processes that would reduce the cost of a transition to a T+2 settlement cycle. In addition, the BCG Study considered as a part of its cost estimates operational cost savings as a result of improvements to operational efficiency, which the Commission preliminarily considers an ancillary benefit of a shorter settlement cycle.

Lastly, the BCG Study was premised on survey responses by a subset of market participants that may be affected by the rule—surveys were sent to 270 market participants and 70 responses were received, including 20 institutional broker-dealers, prime brokers and correspondent clearers; 12 retail broker-dealers; 17 buy side firms; 14 registered investment advisors (RIAs); and seven custodian banks. Given the low response rate, as well as the uncertainty regarding the sample of market participants that was asked to complete the survey, we cannot conclude that the cost estimates in the BCG Study are representative of the costs of all market participants.[283]

b. Commission Estimates of Costs

The proposed amendment might generate direct and indirect costs for market participants, who may need to change multiple systems and processes to comply with a T+2 standard settlement cycle. As noted in Part II.A.5.c.(2), the T+2 Playbook included a timeline with milestones and dependencies necessary for a transition to a T+2 settlement cycle, as well as activities that market participants should consider in preparation for the transition. The Commission preliminarily believes that the majority of activities for migration to a T+2 settlement cycle will stem from behavior modification of market participants and systems testing, and thus the majority of the costs of

[277] *See supra* Part VI.A. and Part VI.C.4. for more discussion about capital formation and efficiency.

[278] The BCG Study generally refers to ''institutional broker-dealers,'' ''retail broker-dealers,'' ''buy side'' firms, and ''custodian banks,'' without defining these particular groups. The Commission uses these terms when referring to estimates provided by the BCG Study but notes that its own definitions of various affected parties may differ from those in the BCG Study.

[279] *See* BCG Study, at 9–10.

[280] *Id.* at 30–31.

[281] *See id.* at 41.

[282] *See supra* Part VI.A. While market participants may have already made investments consistent with implementing a shorter settlement cycle, the fact that these investments have not resulted in a shorter settlement cycle is consistent with the existence of coordination problems among market participants.

[283] *See* BCG Study, *supra* note 103, at 15.

migration will be from labor.[284] These modifications may include a compression of the settlement timeline, as well as an increase in the fees that brokers may impose on their customers for trade failures. Although the T+2 Playbook does not include any direct estimates of the compliance costs for a T+2 settlement cycle, we utilize the timeline in the T+2 Playbook for specific actions necessary to migrate to a T+2 settlement cycle to directly estimate the inputs needed for migration, and form preliminary compliance cost estimates in the next section.

In addition, the T+2 Playbook, the ISC White Paper, and the BCG Study identify several categories of actions that market participants might need to take to comply with a T+2 settlement cycle—processing, asset servicing, and documentation.[285] While the following cost estimates for these remedial activities span industry-wide requirements for a migration to a T+2 settlement cycle, we do not anticipate each market participant directly undertaking all of these activities for several reasons. First, as noted in Part II.A.2.c., some market participants work with third-party service providers for activities such as trade processing and asset servicing, and thus may only indirectly bear the costs of the requirements. Second, certain costs might only fall on specific categories of entities—for example, the costs of updating the CNS and ID Net system would only directly fall on NSCC, DTC, and members/participants of those clearing agencies. Finally, some market participants may already have the processes and systems in place to accommodate a T+2 settlement cycle or would be able to adjust to a T+2 settlement cycle with minimal cost. For example, some market participants may already have the systems and processes to reduce the amount of time needed for trade affirmation and matching.[286] These market participants may thus bear a significantly lower cost to update their trade affirmation to comply with a T+2 standard settlement cycle.[287]

In the following section, we examine several categories of market participants and estimate the compliance costs for each category. Our estimate of the number and type of personnel is based on the scope of activities necessary for the participant to migrate to a T+2 settlement cycle, the participant's role within the clearance and settlement process, and the amount of testing required to ensure an error-free migration.[288] Hourly salaries for personnel are from SIFMA's *Management and Professional Earnings in the Securities Industry 2013*.[289] Our estimates use the timeline from the T+2 Playbook to determine the length of time personnel would work on the activities necessary to support a T+2 settlement cycle. The timeline provides an indirect method to estimate the inputs necessary to migrate to a T+2 settlement cycle, rather than relying directly on survey response estimates. We acknowledge many entities are already undertaking activities to support a migration to a T+2 settlement cycle in anticipation of the proposed amendment. However, to the extent that the costs of these activities have already been incurred, we consider these costs sunk, and do not include them in our analysis.

(1) FMUs—CCPs and CSDs

CNS, NSCC/DTC's ID Net service, and other systems will require adjustment to support a T+2 standard settlement cycle. According to the T+2 Playbook and the ISC White Paper, regulation-dependent planning, implementation, testing, and migration activities associated with the transition to a T+2 settlement cycle could last up to five quarters.[290] We preliminarily believe that these activities will impose a one-time compliance cost of $10.9 million [291] for DTC and NSCC each. After this initial compliance cost, we preliminarily expect that both DTCC and NSCC will incur minimal ongoing costs from the transition to a T+2 settlement cycle, because we believe that the majority of costs will stem from pre-migration activities, such as implementation, updates, and testing.

(2) Matching/ETC Providers—Exempt Clearing Agencies

Matching/ETC Providers may need to adapt their trade processing systems to comply with a T+2 settlement cycle. This may include actions such as updating reference data, configuring trade match systems, and configuring trade affirmation systems to affirm trades by 12:00 p.m. on T+1. Matching/ETC Providers will also need to conduct testing and assess post-migration activities. We preliminarily estimate that these activities will impose a one-time compliance cost of up to $10.9 million [292] for each Matching/ETC Provider. However, we acknowledge that some ETC providers may have a higher cost burden than others based on the volume of transactions that they process. We expect that ETC providers will incur minimal ongoing costs after the initial transition to a T+2 settlement cycle because we preliminarily believe that the majority of the costs of migration to a T+2 settlement cycle entail behavioral changes of market participants and pre-migration testing.

(3) Market Participants—Investors, Broker-Dealers, and Custodians

The overall compliance costs that a market participant incurs will depend on the extent to which it is directly involved in functions related to trade confirmation/affirmation, clearance and settlement, asset servicing, and other activities. For example, retail investors may bear few (if any) direct costs in a transition to a T+2 standard settlement cycle, because their respective broker-dealer handles the back-office functions of each transaction. However, as is discussed below, this does not imply that retail investors will not face indirect costs from the transition, such

[284] *See id.* at 15.

[285] *See* T+2 Playbook, *supra* note 126, at 11.

[286] *See* BCG Study, *supra* note 107, at 23.

[287] The BCG Study, as it is based on survey responses from market participants, does reflect the heterogeneity of compliance costs for market participants. However, for reasons mentioned in Part VI.C.5.a., we are not able to fully accept the BCG Study's cost estimates.

[288] For example, FMUs that play a critical role in the clearance and settlement infrastructure will require more testing associated with a T+2 settlement cycle than institutional investors.

[289] To monetize the internal costs, the Commission staff used data from SIFMA publications, modified by Commission staff to account for an 1800 hour work-year and multiplied by 5.35 (professionals) or 2.93 (office) to account for bonuses, firm size, employee benefits and overhead. *See* SIFMA, Management and Professional Earnings in the Security Industry—2013 (Oct. 7, 2013), *http://www.sifma.org/research/item.aspx?id=8589940603;* SIFMA, Office Salaries in the Securities Industry—2013 (Oct. 7, 2013), *http://www.sifma.org/research/item.aspx?id=8589940608.* These figures have been adjusted for inflation using data published by the Bureau of Labor Statistics.

[290] *See* T+2 Playbook, *supra* note 126, at 11. To monetize the internal costs, Commission staff used data from the SIFMA publications. Our time estimates account for the fact that a portion of the timeline has already elapsed in anticipation of a transition to a T+2 standard settlement cycle, and those costs are already sunk.

[291] The estimate is based on the T+2 Playbook timeline, which estimates regulation-dependent implementation activity, industry testing, and migration lasting five quarters. We assume 10 operations specialists (at $129 per hour), 10 programmers (at $256 per hour), and 1 senior operations manager (at $345/hour), working 40 hours per week. $(10 \times \$129 + 10 \times \$256 + 1 \times \$345) \times 5 \times 13 \times 40 = \$10{,}907{,}000$.

[292] The estimate is based on the T+2 Playbook timeline, which estimates regulation-dependent implementation activity for trade systems, matching, affirmation, testing, and post-migration testing lasting five quarters. We assume 10 operations specialists (at $129 per hour), 10 programmers (at $256 per hour), and 1 senior operations manager (at $345/hour), working 40 hours per week. $(10 \times \$129 + 10 \times \$256 + 1 \times \$345) \times 5 \times 13 \times 40 = \$10{,}907{,}000$.

as those passed through from broker-dealers or banks.

Institutional investors may need to configure systems and update reference data, which may also include updates to trade funding and processing mechanisms, to operate in a T+2 environment. The Commission preliminarily estimates that this will require an initial expenditure of $2.32 million per entity.[293] However, these costs may vary depending on the extent to which a particular institutional investor has already automated their trade processes. We preliminarily expect institutional investors will incur minimal ongoing direct compliance costs after the initial transition to a T+2 standard settlement cycle.

Broker-dealers that serve institutional investors will not only need to configure their trading systems and update reference data, but may also need to update trade confirmation/affirmation systems, documentation, cashiering and asset servicing functions, depending on the roles they assume with respect to their clients. We preliminarily estimate that, on average, each of these broker-dealers will incur an initial compliance cost of $4.72 million.[294] We preliminarily expect that these broker-dealers will incur minimal ongoing direct compliance costs after the initial transition to a T+2 standard settlement cycle.

Broker-dealers that serve retail investors may also need to spend significant resources to educate their clients about the shorter settlement cycle. We preliminarily estimate that these broker-dealers will incur an initial compliance cost of $8.6 million each.[295] However, unlike previously mentioned market participants, we expect that broker-dealers that serve retail investors may face significant one-time compliance costs after the initial transition to T+2. Retail investors may require additional education and customer service, which may impose costs on their broker-dealers. The Commission preliminarily believes that a reasonable upper bound for the costs associated with this requirement is $30,000 per broker-dealer.[296] Assuming all clearing and introducing broker-dealers must educate retail customers, the upper bound for the costs of retail investor education would be approximately $50.5 million.[297]

Custodian banks will need to update their asset servicing functions to comply with a shorter settlement cycle. We preliminarily estimate that custodian banks will incur an initial compliance cost of $1.16 million,[298] and expect them to incur minimal ongoing compliance costs after the initial transition because we preliminarily believe most of the costs will stem from pre-migration updates and testing.

(4) Indirect Costs

In estimating these implementation costs, we note that market participants who bear the direct costs of the actions they undertake to comply with Rule 15c6–1 may pass these costs on to their customers. For example, retail and institutional investors might not directly bear the cost of all of the necessary upgrades for a T+2 settlement cycle, but might indirectly bear these costs as their broker-dealers might increase their fees to amortize the costs of updates among their customers. We are unable to quantify the overall magnitude of the indirect costs that retail and institutional investors may bear, because it will depend on the market power of each broker-dealer, and its willingness to pass on the costs of migration to a T+2 standard settlement cycle to their customers. However, we preliminarily believe that in situations where broker-dealers have little or no competition, broker-dealers may at most pass on the entire cost of the initial investment to their customers. As discussed above, this could be as high as $4.72 million for broker-dealers that serve institutional investors, and $8.6 million for broker-dealers that serve retail investors. However, in situations where broker-dealers face heavy competition for customers, broker-dealers may bear the costs of the initial investment entirely, and avoid passing on these costs to their customers.

As noted in Part VI.B.4., the ability of market participants to pass implementation costs on to customers likely depends on their relative bargaining power. For example, CCPs, like many other utilities, exhibit many of the characteristics of natural monopolies and, as a result, may have market power, particularly relative to broker-dealers who submit trades for clearing. This means that they may be able to share implementation costs they directly face related to shortening the settlement cycle with broker-dealers through higher clearing fees. Conversely, if institutional investors have market power relative to broker-dealers, broker-dealers may not be in a position to impose indirect costs on them.

(5) Industry-Wide Costs

To estimate the aggregate, industry-wide cost of a transition to a T+2 standard settlement cycle, we take our per-entity estimates and multiply them by our estimate of the respective number of entities. The Commission preliminarily estimates that there are 965 buy-side firms, 186 broker-dealers, and 53 custodian banks.[299] Additionally, as noted in Part II.A.2.b., there are three Matching/ETC Providers, and 1,683 broker-dealers that will incur investor education costs. One way to establish a total industry initial compliance cost estimate would be to multiply each estimated per-entity cost by the respective number of entities and sum these values, which would result in an estimate of $4.0 billion.[300] The

[293] The estimate is based on the T+2 Playbook timeline, which estimates regulation-dependent implementation activity for trade systems, reference data, and testing activity to last four quarters. We assume 2 operations specialists (at $129 per hour), 2 programmers (at $256 per hour), and 1 senior operations manager (at $345 per hour), working 40 hours per week. $(2 \times \$129 + 2 \times \$256 + 1 \times \$345) \times 4 \times 13 \times 40 = \$2,319,200$.

[294] The estimate is based on the T+2 Playbook timeline, which estimates regulation-dependent implementation activity for trade systems, reference data, documentation, asset servicing, and testing to last four quarters. We assume 5 operations specialists (at $129 per hour), 5 programmers (at $256 per hour), and 1 senior operations manager (at $345 per hour), working 40 hours per week. $(5 \times \$129 + 5 \times \$256 + 1 \times \$345) \times 4 \times 13 \times 40 = \$4,721,600$.

[295] The estimate is based on the T+2 Playbook timeline, which estimates regulation-dependent implementation activity for trade systems, reference data, documentation, asset servicing, customer education and testing to last five quarters. We assume 5 operations specialists (at $129 per hour), 5 programmers (at $256 per hour), 5 trainers (at $208 per hour) and 1 senior operations manager (at $345 per hour), working 40 hours per week. $(5 \times \$129 + 5 \times \$256 + 5 \times \$208 + 1 \times \$345) \times 5 \times 13 \times 40 = \$8,606,000$.

[296] This estimate is based on the assumption that a broker-dealer chooses to educate customers using a 10-minute view that takes at most $3,000 per minute to produce. *See* Crowdfunding, Exchange Act Release No. 76324 (Oct. 30, 2015), 80 FR 71388, 71529 & n.1683 (Nov. 16, 2015).

[297] Calculated as $30,000 per broker-dealer × (186 broker-dealers reporting as self-clearing + 1,497 broker-dealers reporting as introducing but not self-clearing) = $50,490,000.

[298] The estimate is based on the T+2 Playbook timeline, which estimates regulation-dependent implementation activity for asset servicing and testing to last two quarters. We assume 2 operations specialists (at $129 per hour), 2 programmers (at $256 per hour), and 1 senior operations manager (at $345 per hour), working 40 hours per week. $(2 \times \$129 + 2 \times \$256 + 1 \times \$345) \times 2 \times 13 \times 40 = \$1,159,600$.

[299] The estimate for the number of buy-side firms is based on the Commission's 13(f) holdings information filers with over $1 billion in assets under management, as of December 31, 2015. The estimate for the number of broker-dealers is based on FINRA FOCUS Reports of firms reporting as self-clearing. *See supra* note 235 and accompanying text. The estimate for the number of custodian banks is based on the number of ''settling banks'' listed in DTC's Member Directories, available at *http://www.dtcc.com/client-center/dtc-directories*.

[300] Calculated as 186 broker-dealers (self-clearing) × $8,606,000 + 1683 broker-dealers (self-clearing

Continued

Commission, however, preliminarily believes that this estimate is likely to overstate the true initial cost of transition to a T+2 settlement cycle for a number of reasons. First, our per-entity estimates do not account for the heterogeneity in market participant size, which may have a significant impact on the costs that market participants face. While the BCG Study included both estimates of the number of entities in different size categories as well as estimates of costs that an entity in each size category is likely to incur, it did not provide sufficient underlying information to allow the Commission to estimate the relationship between participant size and compliance cost and thus we cannot produce comparable estimates. The Commission seeks comment on the extent to which market participants believe that the compliance costs for the proposed rule will scale with market participant size.

Second, the Commission's estimate assumes that broker-dealers will not repurpose existing systems that allow them to participate in foreign markets that require settlement by T+2. For example, approximately 99 of the broker-dealers that reported self-clearing also reported that they were affiliates or subsidiaries of foreign broker-dealers or banks. To the extent that a broker-dealer has a foreign affiliate or parent that already has systems in place to support T+2 settlement in foreign markets, it may bear lower costs under the proposed amendment to Rule 15c6–1(a) than the estimate above. Removing all 99 of these broker-dealers from the computation of total industry initial compliance cost estimate presented above results in a reduction of this estimate to approximately $3.2 billion.[301] The Commission seeks comment on the extent to which participants believe that the compliance costs for the proposed rule may be less for those broker-dealers that can repurpose existing systems that they currently use for their activities in foreign markets.

Third, investments by third-party service providers may mean that many of the estimated compliance costs for market participants are duplicated. The BCG Study suggests that ''leverage'' from service providers may yield a savings of $194 million, reducing aggregate costs by approximately 29%.[302] Based on information gathered from the recent available financial reports of service providers, the Commission preliminarily believes that a reasonable range of estimates for the average cost reduction associated with service providers across all entities could be between 16% and 32%.[303] However, the Commission seeks further comment on the extent to which the efficiencies generated by the investments of service providers might reduce the compliance costs of market participants. Applying this range to the total industry initial compliance cost estimate presented above yields a range of total industry initial compliance cost estimates between $2.7 billion and $3.4 billion.

Taking into account potential cost reductions due to repurposing existing systems and using service providers as described above, the Commission preliminarily believes that $2.1 billion to $4.2 billion represents a reasonable range for the total industry initial compliance costs.[304]

In addition to these initial costs, a transition to a shorter settlement cycle may also result in certain ongoing industry-wide costs. Though we preliminarily believe that a move to a shorter settlement cycle will generally bring with it a reduced reliance on manual processing, a shorter settlement cycle may also exacerbate remaining operational risk. This is because a shorter settlement cycle would provide market participants with less time to resolve errors. For example, if there is an entry error in the trade match details sent by either counterparty for a trade, both counterparties would have one extra day to resolve the error under the baseline than in a T+2 environment. For these errors, a shorter settlement cycle may increase the probability that the error ultimately results in a settlement fail. However, given the variety of operational errors that are possible in the clearance and settlement process and the low probability of some of these errors, we are unable to quantify the impact that a shorter settlement cycle may have on the ongoing industry-wide costs stemming from a potential increase in operational risk.

Another industry-wide potential cost of shortening the settlement cycle is related to CCP member default. A shorter settlement cycle may provide CCPs with a shorter horizon in which to manage a defaulting member's outstanding settlement obligations. Besides potentially increasing the operational risks associated with default management, a shorter settlement cycle may also have implications for CCPs that must liquidate a defaulting member's securities and, if circumstances require, the securities of non-defaulting members, in order to meet payment obligations for unsettled trades. A shorter settlement cycle leaves a CCP with less time in which to liquidate the securities and may increase the price impact associated with liquidation.

Current margin models at CCPs may account for the price impact associated with liquidating collateral. Although a CCP's margining algorithm may account for the additional impact generated by a shorter liquidation horizon for the defaulting member's clearing fund deposits, margin requirements may not reflect the costs that a liquidation over a shorter horizon may impose on other market participants. For example, a CCP may impose haircuts on collateral to account for the costs of liquidating collateral in the event of a clearing member default, causing clearing members to internalize a portion of the cost of liquidating illiquid assets. While the haircut may mitigate the risk that the price impact associated with liquidation of collateral assets over a shorter period of time causes the CCP to fail to meet its settlement obligations, the reduction in the price of collateral assets may affect other market participants who may be sensitive to the value of these assets.

D. Alternatives

1. Shift to a T+1 Standard Settlement Cycle

The Commission has considered the consequences of a shift to a T+1 standard settlement cycle.[305] The Commission preliminarily believes that

and introducing) × $30,000 + 53 custodian banks × $1,159,000 + 965 buy-side firms × $2,319,000 + 3 Matching/ETC Providers × $10,900,000 + 2 FMUs × $10,900,000 = $ 4,005,034,800.

[301] Calculated as 87 broker-dealers (self-clearing) × $8,606,000 + 1683 broker-dealers (self-clearing and introducing) × $30,000 + 53 custodian banks × $1,159,000 + 965 buy-side firms × $2,319,000 + 3 Matching/ETC Providers × $10,900,000 + 2 FMUs × $10,900,000 = $ 3,153,040,800.

[302] *See* BCG Study *supra* note 107, at 79.

[303] Commission Staff hand collected information on operating margins for business segments related to settlement services of three large service providers for fiscal years 2013, 2014, and 2015. The median estimate was 16.4%. To arrive at the lower bound of 16%, the Commission assumes service providers capture all of the cost reduction they provide; to arrive at the upper bound, the Commission assumes that service providers share half of the overall cost reduction with their customers. Generally, the extent to which service providers share the efficiencies they provide with their customers may depend on service providers' bargaining power. *See, e.g.,* Binmore, Ken, Ariel Rubinstein, and Asher Wolinsky, *The Nash Bargaining Solution In Economic Modelling,* The RAND Journal of Economics, 17, no. 2, Summer, 1986, at 176–188.

[304] The lower bound of this range is calculated as ($4.0 billion − $0.9 billion cost reduction related to broker-dealers with foreign parents or affiliates) − (1 − 0.32) = $2.1 billion.

[305] *See supra* Part III.A.4. for a discussion on the consideration of a settlement cycle shorter than T+2.

although a move to a T+1 standard settlement cycle could have similar qualitative benefits of market, credit, and liquidity risk reduction as a move to a T+2 standard settlement cycle, the types of necessary investments and changes necessary to move to a T+1 standard settlement cycle also introduce greater costs for market participants.

As stated earlier, a T+1 standard settlement cycle might result in a larger reduction in certain settlement risks than would result from a T+2 standard settlement cycle because, as explained above, the risks associated with counterparty default tend to increase with time. Price volatility, as measured by the standard deviation of the price, is concave in time, which means that as a period of time increases, volatility will increase, but at a decreasing rate. This suggests that the reduction in price volatility from moving from T+2 settlement to T+1 settlement is larger than the reduction in price volatility from moving from T+3 settlement to T+2 settlement. Similarly, assuming constant trading volume, the volume of unsettled trades for a T+1 settlement cycle would be reduced again by one-third, and, as a result, for any given adverse movement in prices, the financial losses resulting from counterparty default will be two-thirds less than those under a T+3 settlement cycle.

At the same time, the Commission preliminarily believes that the initial costs of complying with a T+1 settlement cycle will be greater than with a T+2 settlement cycle. Successful transition to a settlement cycle that is shorter than T+2 could require significantly larger investments by market participants to adopt new systems and processes. The upgrades necessary for a T+1 settlement cycle might include changes such as a transformation of lending and foreign buyer processes, real-time or near real-time trade processing capabilities, as well as a further acceleration of the retail funding timeline, which would require larger structural changes to the settlement process and more cross-industry coordination than the upgrades for a T+2 settlement cycle would. Because these upgrades could require more changes across multiple markets and settlement systems, they may be more expensive to implement than the upgrades necessary for T+2 settlement. Additionally, the lead time and level of coordination by market participants required to implement such changes to transition to a T+1 standard settlement cycle would be longer and greater than the time and coordination required to move to a T+2 standard settlement cycle, which could delay the realization of the risk-reducing benefits of shortening the settlement cycle and increase the risk that market participants would not be able to transition to T+1 in a coordinated fashion.

Further, and as noted above, a move to a T+1 standard settlement cycle could introduce additional financial risks and costs as a result of its impact on transactions in certain foreign markets. Because settlement of spot FX transactions occurs on T+2, market participants who transact in an environment with a shorter settlement cycle would be required to pre-fund securities transactions in foreign currencies. Under these circumstances, a market participant would either incur opportunity costs and currency risk associated with holding FX reserves or be exposed to price volatility by delaying securities transactions by one day to coordinate settlement of the securities and FX legs. In addition, shortening the settlement cycle to T+1 may make it more difficult for market participants to timely settle cross-border transactions because the U.S. settlement cycle would not be harmonized with non-U.S. markets that have already transitioned to a T+2 settlement cycle.[306] The disparity between the settlement cycles would most likely increase the costs associated with such cross-border transactions.

The BCG Study estimated that the transition to a T+1 settlement cycle would cost the industry $1.77 billion in incremental investments (compared to $550 million for a T+2 settlement cycle), with an annual operational cost savings of $175 million per year and $35 million from clearing fund reductions (compared to $170 million and $25 million per year in a T+2 settlement cycle, respectively). Risk reduction benefits were estimated to be $410 million for a T+1 settlement cycle (compared to $200 million per year in a T+2 settlement cycle).[307] Although the Commission preliminarily believes that these numbers cannot be fully accepted as cost estimates for the proposed amendment,[308] the magnitude of the difference between the BCG Study's T+2 and T+1 cost and benefit estimates likely indicate additional larger structural changes necessary to transition to a T+1 settlement cycle.

In addition, the SIA T+1 Report estimated the initial investment costs of a shortened standard settlement cycle of T+1 to be $8 billion, with net annual benefits of $2.7 billion per year. The report estimated that broker-dealers would have an initial investment of $5.4 billion, with net annual benefits of $2.1 billion per year; asset managers would have an initial investment of $1.7 billion, with net annual benefits of $403 million per year; custodians would have an initial investment of $600 million, with net annual benefits of $307 million per year; and infrastructure service providers would have an initial investment of $237 million, with net annual loss of $81 million per year. Although these estimates have higher costs and benefits than the estimates in the BCG Study, the SIA estimates were made in 2000, and are much older than the BCG Study estimates, which were made in 2012. In the sixteen years since the publication of the SIA T+1 Report, significant technological and industry changes may have affected the costs and benefits of a T+1 standard settlement cycle, which may limit the usefulness of the report's estimates for assessing the costs and benefits of a T+1 standard settlement cycle today.[309]

2. Straight-Through Processing Requirement

The Commission has also considered the consequences of mandating specific clearance and settlement practices, such as straight-through processing, in lieu of the proposed rules. STP involves the electronic entry of trade details during the settlement process, which avoids the manual entry and re-entry of trade details. By avoiding the manual entry of trade details, STP can speed up the settlement process as well as reduce error rates. However, the Commission preliminarily believes that although many of the costs and benefits of a T+2 standard settlement cycle could be achieved by mandating specific clearance and settlement practices, there are several reasons why mandating a shorter settlement cycle may substantively differ from a specific practice requirement.

First, the Commission preliminarily believes that many of the proposed rule's benefits stem directly from the fact that the length of the settlement cycle has been shortened, and not from the particular practices used to comply with the proposed rule. As discussed above in Part VI.C., the Commission preliminarily believes that shortening the settlement cycle is likely to reduce a number of risks associated with securities settlement, including credit and market risks that stem from

[306] For further discussion regarding the potential benefits of harmonization of settlement cycles for market participants engaging in cross-border transactions, *see infra* Part III.A.4.

[307] *See* BCG Study, *supra* note 107, at 41.

[308] *See supra* Part VI.C.5.a.

[309] *See* SIA Business Case Report at 3.

counterparty exposures. Moreover, the Commission preliminarily believes that intermediaries that manage these types of risk as a result of their role in the clearance and settlement system may share a portion of potential cost savings associated with reduced risks with financial market participants. While the Commission acknowledges that an alternative approach that primarily focuses on mandating STP may achieve some of the operational benefits associated with a shortened settlement cycles, such an approach may not reduce counterparty exposures and attendant risks.

Furthermore, the Commission recognizes that STP may be a natural enabler for a shorter settlement cycle, but it may not be the most efficient enabler. The Commission preliminarily believes that market participants may have a variety of methods to comply with the proposed rule, and may prefer the least costly method of shortening the settlement cycle. By allowing market participants to choose how to comply with a shorter settlement cycle, rather than mandating a specific practice, the proposed rules may allow the market to realize the benefits of a shorter settlement cycle at the lowest cost to market participants.

Additionally, mandating specific clearance and settlement practices instead of mandating a shortened settlement cycle may have adverse effects on competition in the market for back-office services. Back-office service providers may have a variety of methods to help their clients comply with a shorter settlement cycle, and mandating specific clearance and settlement practices may adversely affect the number of providers that market participants might use, and a reduction in competition among back-office service providers that can comply with required practices may result in higher compliance costs for market participants.

E. Request for Comment

The Commission seeks comment on the potential economic impact of the proposed amendment to Rule 15c6–1(a). In addition, the Commission seeks comment on related issues that may inform the Commission's views regarding the economic impact of the proposed amendment to Rule 15c6–1(a), as well as alternatives to the proposed amendment. The Commission in particular seeks comment on the following:

1. The Commission invites commenters to provide additional data on the time it takes to complete each step within the current clearance and settlement process. What are current constraints or impediments for each step within the clearance and settlement process that would limit the ability to shorten the settlement cycle from T+3 to T+2? Are there similar or additional limitations for shortening the settlement cycle beyond T+2? Do these constraints or impediments vary by market participant type?

2. The Commission invites commenters to provide additional data on the current timing of trade matching. What portion of trades is affirmed on trade date? What portion of trades is currently matched such that they could already be settled on a T+2 settlement cycle? How does the timing of trade matching vary by the type of market participant?

3. The Commission invites commenters to discuss the costs and benefits of the industry changes (*e.g.,* technology changes and business practices) necessary to comply with a T+2 standard settlement cycle related to trade matching. What are the costs of implementing such changes? What cost-savings would these changes yield? What operational risks might these changes create?

4. The Commission invites commenters to provide additional data on the expected collateral efficiency gains from a T+2 standard settlement cycle. How would clearing fund deposits change as a result of the proposed amendment? To what extent does this change fully represent the change to the level of risk associated with the settlement cycle for securities transactions?

5. The Commission invites commenters to discuss the impact of a T+2 settlement cycle on broker-dealers and their customers. What types of adaptations will be necessary to comply with a T+2 settlement cycle, and what are their relative costs and benefits?

6. The Commission invites commenters to discuss the potential impact of a T+2 standard settlement cycle with respect to cross-border and cross-asset class transactions. What are the costs and benefits of harmonizing with certain markets' settlement cycles? Would a T+2 standard settlement cycle make any cross-border or cross-asset transactions more or less difficult?

7. The Commission invites commenters to discuss the anticipated market changes, if any, if the proposed amendment to Rule 15c6–1(a) were not adopted. Which activities necessary for compliance with a T+2 standard settlement cycle would occur in the absence of the proposed rule amendment? Which market participants, if any, would move to a T+2 settlement cycle in the absence of the proposed rule amendment?

8. The Commission seeks comment on the alternative of shifting to a T+1 standard settlement cycle. Would such an alternative be appropriate and preferable to a T+2 standard settlement cycle? Why or why not? What are the costs and benefits of such an alternative relative to the baseline and the proposal?

9. The Commission seeks comment on the alternative of mandating specific clearance and settlement practices, such as STP. Would such an alternative be appropriate and preferable to a T+2 standard settlement cycle? Why or why not? What are the costs and benefits of such an alternative relative to the baseline and the proposal?

10. The Commission seeks comment on several topics related to the response of market participants to the shift to a T+2 settlement cycle in certain foreign markets. The Commission seeks comment on the following:

- Commenters are invited to discuss the impact that the shift to a T+2 settlement cycle in certain foreign markets (*e.g.,* E.U. markets) has had on their clearance and settlement operations. Are there any responses to changes in the settlement cycle of these markets that may alter the costs or benefits of adopting a T+2 standard settlement cycle in the U.S.?
- Commenters are invited to discuss their preparations for upcoming migrations to a T+2 settlement cycle in foreign markets. Do these preparations alter the costs and benefits of adapting to a T+2 standard settlement cycle in the U.S.?
- Has the experience of migrating to a T+2 settlement cycle in certain foreign markets allowed commenters to make any other observations relevant to the proposal to adopt a T+2 standard settlement cycle in the United States?

VII. Small Business Regulatory Enforcement Fairness Act

Under the Small Business Regulatory Enforcement Fairness Act of 1996,[310] a rule is ''major'' if it has resulted, or is likely to result in:

- An annual effect on the economy of $100 million or more;
- A major increase in costs or prices for consumers or individual industries; or
- Significant adverse effects on competition, investment, or innovation.

The Commission requests comment on whether the proposed amendment to Rule 15c6–1(a) would be a ''major'' rule

[310] Public Law 104–121, Title II, 110 Stat. 857 (1996).

for purposes of the Small Business Regulatory Enforcement Fairness Act. In addition, the Commission solicits comment and empirical data on:

- The potential effect on the U.S. economy on annual basis;
- Any potential increase in costs or prices for consumer or individual industries; and
- Any potential effect on competition, investment, or innovation.

VIII. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA'') requires the Commission, in promulgating rules, to consider the impact of those rules on small entities.[311] Section 603(a) of the Administrative Procedure Act,[312] as amended by the RFA, generally requires the Commission to prepare and make available for public comment an initial regulatory flexibility analysis of all proposed rules to determine the impact of such rulemaking on ''small entities.'' [313] Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule which, if adopted, would not have a significant economic impact on a substantial number of small entities.[314]

The Commission has prepared the following initial regulatory flexibility analysis in accordance with Section 603(a) of the RFA in relation to the proposed amendment to Exchange Act Rule 15c6–1(a).

A. Reasons for, and Objectives of, the Proposed Action

The Commission is proposing to amend Exchange Act Rule 15c6–1(a) to shorten the standard settlement cycle for securities transactions (other than those excluded by the rule) from T+3 to T+2. The Commission believes that proposing the amendment to Rule 15c6–1(a) to shorten the standard settlement cycle from three days to two days could potentially offer market participants significant benefits through the reduction of exposure to credit, market, and liquidity risk, as well as related reductions to systemic risk.

B. Legal Basis

The Commission is proposing an amendment to Rule 15c6–1(a) under the authority set forth in the Exchange Act, particularly under Sections 15(c)(6),[315] 17A,[316] and 23(a) [317] of the Exchange Act.

C. Small Entities Subject to the Rule and Rule Amendment

Paragraph (c) of Exchange Act Rule 0–10 provides that, for purposes of Commission rulemaking in accordance with the provisions of the RFA, when used with reference to a broker or dealer, the Commission has defined the term ''small entity'' to mean a broker or dealer: (1) With total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to Rule 17a–5(d) under the Exchange Act,[318] or if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and (2) is not affiliated with any person (other than a natural person) that is not a small business or small organization.[319]

The proposed amendment to Rule 15c6–1(a) would prohibit broker-dealers, including those that are small entities, from effecting or entering into a contract for the purchase or sale of a security (other than an exempted security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities no later than the second business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction. Currently, based on FOCUS Report [320] data, as of December 31, 2015, we estimate that there are 1,235 broker-dealers that may be considered small entities.

D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendment to Rule 15c6–1(a) would not impose any new reporting or recordkeeping requirements on broker-dealers that are small entities. However, the proposed amendment to Rule 15c6–1(a) may impact certain broker-dealers, including those that are small entities, to the extent that broker-dealers may need to make changes to their business operations and incur certain costs in order to operate in a T+2 environment.

For example, conversion to a T+2 standard settlement cycle may require broker-dealers, including those that are small entities, to make changes to their business practices, as well as to their computer systems, and/or to deploy new technology solutions. Implementation of these changes may require broker-dealers to incur new or increased costs, which may vary based on the business model of individual broker-dealers as well as other factors.

Additionally, conversion to a T+2 standard settlement cycle may also result in an increase in costs to certain broker-dealers who finance the purchase of customer securities until the broker-dealer receives payment from its customers. To pay for securities purchases, many customers liquidate other securities or money fund balances held for them by their broker-dealers in consolidated accounts such as cash management accounts. However, some broker-dealers may elect to finance the purchase of customer securities until the broker-dealer receives payment from its customers for those customers that do not choose to liquidate other securities or have a sufficient money fund balance prior to trade execution to pay for securities purchases. Broker-dealers that elect to finance the purchase of customer securities may incur an increase in costs in a T+2 environment resulting from settlement occurring one day earlier unless the broker-dealer can expedite customer payments.

E. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that there are no federal rules that duplicate, overlap or conflict with the proposed amendment to Rule 15c6–1(a).

F. Significant Alternatives

The RFA requires that the Commission include in its regulatory flexibility analysis a description of any significant alternatives to the proposed rule which would accomplish the stated objectives of applicable statutes and which would minimize any significant economic impact of the proposed rule on small entities.[321] Pursuant to Section 3(a) of the RFA, the Commission's initial regulatory flexibility analysis must consider certain types of alternatives, including: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources

[311] *See* 5 U.S.C. 601 *et seq.*

[312] 5 U.S.C. 603(a).

[313] Section 601(b) of the RFA permits agencies to formulate their own definitions of ''small entities.'' *See* 5 U.S.C. 601(b). The Commission has adopted certain definitions for the terms ''small business'' and ''small organization'' for the purposes of rulemaking in accordance with the RFA. These definitions, as relevant to this proposed rulemaking, are set forth in Rule 0–10, 17 CFR 240.0–10.

[314] *See* 5 U.S.C. 605(b).

[315] 15 U.S.C. 78o(c)(6).

[316] 15 U.S.C. 78q–1.

[317] 15 U.S.C. 78w(a).

[318] 17 CFR 240.17a–5(c).

[319] 17 CFR 240.0–10(d).

[320] *See supra* note 235.

[321] 5 U.S.C. 603(c).

available to small entities; (b) the clarification, consolidation, or simplification of the compliance and reporting requirements under the rule for small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the rule, or any part of thereof, for such small entities.[322]

The Commission considered alternatives to the proposed rule amendment that would accomplish the stated objectives of the amendment without disproportionately burdening broker-dealers that are small entities, including: differing compliance requirements or timetables; clarifying, consolidating or simplifying the compliance requirements; using performance rather than design standards; or providing an exemption for certain or all broker-dealers that are small entities. The purpose of Rule 15c6–1(a) is to establish a standard settlement cycle for broker-dealer transactions. Alternatives, such as different compliance requirements or timetables, or exemptions, for Rule 15c6–1(a), or any part thereof, for small entities would undermine the purpose of establishing a standard settlement cycle. For example, allowing small entities to settle at a time later than T+2 could create a two-tiered market that could work to the detriment of small entities whose order flow would not coincide with that of other firms operating on a T+2 settlement cycle. Additionally, the Commission believes that establishing a single timetable (*i.e.,* compliance date) for all broker-dealers, including small entities, to comply with the amendment is necessary to ensure that the transition to a T+2 standard settlement cycle takes place in an orderly manner that minimizes undue disruptions in the securities markets. With respect to using performance rather than design standards, the Commission used performance standards to the extent appropriate under the statute. For example, broker-dealers have the flexibility to settle transactions under a standard settlement cycle shorter than T+2. In addition, under the proposed rule amendment, broker-dealers have the flexibility to tailor their systems and processes, and generally to choose how, to comply with the rule.

[322] *Id.*

G. Request for Comment

The Commission encourages written comments on matters discussed in the initial RFA. In particular, the Commission seeks comment on the number of small entities that would be affected by the proposed amendment to Rule 15c6–1(a) and whether the effect(s) on small entities would be economically significant. Commenters are asked to describe the nature of any effect(s) the proposed amendment to Rule 15c6–1(a) may have on small entities, and to provide empirical data to support their views.

IX. Statutory Authority and Text of the Proposed Amendment to Rule 15c6–1

The Commission is proposing an amendment to Rule 15c6–1 under the Commission's rulemaking authority set forth in Sections 15(c)(6), 17A and 23(a) of the Exchange Act [15 U.S.C. 78o(c)(6), 78q–1, and 78w(a) respectively]. For the reasons stated in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1934

■ 1. The general authority citation for part 240 continues to read as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l,* 78m, 78n, 78n–1, 78*o,* 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll,* 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 *et seq.,* and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

■ 2. Amend § 240.15c6–1 by revising paragraph (a) to read as follows:

The proposed amendment reads as follows:

§ 240.15c6–1 Settlement Cycle.

(a) Except as provided in paragraphs (b), (c), and (d) of this section, a broker or dealer shall not effect or enter into a contract for the purchase or sale of a security (other than an exempted security, government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the second business day after the date of the contract unless otherwise expressly agreed to by the parties at the time of the transaction.

* * * * *

By the Commission.

Dated: September 28, 2016.

Robert W. Errett,

Deputy Secretary.

[FR Doc. 2016–23890 Filed 10–4–16; 8:45 am]

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Part IV

Internal Revenue Service

Food and Drug Administration

26 CFR Part 1
Liabilities Recognized as Recourse Partnership Liabilities Under Section 752; Disguised Sales; Final Rules and Proposed Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9788]

RIN 1545–BM84

Liabilities Recognized as Recourse Partnership Liabilities Under Section 752

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations concerning how liabilities are allocated for purposes of section 707 of the Internal Revenue Code (Code) and when certain obligations are recognized for purposes of determining whether a liability is a recourse partnership liability under section 752. These regulations affect partnerships and their partners. The text of these temporary regulations serves as part of the text of proposed regulations (REG–122855–15) published in the Proposed Rules section in this issue of the **Federal Register**.

DATES: *Effective date:* These regulations are effective on October 5, 2016.

Applicability dates: For dates of applicability, see §§ 1.707–9T(a)(4) and 1.752–2T(l)(2).

FOR FURTHER INFORMATION CONTACT: Concerning the final and temporary regulations, Caroline E. Hay or Deane M. Burke, (202) 317–5279.

SUPPLEMENTARY INFORMATION: In addition to these final and temporary regulations, the Treasury Department and the IRS are publishing in the Rules and Regulations section in this issue of the **Federal Register**, final regulations under section 707 concerning disguised sales and under section 752 regarding the allocation of excess nonrecourse liabilities of a partnership to a partner, and, in the Proposed Rules section in this issue of the **Federal Register**, proposed regulations (REG–122855–15) that incorporate the text of these temporary regulations, withdraw a portion of a notice of proposed rulemaking (REG–119305–11) to the extent not adopted by the final regulations, and contain new proposed regulations addressing (1) when certain obligations to restore a deficit balance in a partner's capital account are disregarded under section 704 and (2) when partnership liabilities are treated as recourse liabilities under section 752.

Paperwork Reduction Act

The collection of information related to these final and temporary regulations under section 752 is reported on Form 8275, Disclosure Statement, and has been reviewed in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) and approved by the Office of Management and Budget under control number 1545–0889.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

For further information concerning this collection of information, and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103.

Background

1. Overview

This Treasury decision contains final and temporary regulations that amend the Income Tax Regulations (26 CFR part 1) under sections 707 and 752 of the Code. On January 30, 2014, the Treasury Department and the IRS published a notice of proposed rulemaking in the **Federal Register** (REG–119305–11, 79 FR 4826) to amend the then existing regulations under section 707 relating to disguised sales of property to or by a partnership and under section 752 concerning the treatment of partnership liabilities (the 2014 Proposed Regulations). The 2014 Proposed Regulations provided certain technical rules intended to clarify the application of the disguised sale rules under section 707 and also contained rules regarding the sharing of partnership recourse and nonrecourse liabilities under section 752.

A public hearing on the 2014 Proposed Regulations was not requested or held, but the Treasury Department and the IRS received written comments.

Based on a comment received on the 2014 Proposed Regulations requesting that guidance provided under section 752 regarding a partner's share of partnership liabilities apply instead solely for disguised sale purposes, the Treasury Department and the IRS have reconsidered the rules under § 1.707–5(a)(2) of the 2014 Proposed Regulations for determining a partner's share of partnership liabilities for purposes of section 707. Accordingly and as recommended by that commenter, this Treasury decision contains temporary regulations under section 707 (the 707 Temporary Regulations) that require a partner to apply the same percentage used to determine the partner's share of excess nonrecourse liabilities under § 1.752–3(a)(3) (with certain limitations) in determining the partner's share of partnership liabilities for disguised sale purposes. This Treasury decision also contains temporary regulations under section 752 (the 752 Temporary Regulations) providing guidance on the treatment of ''bottom dollar payment obligations.'' Cross-referencing proposed regulations providing additional opportunity for comment are contained in the related notice of proposed rulemaking (REG–122855–15) published in the Proposed Rules section in this issue of the **Federal Register**. The Summary of Comments and Explanation of Provisions section of the preamble of this Treasury decision discusses the changes for determining a partner's share of partnership liabilities for disguised sale purposes and also the rules relating to certain ''bottom dollar payment obligations.''

The Treasury Department and the IRS are also publishing final regulations under section 707 (the 707 Final Regulations) in a separate Treasury decision (TD 9787) published in the Rules and Regulations section in this issue of the **Federal Register** that adopt the remaining provisions of the 2014 Proposed Regulations under section 707. That Treasury decision also contains final regulations under section 752 (the 752 Final Regulations) concerning the allocation of a partnership's excess nonrecourse liabilities as explained in the Summary of Comments and Explanation of Provisions sections of that Treasury decision.

Finally, after considering comments on the 2014 Proposed Regulations under section 752, the Treasury Department and the IRS are withdrawing proposed § 1.752–2 and are issuing new proposed regulations (the 752 Proposed Regulations) contained in the related notice of proposed rulemaking (REG–122855–15) published in the Proposed Rules section in this issue of the **Federal Register**.

2. Summary of Applicable Law

In determining a partner's share of a partnership liability for disguised sale purposes, the existing regulations under section 707 prescribe separate rules for a partnership's recourse liability and a partnership's nonrecourse liability. Under § 1.707–5(a)(2)(i), a partner's share of a partnership's recourse liability equals the partner's share of the liability under section 752 and the regulations thereunder. A partnership liability is a recourse liability under section 707 to the extent that the obligation is a recourse liability under § 1.752–1(a)(1). Under § 1.707–5(a)(2)(ii), a partner's share of a partnership's nonrecourse liability is determined by applying the same percentage used to determine the partner's share of the excess nonrecourse liability under § 1.752–3(a)(3). Generally, a partner's share of the excess nonrecourse liability is determined in accordance with the partner's share of partnership profits taking into account all facts and circumstances relating to the economic arrangement of the partners. A partnership liability is a nonrecourse liability under section 707 to the extent that the obligation is a nonrecourse liability under § 1.752–1(a)(2). In addition, the existing regulations under section 707 provide that a partnership liability is a recourse or nonrecourse liability to the extent the liability would be recourse under § 1.752–1(a)(1) or nonrecourse under § 1.752–1(a)(2), respectively, if the liability was treated as a partnership liability for purposes of section 752 (§ 1.752–7 contingent liabilities).

Section 1.752–1(a)(1) provides that a partnership liability is a recourse liability to the extent that a partner or related person bears the economic risk of loss (EROL) for that liability under § 1.752–2. Section 1.752–2(a) provides that a partner's share of a recourse partnership liability equals the portion of the liability, if any, for which the partner or related person bears the EROL. Section 1.752–1(a)(2) provides that a partnership liability is a nonrecourse liability to the extent that no partner or related person bears the EROL for that liability under § 1.752–2. A partner generally bears the EROL for a partnership liability if the partner or related person has an obligation to make a payment under § 1.752–2(b). A partner generally has an obligation to make a payment to the extent that the partner or related person would have to make a payment if, upon a constructive liquidation of the partnership, the partnership's assets were worthless and the liability became due and payable (constructive liquidation test). Section 1.752–2(b)(6) presumes partners and related persons will satisfy their payment obligations irrespective of their net worth, unless the facts and circumstances indicate a plan to circumvent or avoid the obligation.

Summary of Comments and Explanation of Provisions

1. Partner's Share of Partnership Liabilities for Purposes of Section 707

The withdrawn portions of the 2014 Proposed Regulations included proposed changes to § 1.752–2 that were intended to ensure that only genuine commercial payment obligations, including guarantees and indemnities, affected the allocation of partnership liabilities. Although the 2014 Proposed Regulations received some unfavorable comments, one commenter expressed support for the overall objective of those proposed rules. According to the commenter, the clear effect of the 2014 Proposed Regulations under section 752 was to make it more likely that liabilities would be treated as nonrecourse liabilities, and thus allocable under § 1.752–3. The commenter noted that such an effect seems appropriate as an economic matter, because, contrary to the constructive liquidation test in § 1.752–2(b)(1), lenders, borrowers, and credit support providers generally do not expect that the assets of the partnership will become worthless. Rather, lenders, borrowers and credit support providers generally expect borrowers (including partnerships) to satisfy their obligations (in the case of a partnership, with partnership profits). However, the commenter expressed concerns with the proposed section 752 rules. The commenter suggested that the regulations adopt a more narrowly tailored approach that treats all liabilities as nonrecourse liabilities for section 707 disguised sale purposes only.

Other commenters also suggested that changes to the liability allocation rules be limited to the context of disguised sales under section 707 to specifically address the abuses that concern the Treasury Department and the IRS. One abuse relating to disguised sales within the meaning of § 1.707–3 concerns the debt-financed distribution exception under § 1.707–5(b). Under this exception, a distribution of money to a partner by a partnership is not taken into account for purposes of § 1.707–3 to the extent that the distribution is traceable to a partnership borrowing and the amount of the distribution does not exceed the partner's allocable share of the liability incurred to fund the distribution. The legislative history to section 707, upon which the debt-financed distribution exception in § 1.707–5(b) is based, contemplates a contributing partner borrowing through the partnership rather than engaging in a disguised sale when the partner, in substance, retains liability for repayment of the borrowed amounts. See H.R. Rep. No. 861, 98th Cong., 2d Sess. 859 (1984). This exception, however, has been abused through leveraged partnership transactions in which the contributing partners or related persons enter into payment obligations that are not commercial solely to achieve an allocation of the partnership liability to the partner, with the objective of avoiding a disguised sale. See, for example, *Canal Corp.* v. *Commissioner,* 135 T.C. 199, 216 (2010) (''We have carefully considered the facts and circumstances and find that the indemnity agreement should be disregarded because it created no more than a remote possibility that [the indemnitor] would actually be liable for payment.'').

After considering the comments on the 2014 Proposed Regulations suggesting that the regulations be narrowly tailored to address abuse concerns relating to disguised sales, the Treasury Department and the IRS have concluded that, for disguised sale purposes only, it is appropriate for partners to determine their share of any partnership liability, whether recourse or nonrecourse under section 752, in the manner in which excess nonrecourse liabilities are allocated under § 1.752–3(a)(3), as limited for disguised sale purposes in the 752 Final Regulations. For purposes of the disguised sale rules, this allocation method reflects the overall economic arrangement of the partners more accurately than the current regulations or the 2014 Proposed Regulations. In most cases, a partnership will satisfy its liabilities with partnership profits, the partnership's assets do not become worthless, and the payment obligations of partners or related persons are not called upon. This is true whether: (1) A partner's liability is assumed by a partnership in connection with a transfer of property to the partnership or by a partner in connection with a transfer of property by the partnership to the partner; (2) a partnership takes property subject to a liability in connection with a transfer of property to the partnership or a partner takes property subject to a liability in connection with a transfer of property

by the partnership to the partner; or (3) a liability is incurred by the partnership to make a distribution to a partner under the debt-financed distribution exception in § 1.707–5(b). Accordingly, under the 707 Temporary Regulations, a partner's share of any partnership liability for disguised sale purposes is the same percentage used to determine the partner's share of the partnership's excess nonrecourse liabilities under § 1.752–3(a)(3), as limited for disguised sale purposes under the 752 Final Regulations.

Commenters also suggested that a partner's share of a partnership liability for disguised sale purposes should not include any portion of the liability for which another partner bears the EROL, as these liabilities would not be allocated to a partner without EROL under general principles of subchapter K. The Treasury Department and the IRS agree with the commenter that this change should not create a liability allocation not otherwise allowed under general subchapter K principles. Therefore, the 707 Temporary Regulations provide that a partner's share of a partnership liability for disguised sale purposes does not include any amount of the liability for which another partner bears the EROL for the partnership liability under § 1.752–2.

The liability allocation approach for disguised sale purposes in the 707 Temporary Regulations does not conflict with Congress's directive relating to section 752, which had been raised as a potential concern by some commenters with respect to the 2014 Proposed Regulations. Section 79 of the Deficit Reduction Act of 1984 (Pub. L. 98–369) overruled the decision in *Raphan* v. *United States,* 3 Cl. Ct. 457 (1983) (holding that a guarantee by a general partner of an otherwise nonrecourse liability of the partnership did not require the partner to be treated as personally liable for that liability) and directed the Secretary of the Treasury to amend the regulations under section 752 to reflect the overruling of the *Raphan* decision. At issue in the *Raphan* case was debt allocation under section 752; accordingly, Congress's directive related to regulations under section 752 only. As noted, the 707 Temporary Regulations treat all partnership liabilities, whether recourse or nonrecourse, as nonrecourse liabilities solely for purposes of section 707. Thus, the approach adopted in the 707 Temporary Regulations does not conflict with the approach directed by Congress after the *Raphan* case.

Finally, in addition to the rule for determining a partner's share of a § 1.752–1(a) partnership liability for disguised sale purposes, the 707 Temporary Regulations reserve with respect to the treatment of § 1.752–7 contingent liabilities for disguised sale purposes. The 2014 Proposed Regulations proposed removing the ''would be treated'' language in § 1.707–5(a)(2)(i) and (ii) of the existing regulations relating to contingent liabilities. The 707 Temporary Regulations replace the proposed provisions with the previously discussed rule for determining a partner's share of a partnership liability as defined in § 1.752–1(a). Because the 2014 Proposed Regulations would have removed language relating to § 1.752–7 contingent liabilities, some commenters suggested that the regulations specifically clarify how contingent liabilities are treated for purposes of the disguised sale rules. The Treasury Department and the IRS agree that clarification of the treatment of § 1.752–7 contingent liabilities for disguised sale purposes is warranted.

In many cases, § 1.752–7 contingent liabilities may constitute qualified liabilities that would not be taken into account for purposes of determining a disguised sale. However, some commenters noted that there may be circumstances in which certain transfers of § 1.752–7 contingent liabilities to a partnership may be abusive. Thus, the Treasury Department and the IRS will continue to study the issue of the effect of contingent liabilities with respect to section 707, as well as other sections of the Code, in connection with future guidance projects.

2. Determining Whether a Liability Is a Recourse Liability of a Partnership

The 752 Temporary Regulations amend § 1.752–2 to address certain payment obligations of a partner or related person. The Treasury Department and the IRS continue to have concerns that partners and related persons are entering into payment obligations that are not commercial solely to achieve an allocation of a partnership liability.

Under the 2014 Proposed Regulations, a partner's or related person's payment obligation with respect to a partnership liability would not have been recognized under § 1.752–2(b)(3) unless seven factors (recognition factors) were satisfied. Two of the seven recognition factors imposed certain additional requirements on contractual obligations outside a partnership agreement, such as guarantees, indemnifications, reimbursement agreements, and other obligations running directly to creditors, other partners, or to the partnership (guarantee and indemnity recognition factors). In the case of a guarantee or similar arrangement, the 2014 Proposed Regulations would have required the partner or related person to be liable up to the full amount of such partner's or related person's payment obligation, if, and to the extent that, any amount of the partnership liability is not otherwise satisfied. In the case of an indemnity, reimbursement agreement, or similar arrangement, the 2014 Proposed Regulations would have required the partner or related person to be liable up to the full amount of such partner's or related person's payment obligation if, and to the extent that, any amount of the indemnitee's or other benefited party's payment obligation is satisfied. The terms of the guarantee, indemnity, or reimbursement agreement would be treated as modified by any right of indemnity, reimbursement agreement, or similar arrangement. However, a right of proportionate contribution running between partners or related persons who were co-obligors with respect to a payment obligation for which each of them was jointly and severally liable would not modify a guarantee, indemnity, or reimbursement agreement. If the partner's or related person's payment obligation failed to satisfy any of the recognition factors, the payment obligation was not recognized and the partner would not bear EROL for the partnership liability. In addition to the guarantee and indemnity recognition factors, a partner's or related person's payment obligation with respect to a partnership liability would not be recognized under an anti-abuse rule in the 2014 Proposed Regulations if the facts and circumstances indicated that the partnership liability was part of a plan or arrangement involving the use of tiered partnerships, intermediaries, or similar arrangements to convert a single liability into multiple liabilities with a principal purpose of circumventing the guarantee and indemnity recognition factors.

The Treasury Department and the IRS continue to believe that certain obligations, such as certain so-called ''bottom-dollar guarantees,'' should generally not be recognized as payment obligations under § 1.752–2(b)(3) because they generally lack a significant non-tax commercial business purpose. No commenters suggested that bottom-dollar guarantees were relevant to loan risk underwriting. Accordingly, the 752 Temporary Regulations retain the

restriction on certain guarantees and indemnities and provide that these payment obligations are not recognized under § 1.752–2(b)(3). In addition, these regulations remove the *Example* in § 1.752–2(j)(4) to comport with the provisions in the 752 Temporary Regulations relating to bottom dollar payment obligations. However, after considering the comments received on the 2014 Proposed Regulations, the 752 Temporary Regulations provide for an exception as well as an anti-abuse rule to address arrangements that are not intended to be subject to this rule.

A. General Rule: Bottom Dollar Payment Obligations

Although the 752 Temporary Regulations retain the restriction relating to certain guarantees and indemnities, these temporary regulations refine the description of non-commercial obligations in response to comments. Commenters expressed concerns with the 2014 Proposed Regulations' description of so-called ''bottom-dollar guarantees and indemnities.'' Commenters thought the language was confusing. In addition, with respect to the anti-abuse rule in the 2014 Proposed Regulations, one commenter believed that ''tranches'' of debt could be used to effect arrangements that are economically similar to ''bottom-dollar guarantees'' and recommended that the regulations strengthen the anti-abuse rule. This commenter suggested that two or more liabilities be treated as a single liability if: (1) The liabilities are incurred pursuant to a common plan, as part of a single transaction, or as part of a series of related transactions; (2) the liabilities have the same counterparty or counterparties (or substantially the same group of counterparties); or (3) the guarantee or similar arrangement would fail the guarantee recognition factor if the liabilities were treated as a single liability; and (4) multiple liabilities (rather than a single liability) were incurred with a principal purpose of avoiding the guarantee recognition factor.

In response to comments, the 752 Temporary Regulations clarify the description of so-called ''bottom-dollar guarantees and indemnities'' by consolidating these non-commercial obligations under one term: Bottom-dollar payment obligations. In addition, instead of having an anti-abuse rule to address arrangements that use tiered partnerships, intermediaries, senior and subordinate liabilities, or similar arrangements, the 752 Temporary Regulations define these arrangements as bottom dollar payment obligations if certain factors, taking into account the commenter's suggestion, exist. Therefore, under the 752 Temporary Regulations, the term ''bottom dollar payment obligation'' includes (subject to certain exceptions): (1) Any payment obligation other than one in which the partner or related person is or would be liable up to the full amount of such partner's or related person's payment obligation if, and to the extent that (A) any amount of the partnership liability is not otherwise satisfied in the case of an obligation that is a guarantee or other similar arrangement, or (B) any amount of the indemnitee's or benefited party's payment obligation is satisfied in the case of an obligation which is an indemnity or similar arrangement; and (2) an arrangement with respect to a partnership liability that uses tiered partnerships, intermediaries, senior and subordinate liabilities, or similar arrangements to convert what would otherwise be a single liability into multiple liabilities if, based on the facts and circumstances, the liabilities were incurred (A) pursuant to a common plan, as part of a single transaction or arrangement, or as part of a series of related transactions or arrangements, and (B) with a principal purpose of avoiding having at least one of such liabilities or payment obligations with respect to such liabilities being treated as a bottom dollar payment obligation. Any payment obligation under § 1.752–2, including an obligation to make a capital contribution and to restore a deficit capital account upon liquidation of the partnership as described in § 1.704–1(b)(2)(ii)(*b*)(*3*), may be a bottom dollar payment obligation if it meets the requirements set forth above.

The preamble of the 2014 Proposed Regulations requested comments on whether and under what circumstances regulations should permit recognition of a payment obligation for a portion, rather than 100 percent, of each dollar of a partnership liability to which the payment relates (a ''vertical slice'' of a partnership liability). The commenters believed that regulations under section 752 should recognize a vertical slice of a partnership liability because these payment obligations represent the same economic risk as a guarantee, for example, of the entire partnership liability.

The Treasury Department and the IRS agree with the commenters that certain obligations, including a vertical slice of a partnership liability, should not cause a payment obligation to be a bottom dollar payment obligation and, thus, not recognized under § 1.752–2(b)(3). In addition, the Treasury Department and the IRS have determined that, as long as a partner or related person is or would be liable for the full amount of a payment obligation, such obligation is not a bottom dollar payment obligation merely because a maximum amount is placed on the partner's or related person's obligation. Accordingly, the 752 Temporary Regulations specifically except certain payment obligations within those parameters, including obligations with joint and several liability, from being treated as bottom dollar payment obligations.

B. Exception From Treatment as a Bottom Dollar Payment Obligation

In addition to comments relating to the description of ''bottom-dollar guarantees'' and the anti-abuse rule in the 2014 Proposed Regulations, commenters expressed concerns that the guaranty and indemnity recognition factors would deprive a partner from being allocated a liability even in situations where there is real EROL. One commenter described the 2014 Proposed Regulations as prejudging all payment obligations to be remote and fictitious if the obligations did not cover 100 percent of any shortfall in repayment. The commenter believed EROL could exist even if 100 percent of the liability was not covered.

Another commenter appreciated the merits of a bright-line rule that would look to every dollar of a liability, but thought that the 100 percent threshold was too high. This commenter recommended that a payment obligation should be respected if a partner or related person (i) is or would be liable up to the full amount of such partner's or related person's payment obligation if, and to the extent that, less than 80 percent of the partnership liability is not otherwise satisfied and (ii) either (A) the taxpayer or the IRS clearly establishes that the credit support materially decreased the partnership's borrowing costs with respect to the liability or materially enhanced the other terms of the borrowing, or (B) the partners (or persons related to one or more of the partners), in the aggregate, are or would be liable up to the full amount of their payment obligations if, and to the extent that, any amount of the partnership liability is not otherwise satisfied. The commenter believed that this lower threshold incorporates the idea that a person may have meaningful risk with respect to the underlying liability, while protecting the legitimate interests of the government in ensuring that the lower threshold is not abused by taxpayers.

The Treasury Department and the IRS recognize that, in certain circumstances, it might be appropriate to treat a partner as bearing EROL with respect to a

payment obligation that would be characterized as a bottom dollar payment obligation under the general rule. What otherwise would be a bottom dollar payment obligation can be distinguished in a situation where the partners have allocated the risk among themselves, and the person making the bottom dollar payment obligation is liable for at least 90 percent of the person's payment obligation (because the person is not entitled to indemnification or reimbursement for more than 10 percent of the person's payment obligation). For example, if one partner (Partner A) guarantees 100 percent of a partnership liability and another partner (Partner B) indemnifies Partner A for the first one percent of Partner A's obligation, Partner A's obligation would be characterized as a bottom dollar payment obligation under the general rule because Partner A would not be liable to the full extent of the guarantee if any amount of the partnership liability is not otherwise satisfied (because Partner A would be reimbursed due to Partner B's indemnity). To address this concern, the 752 Temporary Regulations provide an exception if a partner or related person has a payment obligation that would be recognized (initial payment obligation) under § 1.752–2T(b)(3) but for the effect of an indemnity, reimbursement agreement, or similar arrangement. Such bottom dollar payment obligation is recognized under § 1.752–2T(b)(3) if, taking into account the indemnity, reimbursement agreement, or similar arrangement, the partner or related person is liable for at least 90 percent of the initial payment obligation. This obligation, like any other payment obligation, must otherwise be recognized under § 1.752–2, including under the anti-abuse rules in § 1.752–2(j).

C. Anti-Abuse Rule

Some commenters noted that partners could manipulate contractual arrangements to achieve a federal income tax result that is not consistent with the economics of an arrangement. For example, a partner could deliberately fail one of the recognition factors in the 2014 Proposed Regulations (including the guarantee or indemnity recognition factor) to cause a partnership liability to be treated as nonrecourse even when one partner has true EROL. Just as the 752 Temporary Regulations provide an exception for certain obligations that meet the definition of a bottom dollar payment obligation but give rise to EROL, the 752 Temporary Regulations also provide an anti-abuse rule in § 1.752–2T(j)(2) that the Commissioner may apply to ensure that if a partner actually bears EROL for a partnership liability, partners may not agree among themselves to create a bottom dollar payment obligation so that the liability will be treated as nonrecourse.

Section 1.752–2(j)(2) of the existing regulations currently provides that, irrespective of the form of a contractual obligation, a partner is considered to bear the EROL with respect to a partnership liability, or a portion thereof, to the extent that: (A) The partner or related person undertakes one or more contractual obligations so that the partnership may obtain a loan; (B) the contractual obligations of the partner or related person eliminate substantially all the risk to the lender that the partnership will not satisfy its obligations under the loan; and (C) one of the principal purposes of using the contractual obligations is to attempt to permit partners (other than those who are directly or indirectly liable for the obligation) to include a portion of the loan in the basis of their partnership interests. The 752 Temporary Regulations expand § 1.752–2(j)(2) to include situations in which a partner is considered to bear the EROL irrespective of a bottom dollar payment obligation.

D. Disclosure Requirement

The 752 Temporary Regulations require the partnership to disclose to the IRS all bottom dollar payment obligations with respect to a partnership liability on a completed Form 8275, Disclosure Statement, attached to the partnership return for the taxable year in which the bottom dollar payment obligation is undertaken or modified. That disclosure must identify the payment obligation with respect to which disclosure is made including the amount of the payment obligation and the parties to the payment obligation. If a bottom dollar payment obligation meets the exception, the partnership must also disclose to the IRS on Form 8275 the facts and circumstances that clearly establish that a partner or related person is liable for up to 90 percent of the partner's or related person's initial payment obligation and, but for an indemnity, reimbursement agreement, or similar arrangement, the partner's or related person's payment obligation would have been recognized.

Effective/Applicability Date

With respect to changes under § 1.707–5, the 707 Temporary Regulations apply to any transaction with respect to which all transfers occur on or after January 3, 2017. In addition, with respect to the changes under § 1.752–2, the 752 Temporary Regulations apply to liabilities incurred or assumed by a partnership and payment obligations imposed or undertaken with respect to a partnership liability on or after October 5, 2016, other than liabilities incurred or assumed by a partnership and payment obligations imposed or undertaken pursuant to a written binding contract in effect prior to that date.

The 2014 Proposed Regulations provided for an effective date similar to the one in these final and temporary regulations. A commenter recommended that partnerships be permitted to elect to apply all, but not less than all, of the provisions of the final regulations to all of its liabilities and payment obligations with respect to its liabilities after the effective date of the final regulations. These 752 Temporary Regulations adopt that change; therefore, partnerships may apply all the provisions contained in the 752 Temporary Regulations to all of their liabilities as of the beginning of the first taxable year of the partnership ending on or after October 5, 2016.

Commenters on the 2014 Proposed Regulations also recommended that partnership liabilities or payment obligations that are modified or refinanced continue to be subject to the provisions of the existing regulations to the extent of the amount and duration of the pre-modification (or refinancing) liability or payment obligation. The 752 Temporary Regulations do not adopt this recommendation as the terms of the partnership liabilities and payment obligations could be changed, which would affect the determination of whether or not an obligation is a bottom dollar payment obligation.

The 752 Temporary Regulations do, however, provide transition relief for any partner whose allocable share of partnership liabilities under § 1.752–2 exceeds its adjusted basis in its partnership interest on the date the temporary regulations are finalized. Under this transitional relief, the partner can continue to apply the existing regulations under § 1.752–2 with respect to a partnership liability for a seven-year period to the extent that the partner's allocable share of partnership liabilities exceeds the partner's adjusted basis in its partnership interest on October 5, 2016. The amount of partnership liabilities subject to transitional relief will be reduced for certain reductions in the amount of liabilities allocated to that partner under the transition rules and, upon the sale of any partnership property, for any tax gain (including

section 704(c) gain) allocated to the partner less that partner's share of amount realized.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

Although the temporary regulations under sections 707 and 752 respond to comments received in response to the 2014 Proposed Regulations, the Treasury Department and the IRS have determined that the regulations would benefit from additional notice and comment instead of being published as final regulations. In addition, decisions made in the final regulations under section 707 contained in a separate Treasury decision (TD 9787) published in the Rules and Regulations section in this issue of the **Federal Register** interact with the changes in the 707 Temporary Regulations regarding how liabilities are allocated for disguised sale purposes. Finally, pursuant to authority under section 7805(b) of the Code, the temporary regulations under sections 707 and 752 are necessary to address particular abuses as described in the Summary of Comments and the Explanation of Provisions section of the preamble of this Treasury decision. For these reasons, good cause also exists pursuant to 5 U.S.C. 553 to issue temporary regulations.

For applicability of the Regulatory Flexibility Act, please refer to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**. Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Caroline E. Hay and Deane M. Burke of the Office of the Associate Chief Counsel (Passthroughs & Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Sections 1.707–2 through 1.707–9 also issued under 26 U.S.C. 707(a)(2)(B).

■ **Par. 2.** Section 1.707–5 is amended by revising paragraph (a)(2) and Examples 2, 3, 7, and 8 in paragraph (f) to read as follows:

§ 1.707–5 Disguised sales of property to partnership; special rules relating to liabilities.

(a) * * *

(2) [Reserved]. For further guidance, see § 1.707–5T(a)(2).

* * * * *

(f) * * *

Example 2. [Reserved]. For further guidance, see § 1.707–5T(f) *Example 2.*

Example 3. [Reserved]. For further guidance, see § 1.707–5T(f) *Example 3.*

* * * * *

Example 7. [Reserved]. For further guidance, see § 1.707–5T(f) *Example 7.*

Example 8. [Reserved]. For further guidance, see § 1.707–5T(f) *Example 8.*

* * * * *

■ **Par. 3.** Section 1.707–5T is added to read as follows:

§ 1.707–5T Disguised sales of property to partnership; special rules relating to liabilities (temporary).

(a)(1) [Reserved]. For further guidance, see § 1.707–5(a)(1).

(2) *Partner's share of liability*—(i) *In general.* For purposes of § 1.707–5, a partner's share of a liability of a partnership, as defined in § 1.752–1(a) (whether a recourse liability or a nonrecourse liability) is determined by applying the same percentage used to determine the partner's share of the excess nonrecourse liability under § 1.752–3(a)(3) (as limited in its application to this paragraph (a)(2)), without including in such partner's share any amount of the liability for which another partner bears the economic risk of loss for the partnership liability under § 1.752–2.

(ii) *Partner's share of § 1.752–7 liability.* [Reserved].

(a)(3) through (e) [Reserved]. For further guidance, see § 1.707–5(a)(3) through (e).

(f) *Example 1* [Reserved]. For further guidance, see § 1.707–5(f) *Example 1.*

Example 2. Partnership's assumption of recourse liability encumbering transferred property. (i) C transfers property Y to a partnership in which C has a 50 percent interest. At the time of its transfer to the partnership, property Y has a fair market value of $10,000,000 and is subject to an $8,000,000 liability that C incurred and guaranteed, immediately before transferring property Y to the partnership, in order to finance other expenditures. Upon the transfer of property Y to the partnership the partnership assumed the liability encumbering that property. Under section 752 and the regulations thereunder, immediately after the partnership's assumption of the liability encumbering property Y, the liability is a recourse liability of the partnership and C's share of that liability is $8,000,000.

(ii) Under the facts of this example, the liability encumbering property Y is not a qualified liability. Accordingly, the partnership's assumption of the liability results in a transfer of consideration to C in connection with C's transfer of property Y to the partnership. Notwithstanding C's share of the liability for section 752 purposes, for disguised sale purposes, C's share of the liability immediately after the partnership's assumption is $4,000,000 (50 percent of $8,000,000) under paragraph (a)(2) of this section (which determines a partner's share of a liability using the percentage under § 1.752–3(a)(3)). Therefore, the amount of consideration to C is $4,000,000 (the excess of the liability assumed by the partnership ($8,000,000) over C's share of the liability for purposes of § 1.707–5(a) immediately after the assumption ($4,000,000)). See § 1.707–5(a)(1) and paragraph (a)(2) of this section.

Example 3. Subsequent reduction of transferring partner's share of liability. (i) The facts are the same as in *Example 2.* In addition, property Y is a fully leased office building, the rental income from property Y is sufficient to meet debt service, and the remaining term of the liability is ten years. It is anticipated that, three years after the partnership's assumption of the liability, C's share of the liability under paragraph (a)(2) of this section will be reduced to $2,000,000 because of a shift in the allocation of partnership profits pursuant to the terms of the partnership agreement which provide that C's share of the partnership profits will be 25 percent at that time. Under the partnership agreement, this shift in the allocation of partnership profits is dependent solely on the passage of time.

(ii) Under § 1.707–5(a)(3), if the reduction in C's share of the liability was anticipated at the time of C's transfer, was not subject to the entrepreneurial risks of partnership operations, and was part of a plan that has as one of its principal purposes minimizing the extent of sale treatment under § 1.707–3 (that is, a principal purpose of allocating a larger percentage of profits to C in the first three years when profits were not likely to be realized was to minimize the extent to which C's transfer would be treated as part of a sale), C's share of the liability immediately after the partnership's assumption is treated as equal to C's reduced share of $2,000,000. Therefore, the amount of consideration to C is $6,000,000 (the excess of the liability assumed by the partnership ($8,000,000) over

C's share of the liability for purposes of § 1.707–5(a) immediately after the assumption ($2,000,000)), taking into account the anticipated reduction in C's share of the liability pursuant to the terms of the partnership agreement. See § 1.707–5(a)(1) and (3) and paragraph (a)(2) of this section.

Examples 4 through *6* [Reserved]. For further guidance, see § 1.707–5(f) *Examples 4* through *6.*

Example 7. Partnership's assumptions of liabilities encumbering properties transferred pursuant to a plan. (i) Pursuant to a plan, G and H transfer property 1 and property 2, respectively, to an existing partnership in exchange for a one-third interest each in the partnership. At the time the properties are transferred to the partnership, property 1 has a fair market value of $10,000 and an adjusted tax basis of $6,000, and property 2 has a fair market value of $10,000 and an adjusted tax basis of $4,000. At the time properties 1 and 2 are transferred to the partnership, a $6,000 nonrecourse liability (liability 1) is secured by property 1 and a $9,000 recourse liability of H (liability 2) is secured by property 2. Properties 1 and 2 are transferred to the partnership, and the partnership takes property 1 subject to liability 1 and assumes liability 2. After the transfer of liability 2 to the partnership, H bears the economic risk of loss for the entire amount of liability 2 under § 1.752–2. G and H incurred liabilities 1 and 2 immediately prior to transferring properties 1 and 2 to the partnership and used the proceeds for personal expenditures. The liabilities are not qualified liabilities. For disguised sale purposes, assume that G's and H's share of liability 1 is $2,000 each in accordance with paragraph (a)(2) of this section (which determines a partner's share of a liability using the percentage under § 1.752–3(a)(3) without including in such partner's share any amount of the liability for which another partner bears the economic risk of loss for the liability under § 1.752–2). Also, in accordance with paragraph (a)(2) of this section, G's share of liability 2 is zero and H's share of liability 2 is $3,000.

(ii) G and H transferred properties 1 and 2 to the partnership pursuant to a plan. Accordingly, pursuant to § 1.707–5(a)(1) and (4), the partnership's taking property 1 subject to liability 1 is treated as a transfer of only $4,000 of consideration to G (the amount by which liability 1 ($6,000) exceeds G's share of liabilities 1 and 2 ($2,000)), and the partnership's assumption of liability 2 is treated as a transfer of only $4,000 of consideration to H (the amount by which liability 2 ($9,000) exceeds H's share of liabilities 1 and 2 ($5,000)). Under the rule in § 1.707–3, G is treated as having sold $4,000 of the fair market value of property 1 in exchange for the partnership's taking property 1 subject to liability 1, and H is treated as having sold $4,000 of the fair market value of property 2 in exchange for the partnership's assumption of liability 2.

Example 8. Partnership's assumption of liability pursuant to a plan to avoid sale treatment of partnership assumption of another liability. (i) The facts are the same as in Example 7, except that—

(A) Liability 2 is a nonrecourse liability;

(B) H transferred the proceeds of liability 2 to the partnership; and

(C) H incurred liability 2 in an attempt to reduce the extent to which the partnership's taking of property 1 subject to liability 1 would be treated as a transfer of consideration to G (and thereby reduce the portion of G's transfer of property 1 to the partnership that would be treated as part of a sale).

(ii) Because the partnership assumed liability 2 with a principal purpose of reducing the extent to which the partnership's taking of property 1 subject to liability 1 would be treated as a transfer of consideration to G, liability 2 is ignored in applying § 1.707–5(a)(1). See § 1.707–5(a)(4). Accordingly, the partnership's taking of property 1 subject to liability 1 is treated as a transfer of $4,000 of consideration to G (the amount by which liability 1 ($6,000) exceeds G's share of liability 1 ($2,000)). Under § 1.707–5(d), the partnership's assumption of liability 2 is not treated as a transfer of any consideration to H because the amount of liability 2 that the partnership is treated as assuming is reduced by the money H transferred to the partnership ($9,000).

Examples 9 through *13* [Reserved]. For further guidance, see § 1.707–5(f) *Examples 9* through *13.*

(g) *Expiration date.* This section expires on October 4, 2019.

■ **Par. 4.** Section 1.707–9 is amended by adding paragraphs (a)(4) and (5) to read as follows:

§ 1.707–9 Effective dates and transitional rules.

(a) * * *

(4) *Section 1.707–5(a)(2) and (f) Examples 2, 3, 7, and 8.* Section 1.707–5(a)(2) and (f) *Examples 2, 3, 7,* and *8,* as contained in 26 CFR part 1 revised as of April 1, 2016, apply to any transaction with respect to which any transfers occur before January 3, 2017. For any transaction with respect to which all transfers occur on or after January 3, 2017, see § 1.707–9T(a)(5).

(5) [Reserved]. For further guidance, see § 1.707–9T(a)(5).

* * * * *

■ **Par. 5.** Section 1.707–9T is added to read as follows:

§ 1.707–9T Effective dates and transitional rules (temporary).

(a)(1) through (a)(4) [Reserved]. For further guidance, see § 1.707–9(a)(1) through (4).

(5) *Section 1.707–5T(a)(2) and (f) Examples 2, 3, 7, and 8.* Section 1.707–5T(a)(2) and (f) *Examples 2, 3, 7,* and *8* apply to any transaction with respect to which all transfers occur on or after January 3, 2017. For any transaction with respect to which any transfers occur before January 3, 2017, see § 1.707–5(a)(2) and (f) *Examples 2, 3, 7,* and *8* as contained in 26 CFR part 1, revised as of April 1, 2016.

(b) [Reserved]. For further guidance, see § 1.707–9(b).

(c) *Expiration date.* This section expires on October 4, 2019.

■ **Par. 6.** Section 1.752–2 is amended by:

■ 1. Revising paragraph (b)(3).

■ 2. Adding *Examples 9, 10,* and *11* to paragraph (f).

■ 3. Revising paragraph (j)(2).

■ 4. Removing paragraph (j)(4).

■ 5. Redesignating paragraph (l) as (l)(1) and revising the heading to paragraph (l).

■ 6. Adding paragraphs (l)(2) and (3).

The revisions and additions read as follows:

§ 1.752–2 Partner's share of recourse liabilities.

* * * * *

(b) * * *

(3) [Reserved]. For further guidance, see § 1.752–2T(b)(3).

* * * * *

(f) * * *

Example 9. [Reserved].

Example 10. [Reserved]. For further guidance, see § 1.752–2T(f) *Example 10.*

Example 11. [Reserved]. For further guidance, see § 1.752–2T(f) *Example 11.*

* * * * *

(j) * * *

(2) [Reserved]. For further guidance, see § 1.752–2T(j)(2).

* * * * *

(l) *Effective/applicability dates.* * * * * * * * *

(2) [Reserved]. For further guidance, see § 1.752–2T(l)(2).

(3) [Reserved]. For further guidance, see § 1.752–2T(l)(3).

■ **Par. 7.** Section 1.752–2T is added to read as follows:

§ 1.752–2T Partner's share of recourse liabilities (temporary).

(a) through (b)(2) [Reserved]. For further guidance, see § 1.752–2(a) through (b)(2).

(3) *Obligations recognized*—(i) *In general.* The determination of the extent to which a partner or related person has an obligation to make a payment under § 1.752–2(b)(1) is based on the facts and circumstances at the time of the determination. To the extent that the obligation of a partner or related person to make a payment with respect to a partnership liability is not recognized under this paragraph (b)(3), § 1.752–2(b) is applied as if the obligation did not exist. All statutory and contractual obligations relating to the partnership liability are taken into account for purposes of applying this section, including—

(A) Contractual obligations outside the partnership agreement such as guarantees, indemnifications, reimbursement agreements, and other obligations running directly to creditors, to other partners, or to the partnership;

(B) Obligations to the partnership that are imposed by the partnership agreement, including the obligation to make a capital contribution and to restore a deficit capital account upon liquidation of the partnership as described in § 1.704–1(b)(2)(ii)(*b*)(*3*) (taking into account § 1.704–1(b)(2)(ii)(*c*)); and

(C) Payment obligations (whether in the form of direct remittances to another partner or a contribution to the partnership) imposed by state or local law, including the governing state or local law partnership statute.

(ii) *Special rules for bottom dollar payment obligations*—(A) *In general.* For purposes of § 1.752–2, a bottom dollar payment obligation (as defined in paragraph (b)(3)(ii)(C) of this section) is not recognized under this paragraph (b)(3).

(B) *Exception.* If a partner or related person has a payment obligation that would be recognized under this paragraph (b)(3) (initial payment obligation) but for the effect of an indemnity, reimbursement agreement, or similar arrangement, such bottom dollar payment obligation is recognized under this paragraph (b)(3) if, taking into account the indemnity, reimbursement agreement, or similar arrangement, the partner or related person is liable for at least 90 percent of the partner's or related person's initial payment obligation.

(C) *Definition of bottom dollar payment obligation*—(*1*) *In general.* Except as provided in paragraph (b)(3)(ii)(C)(*2*) of this section, a *bottom dollar payment obligation* is a payment obligation that is the same as or similar to a payment obligation or arrangement described in this paragraph (b)(3)(ii)(C)(*1*).

(*i*) With respect to a guarantee or similar arrangement, any payment obligation other than one in which the partner or related person is or would be liable up to the full amount of such partner's or related person's payment obligation if, and to the extent that, any amount of the partnership liability is not otherwise satisfied.

(*ii*) With respect to an indemnity or similar arrangement, any payment obligation other than one in which the partner or related person is or would be liable up to the full amount of such partner's or related person's payment obligation, if, and to the extent that, any amount of the indemnitee's or benefited party's payment obligation that is recognized under this paragraph (b)(3) is satisfied.

(*iii*) An arrangement with respect to a partnership liability that uses tiered partnerships, intermediaries, senior and subordinate liabilities, or similar arrangements to convert what would otherwise be a single liability into multiple liabilities if, based on the facts and circumstances, the liabilities were incurred pursuant to a common plan, as part of a single transaction or arrangement, or as part of a series of related transactions or arrangements, and with a principal purpose of avoiding having at least one of such liabilities or payment obligations with respect to such liabilities being treated as a bottom dollar payment obligation as described in paragraph (b)(3)(ii)(C)(*1*)(*i*) or (*ii*) of this section.

(*2*) *Exceptions.* A payment obligation is not a bottom dollar payment obligation merely because a maximum amount is placed on the partner's or related person's payment obligation, a partner's or related person's payment obligation is stated as a fixed percentage of every dollar of the partnership liability to which such obligation relates, or there is a right of proportionate contribution running between partners or related persons who are co-obligors with respect to a payment obligation for which each of them is jointly and severally liable.

(*3*) *Benefited party defined.* For purposes of § 1.752–2, a *benefited party* is the person to whom a partner or related person has the payment obligation.

(D) *Disclosure of bottom dollar payment obligations.* A partnership must disclose to the Internal Revenue Service a bottom dollar payment obligation (including a bottom dollar payment obligation that is recognized under paragraph (b)(3)(ii)(B) of this section) with respect to a partnership liability on a completed Form 8275, Disclosure Statement, or successor form, attached to the return of the partnership for the taxable year in which the bottom dollar payment obligation is undertaken or modified, that includes all of the following information:

(*1*) A caption identifying the statement as a disclosure of a bottom dollar payment obligation under section 752.

(*2*) An identification of the payment obligation with respect to which disclosure is made.

(*3*) The amount of the payment obligation.

(*4*) The parties to the payment obligation.

(*5*) A statement of whether the payment obligation is treated as recognized for purposes of this paragraph (b)(3).

(*6*) If the payment obligation is recognized under paragraph (b)(3)(ii)(B) of this section, the facts and circumstances that clearly establish that a partner or related person is liable for up to 90 percent of the partner's or related person's initial payment obligation and, but for an indemnity, reimbursement agreement, or similar arrangement, the partner's or related person's initial payment obligation would have been recognized under this paragraph (b)(3).

(iii) *Special rule for indemnities and reimbursement agreements.* An indemnity, reimbursement agreement, or similar arrangement will be recognized under this paragraph (b)(3) only if, before taking into account the indemnity, reimbursement agreement, or similar arrangement, the indemnitee's or other benefited party's payment obligation is recognized under this paragraph (b)(3), or would be recognized under this paragraph (b)(3) if such person were a partner or related person.

(b)(4) through (e) [Reserved]. For further guidance, see § 1.752–2(b)(4) through (e).

(f) *Examples 1* through *9* [Reserved]. For further guidance, see § 1.752–2(f) *Examples 1* through *9.*

Example 10. Guarantee of first and last dollars. (i) A, B, and C are equal members of a limited liability company, ABC, that is treated as a partnership for federal tax purposes. ABC borrows $1,000 from Bank. A guarantees payment of up to $300 of the ABC liability if any amount of the full $1,000 liability is not recovered by Bank. B guarantees payment of up to $200, but only if the Bank otherwise recovers less than $200. Both A and B waive their rights of contribution against each other.

(ii) Because A is obligated to pay up to $300 if, and to the extent that, any amount of the $1,000 partnership liability is not recovered by Bank, A's guarantee is not a bottom dollar payment obligation under paragraph (b)(3)(ii)(C) of this section. Therefore, A's payment obligation is recognized under paragraph (b)(3) of this section. The amount of A's economic risk of loss under § 1.752–2(b)(1) is $300.

(iii) Because B is obligated to pay up to $200 only if and to the extent that the Bank otherwise recovers less than $200 of the $1,000 partnership liability, B's guarantee is a bottom dollar payment obligation under paragraph (b)(3)(ii)(C) of this section and, therefore, is not recognized under paragraph (b)(3)(ii)(A) of this section. Accordingly, B bears no economic risk of loss under § 1.752–2(b)(1) for ABC's liability.

(iv) In sum, $300 of ABC's liability is allocated to A under § 1.752–2(a), and the remaining $700 liability is allocated to A, B, and C under § 1.752–3.

Example 11. Indemnification of guarantees. (i) The facts are the same as in *Example 10,* except that, in addition, C agrees to indemnify A up to $100 that A pays with respect to its guarantee and agrees to indemnify B fully with respect to its guarantee.

(ii) The determination of whether C's indemnity is recognized under paragraph (b)(3) of this section is made without regard to whether C's indemnity itself causes A's guarantee not to be recognized. Because A's obligation would be recognized but for the effect of C's indemnity and C is obligated to pay A up to the full amount of C's indemnity if A pays any amount on its guarantee of ABC's liability, C's indemnity of A's guarantee is not a bottom dollar payment obligation under paragraph (b)(3)(ii)(C) of this section and, therefore, is recognized under paragraph (b)(3) of this section. The amount of C's economic risk of loss under § 1.752–2(b)(1) for its indemnity of A's guarantee is $100.

(iii) Because C's indemnity is recognized under paragraph (b)(3) of this section, A is treated as liable for $200 only to the extent any amount beyond $100 of the partnership liability is not satisfied. Thus, A is not liable if, and to the extent, any amount of the partnership liability is not otherwise satisfied, and the exception in paragraph (b)(3)(ii)(B) of this section does not apply. As a result, A's guarantee is a bottom dollar payment obligation under paragraph (b)(3)(ii)(C) of this section and is not recognized under paragraph (b)(3)(ii)(A) of this section. Therefore, A bears no economic risk of loss under § 1.752–2(b)(1) for ABC's liability.

(iv) Because B's obligation is not recognized under paragraph (b)(3)(ii) of this section independent of C's indemnity of B's guarantee, C's indemnity is not recognized under paragraph (b)(3)(iii) of this section. Therefore, C bears no economic risk of loss under § 1.752–2(b)(1) for its indemnity of B's guarantee.

(v) In sum, $100 of ABC's liability is allocated to C under § 1.752–2(a) and the remaining $900 liability is allocated to A, B, and C under § 1.752–3.

(g) through (j)(1) [Reserved]. For further guidance, see § 1.752–2(g) through (j)(1).

(2) *Arrangements tantamount to a guarantee*—(i) *In general.* Irrespective of the form of a contractual obligation, the Commissioner may treat a partner as bearing the economic risk of loss with respect to a partnership liability, or a portion thereof, to the extent that—

(A) The partner or related person undertakes one or more contractual obligations so that the partnership may obtain or retain a loan;

(B) The contractual obligations of the partner or related person significantly reduce the risk to the lender that the partnership will not satisfy its obligations under the loan, or a portion thereof; and

(C) With respect to the contractual obligations described in paragraphs (j)(2)(i)(A) and (B) of this section—

(*1*) One of the principal purposes of using the contractual obligations is to attempt to permit partners (other than those who are directly or indirectly liable for the obligation) to include a portion of the loan in the basis of their partnership interests; or

(*2*) Another partner, or a person related to another partner, enters into a payment obligation and a principal purpose of the arrangement is to cause the payment obligation described in paragraphs (j)(2)(i)(A) and (B) of this section to be disregarded under paragraph (b)(3) of this section.

(ii) *Economic risk of loss.* For purposes of this paragraph (j)(2), partners are considered to bear the economic risk of loss for a liability in accordance with their relative economic burdens for the liability pursuant to the contractual obligations. For example, a lease between a partner and a partnership that is not on commercially reasonable terms may be tantamount to a guarantee by the partner of the partnership liability.

(j)(3) through (l)(1) [Reserved]. For further guidance, see § 1.752–2(j)(3) through (l)(1).

(2) Paragraph (b)(3), paragraph (f) *Examples 10* and *11,* and paragraph (j)(2) of this section apply to liabilities incurred or assumed by a partnership and payment obligations imposed or undertaken with respect to a partnership liability on or after October 5, 2016, other than liabilities incurred or assumed by a partnership and payment obligations imposed or undertaken pursuant to a written binding contract in effect prior to that date. Partnerships may apply paragraph (b)(3), paragraph (f) *Examples 10* and *11,* and paragraph (j)(2) of this section to all of their liabilities as of the beginning of the first taxable year of the partnership ending on or after October 5, 2016. The rules applicable to liabilities incurred or assumed (or subject to a written binding contract in effect) prior to October 5, 2016 are contained in § 1.752–2 in effect prior to October 5, 2016 (see 26 CFR part 1 revised as of April 1, 2016).

(3) If a partner has a share of a recourse partnership liability under § 1.752–2(a) as a result of bearing the economic risk of loss under § 1.752–2(b) immediately prior to October 5, 2016 (Transition Partner), the partnership (Transition Partnership) may choose not to apply paragraph (b)(3), paragraph (f) *Examples 10* and *11,* and paragraph (j)(2)(i)(C)(*2*) of this section to the extent the amount of the Transition Partner's share of liabilities under § 1.752–2(a) as a result of bearing the economic risk of loss under § 1.752–2(b) immediately prior to October 5, 2016 exceeds the amount of the Transition Partner's adjusted basis in its partnership interest as determined under § 1.705–1 at such time (Grandfathered Amount). A Transition Partner that is a partnership, S corporation, or a business entity disregarded as an entity separate from its owner under section 856(i) or 1361(b)(3) or §§ 301.7701–1 through 301.7701–3 of this chapter ceases to qualify as a Transition Partner if the direct or indirect ownership of that Transition Partner changes by 50 percent or more. The Transition Partnership may continue to apply the rules under § 1.752–2 in effect prior to October 5, 2016, with respect to a Transition Partner for payment obligations described in § 1.752–2(b) to the extent of the Transition Partner's adjusted Grandfathered Amount for the seven-year period beginning October 5, 2016. The termination of a Transition Partnership under section 708(b)(1)(B) and applicable regulations does not affect the Grandfathered Amount of a Transition Partner that remains a partner in the new partnership (as described in § 1.708–1(b)(4)), and the new partnership is treated as a continuation of the Transition Partnership for purposes of this paragraph (l)(3). However, a Transition Partner's Grandfathered Amount is reduced (not below zero), but never increased by—

(i) Upon the sale of any property by the Transition Partnership, an amount equal to the excess of any gain allocated for federal income tax purposes to the Transition Partner by the Transition Partnership (including amounts allocated under section 704(c) and applicable regulations) over the product of the total amount realized by the Transition Partnership from the property sale multiplied by the Transition Partner's percentage interest in the partnership; and

(ii) An amount equal to any decrease in the Transition Partner's share of liabilities to which the rules of this paragraph (l)(3) apply, other than by operation of paragraph (l)(3)(i) of this section.

(m) *Expiration date.* This section expires on October 4, 2019.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: August 29, 2016.

Mark J. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2016–23388 Filed 10–4–16; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9787]

RIN 1545–BK29

Section 707 Regarding Disguised Sales, Generally

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under sections 707 and 752 of the Internal Revenue Code (Code). The final regulations under section 707 provide guidance relating to disguised sales of property to or by a partnership and the final regulations under section 752 provide guidance relating to allocations of excess nonrecourse liabilities of a partnership to partners for disguised sale purposes. The final regulations affect partnerships and their partners.

DATES: *Effective date:* These regulations are effective on October 5, 2016.

Comment date: Comments will be accepted until January 3, 2017.

Applicability dates: For dates of applicability, see §§ 1.707–9(a)(1) and 1.752–3(d).

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–122855–15), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–122855–15), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal site at *http://www.regulations.gov* (indicate IRS and REG–122855–15).

FOR FURTHER INFORMATION CONTACT: Deane M. Burke or Caroline E. Hay at (202) 317–5279 (not a toll-free number).

SUPPLEMENTARY INFORMATION: In addition to these final regulations, the Treasury Department and the IRS are publishing temporary regulations concerning a partner's share of partnership liabilities for purposes of section 707 (the 707 Temporary Regulations) and the treatment of certain payment obligations under section 752 (the 752 Temporary Regulations) in the Rules and Regulations section in this issue of the **Federal Register**, and, in the Proposed Rules section in this issue of the **Federal Register**, proposed regulations (REG–122855–15) that incorporate the text of the temporary regulations, withdraw a portion of a notice of proposed rulemaking (REG–119305–11) to the extent not adopted by the final regulations, and contain new proposed regulations (the 752 Proposed Regulations) addressing (1) when certain obligations to restore a deficit balance in a partner's capital account are disregarded under section 704 and (2) when a partnership's liabilities are treated as recourse liabilities under section 752.

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) and approved by the Office of Management and Budget under control number 1545–0889.

The collection of information in these final regulations under section 707 is in § 1.707–5(a)(7)(ii) (regarding a liability incurred within two years prior to a transfer of property) and is reported on Form 8275, Disclosure Statement. This information is required by the IRS to ensure that section 707(a)(2)(B) of the Code and applicable regulations are properly applied to transfers between a partner and a partnership.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103.

Background

1. Overview

This Treasury decision contains amendments to the Income Tax Regulations (26 CFR part 1) under sections 707 and 752 of the Code related to a notice of proposed rulemaking published on January 30, 2014 in the **Federal Register** (REG–119305–11, 79 FR 4826) to amend regulations under sections 707 and 752 (the 2014 Proposed Regulations). A public hearing on the 2014 Proposed Regulations was not requested or held, but the Treasury Department and the IRS received written comments. After full consideration of the comments, the final regulations contained in this Treasury decision substantially adopt the 2014 Proposed Regulations under section 707 with revisions to certain proposed rules in response to comments. The revisions to the 2014 Proposed Regulations under section 707 adopted in these final regulations are discussed in the Summary of Comments and Explanation of Revisions section of this preamble. In addition, after considering comments on the 2014 Proposed Regulations under section 752, this Treasury decision adopts as final regulations provisions of the 2014 Proposed Regulations that amend § 1.752–3, revised in response to the comments received. Finally, these final regulations adopt provisions of the 2014 Proposed Regulations revising § 1.704–2(d)(2)(ii) and (m) *Example 1,* to comport with the provisions in the 752 Proposed Regulations and the 752 Temporary Regulations relating to ''bottom dollar payment obligations.''

However, based on a comment received on the 2014 Proposed Regulations requesting that guidance regarding a partner's share of partnership liabilities apply solely for disguised sale purposes, the Treasury Department and the IRS have reconsidered the rules under § 1.707–5(a)(2) of the 2014 Proposed Regulations for determining a partner's share of partnership liabilities for purposes of section 707. Accordingly, in a separate Treasury decision (TD 9788), the Treasury Department and the IRS are also publishing the 707 Temporary Regulations that require a partner to apply the same percentage used to determine the partner's share of excess nonrecourse liabilities under § 1.752–3(a)(3) (with certain limitations) in determining the partner's share of partnership liabilities for disguised sale purposes. That Treasury decision also contains the 752 Temporary Regulations providing guidance on the treatment of ''bottom dollar payment obligations.'' Cross-referencing proposed regulations providing additional opportunity for comment are contained in the related notice of proposed rulemaking (REG–122855–15) published in the Proposed Rules section in this issue of the **Federal Register**.

Finally, after considering comments on the 2014 Proposed Regulations under section 752, the Treasury Department

and the IRS are withdrawing § 1.752–2 of the 2014 Proposed Regulations and are publishing the new 752 Proposed Regulations contained in the related notice of proposed rulemaking (REG–122855–15) published in the Proposed Rules section in this issue of the **Federal Register**.

2. Summary of Applicable Law

A. Section 707

Section 707 provides rules concerning ''disguised sales'' of property to or by a partnership. Section 707(a)(2)(B) generally provides that, under regulations prescribed by the Secretary, related transfers to and by a partnership that, when viewed together, are more properly characterized as a sale or exchange of property, will be treated either as a transaction between the partnership and one who is not a partner or between two or more partners acting other than in their capacity as partners. Generally under § 1.707–3, a transfer of property by a partner to a partnership followed by a transfer of money or other consideration from the partnership to the partner will be treated as a sale of property by the partner to the partnership (a disguised sale), if based on all the facts and circumstances, the transfer of money or other consideration would not have been made but for the transfer of property and, for non-simultaneous transfers, the subsequent transfer is not dependent on the entrepreneurial risks of the partnership.

The existing regulations under section 707, however, provide several exceptions. One exception is in § 1.707–4(d) for reimbursements of capital expenditures. Section 1.707–4(d) excepts transfers of money or other consideration from a partnership to reimburse a partner for certain capital expenditures and costs incurred by the partner from being treated as part of a disguised sale of property under § 1.707–3 (exception for preformation capital expenditures). The exception for preformation capital expenditures generally applies only to the extent that the reimbursed capital expenditures do not exceed 20 percent of the fair market value of the property transferred by the partner to the partnership (the 20-percent limitation). The 20-percent limitation, however, does not apply if the fair market value of the transferred property does not exceed 120 percent of the partner's adjusted basis in the property at the time of the transfer (the 120-percent test).

Another exception is in § 1.707–5(b), which generally provides that if a partner transfers property to a partnership, the partnership incurs a liability and all or a portion of the proceeds of that liability are traceable to a transfer of money or other consideration to the partner, the transfer of money or other consideration is taken into account for purposes of § 1.707–3 only to the extent that the amount of money or the fair market value of other consideration exceeds the partner's allocable share of the partnership liability (the debt-financed distribution exception).

In addition to the exception for preformation capital expenditures and the debt-financed distribution exception, the disguised sale rules generally exclude certain types of liabilities from disguised sale treatment. Generally under § 1.707–5(a)(5), a partnership's assumption of a qualified liability, or a partnership's taking property subject to a qualified liability, in connection with a transfer of property by a partner to the partnership is not treated as part of a disguised sale. Section 1.707–5(a)(6) of the existing regulations defines four types of liabilities that are qualified liabilities. One type of qualified liability is a liability that is allocable under the rules of § 1.163–8T to capital expenditures with respect to the property transferred to the partnership. Another type is one incurred in the ordinary course of the trade or business in which property transferred to the partnership was used or held, but only if all of the assets that are material to that trade or business are transferred to the partnership. The other two types of qualified liabilities are liabilities incurred more than two years before the transfer of property to the partnership and liabilities incurred within two years of the transfer of the property to the partnership, but not in anticipation of transfer to the partnership. In order to qualify as one of these types of liabilities, it is required that the liability encumber the transferred property.

B. Determining a Partner's Share of Liability for Disguised Sale Purposes

In determining a partner's share of a partnership liability for disguised sale purposes, the existing regulations under section 707 prescribe separate rules for a partnership's recourse liability and a partnership's nonrecourse liability. Under § 1.707–5(a)(2)(i), a partner's share of a partnership's recourse liability equals the partner's share of the liability under section 752 and the regulations thereunder. A partnership liability is a recourse liability under section 707 to the extent that the obligation is a recourse liability under § 1.752–1(a)(1). Under § 1.707–5(a)(2)(ii), a partner's share of a partnership's nonrecourse liability is determined by applying the same percentage used to determine the partner's share of the excess nonrecourse liabilities under § 1.752–3(a)(3). Generally, a partner's share of excess nonrecourse liabilities is determined in accordance with the partner's share of partnership profits taking into account all facts and circumstances relating to the economic arrangement of the partners. A partnership liability is a nonrecourse liability under section 707 to the extent that the obligation is a nonrecourse liability under § 1.752–1(a)(2). Also for purposes of the rules under section 707, a partner's share of a liability assumed or taken subject to by a partnership is determined by taking into account certain subsequent reductions in the partner's share of the liability under an anticipated reduction rule.

C. Section 752 Allocation of Excess Nonrecourse Liabilities

Section 1.752–3(a)(3) provides various methods to determine a partner's share of excess nonrecourse liabilities. Under one method, a partner's share of excess nonrecourse liabilities of the partnership is determined in accordance with the partner's share of partnership profits, which takes into account all facts and circumstances relating to the economic arrangement of the partners. For this purpose, the partnership agreement may specify the partners' interests in partnership profits so long as the interests so specified are reasonably consistent with allocations (that have substantial economic effect under the section 704(b) regulations) of some other significant item of partnership income or gain (the significant item method). Alternatively, excess nonrecourse liabilities may be allocated among partners in a manner that deductions attributable to those liabilities are reasonably expected to be allocated (alternative method). Additionally, the partnership may first allocate an excess nonrecourse liability to a partner up to the amount of built-in gain that is allocable to the partner on section 704(c) property (as defined under § 1.704–3(a)(3)(ii)) or property for which reverse section 704(c) allocations are applicable (as described in § 1.704–3(a)(6)(i)) where such property is subject to the nonrecourse liability, to the extent that such built-in gain exceeds the gain described in § 1.752–3(a)(2) with respect to such property (additional method). This additional method does not apply in determining a partner's share of a liability for disguised sale purposes.

3. The 2014 Proposed Regulations

As discussed in greater detail in the Summary of Comments and Explanation of Provisions section of this preamble, the 2014 Proposed Regulations, as they pertained to section 707, were intended to address certain deficiencies and ambiguities under existing regulations §§ 1.707–3, 1.707–4, and 1.707–5. The 2014 Proposed Regulations, among other things, provided rules that (1) clarified that in the case of multiple property contributions to a partnership, the exception for preformation capital expenditures applies on a property-by-property basis, (2) clarified the definition of capital expenditures for the purpose of the exception for preformation capital expenditures, (3) coordinated the exception for preformation capital expenditures and the rules regarding liabilities traceable to capital expenditures, (4) added a new type of qualified liability, (5) prescribed an ordering rule for applying the debt-financed distribution exception where other exceptions also potentially applied, (6) specified that a reduction that is subject to the entrepreneurial risks of the partnership is not an anticipated reduction for purposes of the rule taking into account an anticipated reduction in a partner's share of a liability, (7) clarified, with respect to tiered partnerships, the application of the debt-financed distribution exception and the application of the rules for qualified liabilities, and (8) extended the principles of § 1.752–1(f) providing for netting of increases and decreases in a partner's share of liabilities resulting from a single transaction to the disguised sale rules.

Summary of Comments and Explanation of Revisions

1. Preformation Capital Expenditures

As explained above, § 1.707–4(d) excepts transfers of money or other consideration from a partnership to reimburse a partner for certain capital expenditures and costs incurred by the partner from being treated as part of a disguised sale of property under § 1.707–3, subject to the 20 percent limitation and the 120 percent test.

The 2014 Proposed Regulations under section 707 provided that the determination of whether the 20 percent limitation and the 120 percent test apply to reimbursements of capital expenditures is made, in the case of multiple property transfers, separately for each property that qualifies for the exception (property-by-property rule). Commenters generally supported the property-by-property rule but noted that in some circumstances the approach may be burdensome and recommended limited aggregation of certain property. After considering the comments, the Treasury Department and the IRS have determined that limited aggregation of property is warranted in certain cases to reduce the burden of separately accounting for each property under the property-by-property rule. Thus, the final regulations adopt the proposed rule but permit aggregation to the extent: (i) The total fair market value of the aggregated property (of which no single property's fair market value exceeds 1 percent of the total fair market value of such aggregated property) is not greater than the lesser of 10 percent of the total fair market value of all property, excluding money and marketable securities (as defined under section 731(c)), transferred by the partner to the partnership, or $1,000,000; (ii) the partner uses a reasonable aggregation method that is consistently applied; and (iii) the aggregation of property is not part of a plan a principal purpose of which is to avoid §§ 1.707–3 through 1.707–5. Additionally, the final regulations add an example to illustrate the application of the property-by-property rule when a partner transfers both tangible and intangible property to a partnership.

In addition to the property-by-property rule, the 2014 Proposed Regulations provided a rule coordinating the exception for preformation capital expenditures with a rule regarding one type of qualified liability (within the meaning of § 1.707–5(a)(6)) under § 1.707–5(a)(6)(i)(C). Under § 1.707–5(a)(6)(i)(C), a liability that is allocable under the rules of § 1.163–8T to capital expenditures with respect to the property transferred to the partnership by the partner is a qualified liability (capital expenditure qualified liability). Generally under § 1.707–5(a)(5), a partnership's assumption of a qualified liability, or a partnership's taking property subject to a qualified liability, in connection with a transfer of property by a partner to the partnership is not treated as part of a disguised sale. To coordinate the exception for preformation capital expenditures and the capital expenditure qualified liability rule under § 1.707–5(a)(6)(i)(C), the 2014 Proposed Regulations provided that to the extent a partner funded a capital expenditure through a capital expenditure qualified liability and economic responsibility for that borrowing shifts to another partner, the exception for preformation capital expenditures would not apply because there is no outlay by the partner to reimburse.

A commenter suggested that the final regulations broaden this proposed rule to include any qualified liability under § 1.707–5(a)(6) used to fund capital expenditures, not just a capital expenditure qualified liability under § 1.707–5(a)(6)(i)(C). The final regulations adopt the suggestion and provide that to the extent any qualified liability under § 1.707–5(a)(6) is used by a partner to fund capital expenditures and economic responsibility for that borrowing shifts to another partner, the exception for preformation capital expenditures does not apply. Under the final regulations, capital expenditures are treated as funded by the proceeds of a qualified liability to the extent the proceeds are either traceable to the capital expenditures under § 1.163–8T or are actually used to fund the capital expenditures, irrespective of the tracing requirements under § 1.163–8T. However, under an anti-abuse provision, if capital expenditures and a qualified liability are incurred under a plan a principal purpose of which is to avoid the requirements of this coordinating rule, the capital expenditures are deemed funded by the qualified liability.

Finally, it has come to the attention of the Treasury Department and the IRS that some partners have taken the position that the disclosure requirements of § 1.707–3(c)(2) are not applicable to situations in which the partners believe that one or more of the exceptions for disguised sale treatment are applicable, including the exception for preformation capital expenditures. The Treasury Department and the IRS remind taxpayers that disclosure is required whenever money or other consideration is transferred by a partnership to a partner within two years of the transfer of property by the partner to the partnership, except in the limited situations described in § 1.707–3(c)(2)(iii).

Notwithstanding the final regulations, the Treasury Department and the IRS continue to study the appropriateness of the exception for preformation capital expenditures. Specifically, because the receipt of ''boot'' in the context of other nonrecognition transactions, for example, transfers of property to corporations in section 351 transactions, is generally taxable to the transferor, the Treasury Department and the IRS are considering whether the exception for preformation capital expenditures is appropriate and request comments on whether the regulations should continue to include the exception, including any policy justifications for keeping the

exception, and on the effects that removing the exception may have. In addition, the Treasury Department and the IRS are concerned that partners and partnerships may be attempting to apply the exception in an unintended manner such that the exception may be subject to potential abuses in certain circumstances that could effectively refresh expenditures not incurred within the two-year period preceding a contribution to a partnership (for example, where an entity treats as a capital expenditure an issuance of its own interest in exchange for property contributed to it in a nonrecognition transaction). Also, the Treasury Department and the IRS are aware that a contribution to a partnership of an intangible such as goodwill, may, in certain circumstances, give rise to an unintended benefit under the exception. The Treasury Department and the IRS are studying the potential for abuse under the exception for preformation capital expenditures, including any unintended benefits with respect to intangibles, for which the final regulations reserve a section under the exception.

2. Partner's Share of Partnership Liabilities

As is discussed in the preamble to the 707 Temporary Regulations, after considering the comments on the 2014 Proposed Regulations under both sections 707 and 752, the Treasury Department and the IRS have determined that, for disguised sale purposes only, it is appropriate for partners to determine their share of any liability, whether recourse or nonrecourse, in the manner in which excess nonrecourse liabilities are allocated under § 1.752–3(a)(3). Accordingly, under the 707 Temporary Regulations a partner's share of any partnership liability for disguised sale purposes is determined using the same percentage used to determine the partner's share of the partnership's excess nonrecourse liabilities under § 1.752–3(a)(3) based on the partner's share of partnership profits. Thus, the 707 Temporary Regulations treat all partnership liabilities, whether recourse or nonrecourse, as nonrecourse liabilities solely for disguised sale purposes under section 707. These final regulations, however, provide limitations on the available allocation methods under § 1.752–3(a)(3), applicable solely for disguised sale purposes under section 707, for determining a partner's share of excess nonrecourse liabilities.

For purposes of allocating excess nonrecourse liabilities under § 1.752–3(a)(3), proposed § 1.752–3(a)(3) removed the significant item method and the alternative method, but provided a new approach based on a partner's liquidation value percentage. Under the 2014 Proposed Regulations, a partner's liquidation value percentage was a ratio (expressed as a percentage) of the liquidation value of the partner's interest in the partnership to the liquidation value of all of the partners' interests in the partnership. The liquidation value of a partner's interest in a partnership was defined as the amount of cash the partner would receive with respect to the interest if, immediately after formation of the partnership or the occurrence of an event described in § 1.704–1(b)(2)(iv)(*f*)(*5*), as the case may be, the partnership sold all of its assets for cash equal to the fair market value of such property (taking into account section 7701(g)), satisfied all of its liabilities (other than those described in § 1.752–7), paid an unrelated third party to assume all of its § 1.752–7 liabilities in a fully taxable transaction, and then liquidated.

Commenters expressed concerns with the scope of changes to § 1.752–3(a)(3) in the 2014 Proposed Regulations and suggested that such changes should be adopted, if at all, for disguised sale purposes only. Additionally, one commenter noted that in all but the simplest of partnerships the liquidation value percentage may have little or no relationship to the partners' share of profits and therefore is inconsistent with the general rule for allocating excess nonrecourse liabilities. Another commenter thought the liquidation value percentage approach could be subject to manipulation. Partially in response to commenters' concerns about both the liquidation value percentage and the relationship between the methods and certain rules under § 1.704–2, the final regulations under § 1.752–3 retain the significant item method and the alternative method, but do not adopt the liquidation value percentage approach for determining partners' interests in partnership profits. However, the Treasury Department and the IRS have concluded that the allocation of excess nonrecourse liabilities in accordance with the significant item method and the alternative method has been abused by partnerships and their partners for disguised sale purposes under section 707. Therefore, as suggested by some commenters, the final regulations under § 1.752–3 provide that, along with the additional method, the significant item method and the alternative method do not apply for purposes of determining a partner's share of a partnership liability for disguised sale purposes.

In addition to the changes to § 1.752–3, the final regulations revise *Example 1* under § 1.707–5(f) and *Example 2* under § 1.707–6(d) to update some of the cross references to the liability allocation rule in the 707 Temporary Regulations. The final regulations also revise *Examples 5* and *6* under § 1.707–5(f) and *Examples 10* and *12* under proposed § 1.707–5(f) to remove the assumption that the liability is a recourse liability.

Finally, because, under the 707 Temporary Regulations, a partner's share of a partnership liability for disguised sale purposes is based on the partner's share of partnership profits, a partner cannot be allocated 100 percent of the liabilities for purposes of section 707. As a result, some amount of the liabilities, both qualified liabilities and nonqualified liabilities, may shift among partners. The shifting of even a minimal amount of a nonqualified liability that triggers a disguised sale can cause a portion of the qualified liability to be treated as consideration under § 1.707–5(a)(5). Section 1.707–5(a)(5) provides a special rule when a partnership's assumption of, or taking property subject to, a qualified liability is treated as a transfer of consideration made pursuant to a sale due solely to the partnership's assumption of, or taking property subject to, a liability other than a qualified liability. To mitigate the effect of the allocation method for disguised sales, the final regulations include a rule under § 1.707–5(a)(5) that does not take into account qualified liabilities as consideration in transfers of property treated as a sale when the total amount of all liabilities other than qualified liabilities that the partnership assumes or takes subject to is the lesser of 10 percent of the total amount of all qualified liabilities the partnership assumes or takes subject to, or $1,000,000.

3. Step-in-the-Shoes Rule Regarding Preformation Capital Expenditures and Liabilities Incurred by Another Person

For purposes of applying the exception for preformation capital expenditures and determining whether a liability is a qualified liability under § 1.707–5(a)(6), commenters suggested that the final regulations clarify how the rules under §§ 1.707–4(d) and 1.707–5 apply if the transferor partner acquired the transferred property in a nonrecognition transaction, assumed a liability in a nonrecognition transaction, or took property subject to a liability in a nonrecognition transaction from a

person who incurred the preformation capital expenditures or the liability. Commenters noted that Rev. Rul. 2000–44 (2000–2 CB 336) allowed ''step-in-the-shoes'' treatment when a corporation that acquires assets in a transaction described in section 381(a) succeeds to the status of the transferor corporation for purposes of applying the exception for preformation capital expenditures and determining whether a liability is a qualified liability under § 1.707–5(a)(6). Similar to a corporation that acquires assets in a section 381(a) transaction, a partner that acquires property, assumes a liability, or takes property subject to a liability from another person in connection with certain other nonrecognition transactions should succeed to the status of the other person for purposes of applying the exception for preformation capital expenditures and determining whether a liability is a qualified liability under § 1.707–5(a)(6). Thus, the final regulations provide a ''step-in-the-shoes'' rule for applying the exception for preformation capital expenditures and for determining whether a liability is a qualified liability under § 1.707–5(a)(6) when a partner acquires property, assumes a liability, or takes property subject to a liability from another person in connection with a nonrecognition transaction under section 351, 381(a), 721, or 731. As a result, Rev. Rul. 2000–44, relating to preformation capital expenditures and qualified liabilities involved in a transaction described in section 381(a), is superseded by these final regulations.

4. Anticipated Reduction

Under the existing regulations, for purposes of the rules under section 707, a partner's share of a liability assumed or taken subject to by a partnership is determined by taking into account certain subsequent reductions in the partner's share of the liability. See § 1.707–5(a)(3) and (b)(2)(iii). The 2014 Proposed Regulations provided that if, within two years of the partnership assuming, taking property subject to, or incurring a liability, a partner's share of the liability is reduced due to a decrease in the partner's or a related person's net value, then the reduction will be presumed to be anticipated and must be disclosed under § 1.707–8, unless the facts and circumstances clearly establish that the decrease in the net value was not anticipated. Because the 707 Temporary Regulations provide that a partner's share of any liability for disguised sale purposes is determined in accordance with the partner's interest in partnership profits under § 1.752–3(a)(3), net value is not relevant in determining a partner's share of partnership liabilities for disguised sale purposes. Accordingly, the final regulations do not retain the net value component of the anticipated reduction of share of liabilities rule.

5. Tiered Partnerships

The existing regulations in § 1.707–5(e), and § 1.707–6(b) by applying rules similar to § 1.707–5(e), provide only a limited tiered-partnership rule for cases in which a partnership succeeds to a liability of another partnership. The 2014 Proposed Regulations added additional rules regarding tiered partnerships. One rule related to the characterization of liabilities attributable to a contributed partnership interest. Under that proposed rule, a contributing partner's share of a liability from a lower-tier partnership is treated as a qualified liability to the extent the liability would be a qualified liability had the liability been assumed or taken subject to by the upper-tier partnership in connection with a transfer of all of the lower-tier partnership's property to the upper-tier partnership by the lower-tier partnership. The final regulations retain this proposed rule but, in response to comments, address whose intent, the partner's or the lower-tier partnership's, is relevant when applying the anticipated transfer of property rule in § 1.707–5(a)(6) for purposes of determining whether a liability constitutes a qualified liability. The comments suggested that it should be the intent of the partner as to whether the partner anticipated transferring its interest in the lower-tier partnership to the upper-tier partnership at the time the lower-tier partnership incurred the liability.

The Treasury Department and the IRS agree that the intent of the partner is the appropriate inquiry in applying the anticipated transfer of property rule under § 1.707–5(a)(6) in the context of contributions of a partnership interest. Thus, the final regulations provide that in determining whether a liability would be a qualified liability under § 1.707–5(a)(6)(i)(B) or (E), the determination of whether the liability was incurred in anticipation of the transfer of property to the upper-tier partnership is based on whether the partner in the lower-tier partnership anticipated transferring the partner's interest in the lower-tier partnership to the upper-tier partnership at the time the liability was incurred by the lower-tier partnership.

Commenters also requested that the final regulations allow for the application of the exception for preformation capital expenditures when a person incurs capital expenditures with respect to property, transfers the property to a partnership (lower-tier partnership), and then transfers an interest in the lower-tier partnership to another partnership (upper-tier partnership) within the two-year period in which the person incurred the capital expenditures. The Treasury Department and the IRS have determined that such a rule is warranted, subject to certain limitations. Therefore, the final regulations provide that, in such circumstances, and provided such expenditures are not otherwise reimbursed to the person, the upper-tier partnership ''steps in the shoes'' of the person with respect to the property for which the capital expenditures were incurred and may be reimbursed for the capital expenditures by the lower-tier partnership to the same extent that the person could have been reimbursed by the lower-tier partnership. In addition, the person is deemed to have transferred the property, rather than the partnership interest, to the upper-tier partnership for purposes of the exception for preformation capital expenditures and, accordingly, may be reimbursed by the upper-tier partnership to the extent the person could have been previously reimbursed by the lower-tier partnership. The aggregate reimbursements for capital expenditures under this rule cannot exceed the amount that the person could have been reimbursed for such capital expenditures under § 1.707–4(d)(1).

6. Treatment of Liabilities in Assets-Over Merger

The 2014 Proposed Regulations extended the netting principles of § 1.752–1(f) in a provision for determining the effect of an assets-over merger or consolidation under the disguised sale rules. Although comments were generally favorable, they did request clarification on the specific rule provided.

Upon further consideration of the area, the Treasury Department and the IRS have determined that no rule on the treatment of liabilities in an assets-over merger is needed in § 1.707–5. In many instances, liabilities involved in such a merger will constitute qualified liabilities, especially given that the final regulations adopt a ''step-in-the-shoes'' rule for liabilities acquired by a partner from another person in certain nonrecognition transactions. In cases in which liabilities involved in an assets-over merger do not constitute qualified liabilities, the facts and circumstances test in § 1.707–3 should reach the proper result. Thus, the final regulations do not retain the proposed rule for

partnership assets-over mergers or consolidations.

7. Disguised Sales of Property by a Partnership to a Partner

Under § 1.707–6, rules similar to those provided in § 1.707–3 apply in determining whether a transfer of property by a partnership to a partner and one or more transfers of money or other consideration by that partner to the partnership are treated as a disguised sale of property, in whole or in part, to the partner. The Treasury Department and the IRS requested in the preamble to the 2014 Proposed Regulations comments on whether, for purposes of § 1.707–6, it is inappropriate to take into account a transferee partner's share of a partnership liability immediately prior to a distribution if the transferee partner did not have economic exposure with respect to the partnership liability for a meaningful period of time before appreciated property is distributed to that partner subject to the liability. Commenters suggested that § 1.707–6 should be amended to take into account the transitory nature of a partner's share of nonqualified liabilities.

Because under the 707 Temporary Regulations a partner's share of all liabilities is determined for disguised sale purposes in accordance with the partner's interest in partnership profits under § 1.752–3(a)(3), the transitory nature of a partner's share of nonqualified liabilities is no longer an issue. Under that allocation method, an allocation of a 100 percent share of a liability to a partner immediately before a transfer of property by the partnership to the partner in which the transferee partner assumes the liability will not be taken into account. Therefore, the final regulations do not make any changes to the rules under § 1.707–6, other than revising *Example 2* under § 1.707–6(d) to update a cross reference to the liability allocation rule in the 707 Temporary Regulations.

Effective/Applicability Dates

With respect to amendments to §§ 1.707–3 through 1.707–6, the final regulations under section 707 apply to any transaction with respect to which all transfers occur on or after October 5, 2016.

With respect to amendments to § 1.752–3, the final regulations under section 752 apply to liabilities that are incurred by a partnership, that a partnership takes property subject to, or that are assumed by a partnership on or after October 5, 2016, other than liabilities incurred by a partnership, that a partnership takes property subject to, or that are assumed by a partnership pursuant to a written binding contract in effect prior to that date.

Effect on Other Documents

The following publication is superseded on October 5, 2016: Rev. Rul. 2000–44 (2000–2 CB 336).

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the amount of time necessary to report the required information will be minimal in that it requires partners to provide information they already maintain or can easily obtain to the IRS. Moreover, it should take a partner no more than 1 hour to satisfy the information requirement in these regulations. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal authors of these regulations are Deane M. Burke and Caroline E. Hay of the Office of the Associate Chief Counsel (Passthroughs & Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Sections 1.707–2 through 1.707–9 also issued under 26 U.S.C. 707(a)(2)(B).

§ 1.704–2 [Amended]

■ **Par. 2.** Section 1.704–2 is amended by:

■ 1. Removing the language ''and (vii)'' in paragraph (d)(2)(ii).

■ 2. Removing the language ''*Example* (1)(viii) and (ix)'' in paragraph (i)(2) and adding the language ''*Example* (1)(vii) and (viii)'' in its place.

■ 3. Removing the language ''*Example* (1)(viii)'' in paragraph (i)(5) and adding the language ''*Example* (1)(vii)'' in its place.

■ 4. Removing *Example* (1)(vii) in paragraph (m) and redesignating *Examples* (1)(viii) and (ix) as *Examples* (1)(vii) and (viii) respectively.

■ 5. Removing the language ''*Example* (1)(viii)'' in newly redesignated *Example* (1)(viii) in paragraph (m) and adding the language ''*Example* (1)(vii)'' in its place.

■ **Par. 3.** Section 1.707–0 is amended by:

■ 1. Adding entries for §§ 1.707–4(d)(1), (d)(2) through (4), (d)(4)(i) and (ii), (d)(5) and (6), and (f).

■ 2. Adding entries for §§ 1.707–5(a)(8) and (b)(3).

The additions read as follows:

§ 1.707–0 Table of contents.

* * * * *

§ 1.707–4 Disguised sales of property to partnership; special rules applicable to guaranteed payments, preferred returns, operating cash flow distributions, and reimbursements of preformation expenditures.

* * * * *

(d) * * *

(1) In general.

(2) Capital expenditures incurred by another person.

(3) Contribution of a partnership interest with capital expenditures property.

(4) Special rule for qualified liabilities.

(i) In general.

(ii) Anti-abuse rule.

(5) Scope of capital expenditures.

(6) Example.

* * * * *

(f) Ordering rule cross reference.

* * * * *

§ 1.707–5 Disguised sales of property to partnership; special rules relating to liabilities.

(a) * * *

(8) Liability incurred by another person.

(b) * * *

(3) Ordering rule.

* * * * *

■ **Par. 4.** Section 1.707–4 is amended by:
■ 1. Redesignating the text of paragraph (d) introductory text after its subject heading as paragraph (d)(1) and adding a paragraph (d)(1) subject heading.
■ 2. Redesignating paragraph (d)(1) as paragraph (d)(1)(i).
■ 3. Redesignating paragraph (d)(2) introductory text as paragraph (d)(1)(ii).
■ 4. Redesignating paragraph (d)(2)(i) as paragraph (d)(1)(ii)(A).
■ 5. Redesignating paragraph (d)(2)(ii) as paragraph (d)(1)(ii)(B) and revising it.
■ 6. Adding reserved paragraph (d)(1)(ii)(C) and paragraphs (d)(2) through (6) and (f).

The additions and revisions read as follows:

§ 1.707–4 Disguised sales of property to partnership; special rules applicable to guaranteed payments, preferred returns, operating cash flow distributions, and reimbursements of preformation expenditures.

* * * * *

(d) * * *

(1) *In general.* * * *

(ii) * * *

(B) Property transferred to the partnership by the partner, but only to the extent the reimbursed capital expenditures do not exceed 20 percent of the fair market value of such property at the time of the transfer (the 20-percent limitation). However, the 20-percent limitation of this paragraph (d)(1)(ii)(B) does not apply if the fair market value of the transferred property does not exceed 120 percent of the partner's adjusted basis in the transferred property at the time of the transfer (the 120-percent test). This paragraph (d)(1)(ii)(B) shall be applied on a property-by-property basis, except that a partner may aggregate any of the transferred property under this paragraph (d)(1) to the extent—

(*1*) The total fair market value of such aggregated property (of which no single property's fair market value exceeds 1 percent of the total fair market value of such aggregated property) is not greater than the lesser of 10 percent of the total fair market value of all property, excluding money and marketable securities (as defined under section 731(c)), transferred by the partner to the partnership, or $1,000,000;

(*2*) The partner uses a reasonable aggregation method that is consistently applied; and

(*3*) Such aggregation of property is not part of a plan a principal purpose of which is to avoid §§ 1.707–3 through 1.707–5.

(C) [Reserved].

(2) *Capital expenditures incurred by another person.* For purposes of paragraph (d)(1) of this section, a partner steps in the shoes of a person (to the extent the person was not previously reimbursed under paragraph (d)(1) of this section) with respect to capital expenditures the person incurred with respect to property transferred to the partnership by the partner to the extent the partner acquired the property from the person in a nonrecognition transaction described in section 351, 381(a), 721, or 731.

(3) *Contribution of a partnership interest with capital expenditures property.* If a person transfers property with respect to which the person incurred capital expenditures (capital expenditures property) to a partnership (lower-tier partnership) and, within the two-year period beginning on the date upon which the person incurred the capital expenditures, transfers an interest in the lower-tier partnership to another partnership (upper-tier partnership) in a nonrecognition transaction under section 721, the upper-tier partnership steps in the shoes of the person who transferred the capital expenditures property to the lower-tier partnership with respect to the capital expenditures that are not otherwise reimbursed to the person. The upper-tier partnership may be reimbursed by the lower-tier partnership under paragraph (d)(1) of this section to the extent the person could have been reimbursed for the capital expenditures by the lower-tier partnership under paragraph (d)(1) of this section. In addition, for purposes of paragraph (d)(1) of this section, the person is deemed to have transferred the capital expenditures property to the upper-tier partnership and may be reimbursed by the upper-tier partnership under paragraph (d)(1) of this section to the extent the person could have been reimbursed for the capital expenditures by the lower-tier partnership under paragraph (d)(1) of this section and has not otherwise been previously reimbursed. The aggregate reimbursements for capital expenditures under this paragraph (d)(3) shall not exceed the amount that the person could have been reimbursed for such capital expenditures under paragraph (d)(1) of this section.

(4) *Special rule for qualified liabilities*—(i) *In general.* For purposes of paragraph (d)(1) of this section, if capital expenditures were funded by the proceeds of a qualified liability defined in § 1.707–5(a)(6)(i) that a partnership assumes or takes property subject to in connection with a transfer of property to the partnership by a partner, a transfer of money or other consideration by the partnership to the partner is not treated as made to reimburse the partner for such capital expenditures to the extent the transfer of money or other consideration by the partnership to the partner exceeds the partner's share of the qualified liability (as determined under § 1.707–5(a)(2), (3), and (4)). Capital expenditures are treated as funded by the proceeds of a qualified liability to the extent the proceeds are either traceable to the capital expenditures under § 1.163–8T or were actually used to fund the capital expenditures, irrespective of the tracing requirements under § 1.163–8T.

(ii) *Anti-abuse rule.* If capital expenditures and a qualified liability are incurred under a plan a principal purpose of which is to avoid the requirements of paragraph (d)(4)(i) of this section, the capital expenditures are deemed funded by the qualified liability.

(5) *Scope of capital expenditures.* For purposes of this section and § 1.707–5, the term *capital expenditures* has the same meaning as the term *capital expenditures* has under the Internal Revenue Code and applicable regulations, except that it includes capital expenditures taxpayers elect to deduct, and does not include deductible expenses taxpayers elect to treat as capital expenditures.

(6) *Example.* The following example illustrates the application of paragraph (d) of this section:

Example. Intangible treated as separate property. (i) Z transfers to a partnership a business the material assets of which include a tangible asset and goodwill from the reputation of the business. At the time Z transfers the business to the partnership, the tangible asset has a fair market value of $550,000 and an adjusted basis of $450,000. The goodwill is a section 197 intangible with a fair market value of $100,000 and an adjusted basis of $0. Z incurred $130,000 of capital expenditures with respect to improvements to the tangible asset (which amount is reflected in its adjusted basis) one year preceding the transfer. Z would like to be reimbursed by the partnership for the capital expenditures with an amount that qualifies for the exception for reimbursement of preformation expenditures under paragraph (d)(1) of this section.

(ii) Under paragraph (d)(1)(ii)(B) of this section, the 20-percent limitation on reimbursed capital expenditures applies on a property-by-property basis. The 120-percent test also applies on a property-by-property basis. Accordingly, the tangible asset and the goodwill each constitutes a separate property. Z incurred the capital expenditures with respect to the tangible asset only. The $550,000 fair market value of the tangible asset exceeds 120 percent of Z's $450,000 adjusted basis in the asset at the time of the transfer (120 percent × $450,000 = $540,000). Thus, the 20-percent limitation applies so that the reimbursement of Z's $130,000 of

capital expenditures is limited to 20 percent of the fair market value of the tangible asset, or $110,000 (20 percent × $550,000).

* * * * *

(f) *Ordering rule cross reference.* For payments or transfers by a partnership to a partner to which the rules under this section and § 1.707–5(b) apply, see the ordering rule under § 1.707–5(b)(3).

■ **Par. 5.** Section 1.707–5 is amended by:

■ 1. Revising paragraph (a)(3).

■ 2. Adding paragraph (a)(5)(iii).

■ 3. Revising paragraph (a)(6)(i)(C).

■ 4. Removing ''and'' at the end of paragraph (a)(6)(i)(D) and adding ''or'' in its place.

■ 5. Adding paragraph (a)(6)(i)(E).

■ 6. Revising paragraph (a)(7)(ii).

■ 7. Adding paragraph (a)(8).

■ 8. Adding a sentence at the end of paragraph (b)(1).

■ 9. Removing the word ''property'' in paragraph (b)(2)(i)(A) and adding the word ''consideration'' in its place.

■ 10. Revising paragraph (b)(2)(iii).

■ 11. Adding paragraph (b)(3).

■ 12. Designating the text of paragraph (e) after its subject heading as paragraph (e)(1) and adding paragraph (e)(2).

■ 13. Revising *Examples 1, 5, 6,* and *10* in paragraph (f).

■ 14. Redesignating *Example 11* in paragraph (f) as *Example 13* and adding new *Examples 11* and *12.*

The additions and revisions read as follows:

§ 1.707–5 Disguised sales of property to partnership; special rules relating to liabilities.

(a) * * *

(3) *Reduction of partner's share of liability.* For purposes of this section, a partner's share of a liability, immediately after a partnership assumes or takes property subject to the liability, is determined by taking into account a subsequent reduction in the partner's share if—

(i) At the time that the partnership assumes or takes property subject to the liability, it is anticipated that the transferring partner's share of the liability will be subsequently reduced;

(ii) The anticipated reduction is not subject to the entrepreneurial risks of partnership operations; and

(iii) The reduction of the partner's share of the liability is part of a plan that has as one of its principal purposes minimizing the extent to which the assumption of or taking property subject to the liability is treated as part of a sale under § 1.707–3.

* * * * *

(5) * * *

(iii) Notwithstanding paragraph (a)(5)(i) of this section, in connection with a transfer of property by a partner to a partnership that is treated as a sale due solely to the partnership's assumption of or taking property subject to a liability other than a qualified liability, the partnership's assumption of or taking property subject to a qualified liability is not treated as a transfer of consideration made pursuant to the sale if the total amount of all liabilities other than qualified liabilities that the partnership assumes or takes subject to is the lesser of 10 percent of the total amount of all qualified liabilities the partnership assumes or takes subject to, or $1,000,000.

(6) * * *

(i) * * *

(C) A liability that is allocable under the rules of § 1.163–8T to capital expenditures (as described under § 1.707–4(d)(5)) with respect to the property;

* * * * *

(E) A liability that was not incurred in anticipation of the transfer of the property to a partnership, but that was incurred in connection with a trade or business in which property transferred to the partnership was used or held but only if all the assets related to that trade or business are transferred other than assets that are not material to a continuation of the trade or business (see paragraph (a)(7) of this section for further rules regarding a liability incurred within two years of a transfer presumed to be in anticipation of the transfer); and

* * * * *

(7) * * *

(ii) *Disclosure of transfers of property subject to liabilities incurred within two years of the transfer.* A partner that treats a liability assumed or taken subject to by a partnership in connection with a transfer of property as a qualified liability under paragraph (a)(6)(i)(B) of this section or under paragraph (a)(6)(i)(E) of this section (if the liability was incurred by the partner within the two-year period prior to the earlier of the date the partner agrees in writing to transfer the property or the date the partner transfers the property to the partnership) must disclose such treatment to the Internal Revenue Service in accordance with § 1.707–8.

(8) *Liability incurred by another person.* Except as provided in paragraph (e)(2) of this section, a partner steps in the shoes of a person for purposes of paragraph (a) of this section with respect to a liability the person incurred or assumed to the extent the partner assumed or took property subject to the liability from the person in a nonrecognition transaction described in section 351, 381(a), 721, or 731.

(b) * * *

(1) * * * For purposes of paragraph (b) of this section, an upper-tier partnership's share of the liability of a lower-tier partnership as described under § 1.707–5(a)(2) that is treated as a liability of the upper-tier partnership under § 1.752–4(a) shall be treated as a liability of the upper-tier partnership incurred on the same day the liability was incurred by the lower-tier partnership.

(2) * * *

(iii) *Reduction of partner's share of liability.* For purposes of paragraph (b)(2) of this section, a partner's share of a liability immediately after a partnership incurs the liability is determined by taking into account a subsequent reduction in the partner's share if—

(A) At the time that the partnership incurs the liability, it is anticipated that the partner's share of the liability that is allocable to a transfer of money or other consideration to the partner will be reduced subsequent to the transfer;

(B) The anticipated reduction is not subject to the entrepreneurial risks of partnership operations; and

(C) The reduction of the partner's share of the liability is part of a plan that has as one of its principal purposes minimizing the extent to which the partnership's distribution of the proceeds of the borrowing is treated as part of a sale.

(3) *Ordering rule.* The treatment of a transfer of money or other consideration under paragraph (b) of this section is determined before applying the rules under § 1.707–4.

* * * * *

(e) * * *

(2) If an interest in a partnership that has one or more liabilities (the lower-tier partnership) is transferred to another partnership (the upper-tier partnership), the upper-tier partnership's share of any liability of the lower-tier partnership that is treated as a liability of the upper-tier partnership under § 1.752–4(a) is treated as a qualified liability under paragraph (a)(6)(i) of this section to the extent the liability would be a qualified liability under paragraph (a)(6)(i) of this section had the liability been assumed or taken subject to by the upper-tier partnership in connection with a transfer of all of the lower-tier partnership's property to the upper-tier partnership by the lower-tier partnership. For purposes of determining whether the liability constitutes a qualified liability under paragraphs (a)(6)(i)(B) and (E) of this

section, a determination that the liability was not incurred in anticipation of the transfer of property to the upper-tier partnership is based on whether the partner in the lower-tier partnership anticipated transferring its interest in the lower-tier partnership to the upper-tier partnership at the time the liability was incurred by the lower-tier partnership.

(f) * * *

Example 1. Partnership's assumption of nonrecourse liability encumbering transferred property. (i) A and B form partnership AB, which will engage in renting office space. A transfers $500,000 in cash to the partnership, and B transfers an office building to the partnership. At the time it is transferred to the partnership, the office building has a fair market value of $1,000,000, has an adjusted basis of $400,000, and is encumbered by a $500,000 nonrecourse liability, which B incurred 12 months earlier to finance the acquisition of other property and which the partnership assumed. No facts rebut the presumption that the liability was incurred in anticipation of the transfer of the property to the partnership. Assume that this liability is a nonrecourse liability of the partnership within the meaning of section 752 and the regulations thereunder. The partnership agreement provides that partnership items will be allocated equally between A and B, including excess nonrecourse liabilities under § 1.752–3(a)(3). The partnership agreement complies with the requirements of § 1.704–1(b)(2)(ii)(*b*).

(ii) The nonrecourse liability secured by the office building is not a qualified liability within the meaning of paragraph (a)(6) of this section. B would be allocated 50 percent of the excess nonrecourse liability under the partnership agreement. Accordingly, immediately after the partnership's assumption of that liability, B's share of the liability as determined under paragraph (a)(2) of this section is $250,000 (B's 50 percent share of the partnership's excess nonrecourse liability as determined in accordance with B's share of partnership profits under § 1.752–3(a)(3)).

(iii) The partnership's assumption of the liability encumbering the office building is treated as a transfer of $250,000 of consideration to B (the amount by which the liability ($500,000) exceeds B's share of that liability immediately after the partnership's assumption of the liability ($250,000)). B is treated as having sold $250,000 of the fair market value of the office building to the partnership in exchange for the partnership's assumption of a $250,000 liability. This results in a gain of $150,000 ($250,000 minus ($250,000/$1,000,000 multiplied by $400,000)).

* * * * *

Example 5. Partnership's assumption of a qualified liability as sole consideration. (i) F purchases property Z in 2012. In 2016, F transfers property Z to a partnership. At the time of its transfer to the partnership, property Z has a fair market value of $165,000 and an adjusted tax basis of $75,000. Also, at the time of the transfer, property Z is subject to a $75,000 nonrecourse liability that F incurred more than two years before transferring property Z to the partnership. The liability has been secured by property Z since it was incurred by F. Upon the transfer of property Z to the partnership, the partnership assumed the liability encumbering that property. The partnership made no other transfers to F in consideration for the transfer of property Z to the partnership. Assume that immediately after the partnership's assumption of the liability encumbering property Z, F's share of that liability for disguised sale purposes is $25,000 in accordance with § 1.707–5(a)(2).

(ii) The $75,000 liability secured by property Z is a qualified liability of F because F incurred the liability more than two years prior to the partnership's assumption of the liability and the liability has encumbered property Z for more than two years prior to F's transfer. See paragraph (a)(6) of this section. Therefore, since no other transfer to F was made as consideration for the transfer of property Z, under paragraph (a)(5) of this section, the partnership's assumption of the qualified liability of F encumbering property Z is not treated as part of a sale.

Example 6. Partnership's assumption of a qualified liability in addition to other consideration. (i) The facts are the same as in *Example 5,* except that the partnership makes a transfer to F of $30,000 in money that is consideration for F's transfer of property Z to the partnership under § 1.707–3.

(ii) As in *Example 5,* the $75,000 liability secured by property Z is a qualified liability of F. Since the partnership transferred $30,000 to F in addition to assuming the qualified liability under paragraph (a)(5) of this section, assuming no other exception to disguised sale treatment applies to the transfer of the $30,000, the partnership's assumption of this qualified liability is treated as a transfer of additional consideration to F to the extent of the lesser of—

(A) The amount that the partnership would be treated as transferring to F if the liability were not a qualified liability ($50,000 (that is, the excess of the $75,000 qualified liability over F's $25,000 share of that liability)); or

(B) The amount obtained by multiplying the qualified liability ($75,000) by F's net equity percentage with respect to property Z (one-third).

(iii) F's net equity percentage with respect to property Z equals the fraction determined by dividing—

(A) The aggregate amount of money or other consideration (other than the qualified liability) transferred to F and treated as part of a sale of property Z under § 1.707–3(a) ($30,000 transfer of money); by

(B) F's net equity in property Z ($90,000 (that is, the excess of the $165,000 fair market value over the $75,000 qualified liability)).

(iv) Accordingly, the partnership's assumption of the qualified liability of F encumbering property Z is treated as a transfer of $25,000 (one-third of $75,000) of consideration to F pursuant to a sale. Therefore, F is treated as having sold $55,000 of the fair market value of property Z to the partnership in exchange for $30,000 in money and the partnership's assumption of $25,000 of the qualified liability. Accordingly, F must recognize $30,000 of gain on the sale (the excess of the $55,000 amount realized over $25,000 of F's adjusted basis for property Z (that is, one-third of F's adjusted basis for the property, because F is treated as having sold one-third of the property to the partnership)).

* * * * *

Example 10. Treatment of debt-financed transfers of consideration by partnership. (i) K transfers property Z to partnership KL in exchange for a 50 percent interest therein on April 9, 2016. On September 13, 2016, the partnership incurs a nonrecourse liability of $20,000. On November 17, 2016, the partnership transfers $20,000 to K, and $10,000 of this transfer is allocable under the rules of § 1.163–8T to proceeds of the partnership liability incurred on September 13, 2016. The remaining $10,000 is paid from other partnership funds. Assume that on November 17, 2016, for disguised sale purposes, K's share of the $20,000 liability incurred on September 13, 2016, is $10,000 in accordance with § 1.707–5(a)(2).

(ii) Because a portion of the transfer made to K on November 17, 2016, is allocable under § 1.163–8T to proceeds of a partnership liability that was incurred by the partnership within 90 days of that transfer, K is required to take the transfer into account in applying the rules of this section and § 1.707–3 only to the extent that the amount of the transfer exceeds K's allocable share of the liability used to fund the transfer. K's allocable share of the $20,000 liability used to fund $10,000 of the transfer to K is $5,000 (K's share of the liability ($10,000) multiplied by the fraction obtained by dividing—

(A) The amount of the liability that is allocable to the distribution to K ($10,000); by

(B) The total amount of such liability ($20,000)).

(iii) Therefore, K is required to take into account $15,000 of the $20,000 partnership transfer to K for purposes of this section and § 1.707–3. Under these facts, assuming no other exception applies and the within-two-year presumption is not rebutted, this $15,000 transfer will be treated under the rule in § 1.707–3 as part of a sale by K of property Z to the partnership.

Example 11. Treatment of debt-financed transfers of consideration and transfers characterized as guaranteed payments by a partnership. (i) The facts are the same as in *Example 10,* except that the entire $20,000 transfer to K is allocable under the rules of § 1.163–8T to proceeds of the partnership liability incurred on September 13, 2016. In addition, the partnership agreement provides that K is to receive a guaranteed payment for the use of K's capital in the amount of $10,000 in each of the three years following the transfer of property Z. Ten thousand dollars of the transfer made to K on November 17, 2016, is pursuant to this provision of the partnership agreement. Assume that the guaranteed payment to K constitutes a reasonable guaranteed payment within the meaning of § 1.707–4(a)(3).

(ii) Under these facts, the rules under both § 1.707–4(a) and § 1.707–5(b) apply to the

November 17, 2016 transfer to K by the partnership. Thus, the ordering rule in § 1.707–5(b)(3) requires that the § 1.707–5(b) debt-financed distribution rules apply first to determine the treatment of the $20,000 transfer. Because the entire transfer made to K on November 17, 2016, is allocable under § 1.163–8T to proceeds of a partnership liability that was incurred by the partnership within 90 days of that transfer, K is required to take the transfer into account in applying the rules of this section and § 1.707–3 only to the extent that the amount of the transfer exceeds K's allocable share of the liability used to fund the transfer. K's allocable share of the $20,000 liability used to fund the transfer to K is $10,000 (K's share of the liability ($10,000) multiplied by the fraction obtained by dividing—

(A) The amount of the liability that is allocable to the distribution to K ($20,000); by

(B) The total amount of such liability ($20,000)).

(iii) The remaining $10,000 amount of the transfer to K that exceeds K's allocable share of the liability is tested to determine whether an exception under § 1.707–4 applies. Because $10,000 of the payment to K is a reasonable guaranteed payment for capital under § 1.707–4(a)(1)(ii), the $10,000 transfer will not be treated as part of a sale by K of property *Z* to the partnership under § 1.707–3.

Example 12. Treatment of debt-financed transfers of consideration by partnership made pursuant to plan. (i) O transfers property X, and P transfers property Y, to partnership OP in exchange for equal interests therein on June 1, 2016. On October 1, 2016, the partnership incurs two nonrecourse liabilities: Liability 1 of $8,000 and Liability 2 of $4,000. On December 15, 2016, the partnership transfers $2,000 to each of O and P pursuant to a plan. The transfers made to O and P on December 15, 2016 are allocable under § 1.163–8T to the proceeds of either Liability 1 or Liability 2. Assume that under § 1.707–5(a)(2), O's and P's share of Liability 1 is $4,000 each and of Liability 2 is $2,000 each on December 15, 2016.

(ii) Because the partnership transferred pursuant to a plan a portion of the proceeds of the two liabilities to O and P, paragraph (b)(1) of this section is applied by treating Liability 1 and Liability 2 as a single $12,000 liability. Pursuant to paragraph (b)(2)(ii)(A) of this section, each partner's allocable share of the $12,000 liability equals the amount obtained by multiplying the sum of the partner's share of Liability 1 and Liability 2 ($6,000) ($4,000 for Liability 1 plus $2,000 for Liability 2) by the fraction obtained by dividing—

(A) The amount of the liability that is allocable to the distribution to O and P pursuant to the plan ($4,000); by

(B) The total amount of such liability ($12,000).

(iii) Therefore, O's and P's allocable share of the $12,000 liability is $2,000 each. Accordingly, because a portion of the proceeds of the $12,000 liability are allocable under § 1.163–8T to the $2,000 transfer made to each of O and P within 90 days of incurring the liability, and the $2,000 transfer does not exceed O's or P's $2,000 allocable share of that liability, each is required to take into account $0 of the $2,000 transfer for purposes of this section and § 1.707–3. Under these facts, no part of the transfers to O and P will be treated as part of a sale of property X by O or of property Y by P.

* * * * *

■ **Par. 6.** Section 1.707–6 is amended by revising *Example 2*(i) in paragraph (d) to read as follows:

§ 1.707–6 Disguised sales of property by partnership to partner; general rules.

* * * * *

(d) * * *

Example 2. Assumption of liability by partner. (i) B is a member of an existing partnership. The partnership transfers property Y to B. On the date of the transfer, property Y has a fair market value of $1,000,000 and is encumbered by a nonrecourse liability of $600,000. B takes the property subject to the liability. The partnership incurred the nonrecourse liability six months prior to the transfer of property Y to B and used the proceeds to purchase an unrelated asset. Assume that under § 1.707–5(a)(2), B's share of the nonrecourse liability immediately before the transfer of property Y was $100,000.

* * * * *

■ **Par. 7.** Section 1.707–9 is amended by revising paragraph (a)(1) to read as follows:

§ 1.707–9 Effective dates and transitional rules.

(a) * * *

(1) *In general.* Except as otherwise provided in this paragraph (a), §§ 1.707–3 through 1.707–6 apply to any transaction with respect to which all transfers occur on or after October 5, 2016. For any transaction with respect to which all transfers that are part of a sale of an item of property occur after April 24, 1991, but before October 5, 2016, §§ 1.707–3 through 1.707–6 as contained in 26 CFR part 1 revised as of April 1, 2016, apply.

* * * * *

■ **Par. 8.** Section 1.752–3 is amended by:

■ 1. Revising the third, fourth, fifth, and sixth sentences in paragraph (a)(3).

■ 2. Adding paragraph (d).

The revisions and addition read as follows:

§ 1.752–3 Partner's share of nonrecourse liabilities.

(a) * * *

(3) * * * The partnership agreement may specify the partners' interests in partnership profits for purposes of allocating excess nonrecourse liabilities provided the interests so specified are reasonably consistent with allocations (that have substantial economic effect under the section 704(b) regulations) of some other significant item of partnership income or gain (significant item method). Alternatively, excess nonrecourse liabilities may be allocated among the partners in accordance with the manner in which it is reasonably expected that the deductions attributable to those nonrecourse liabilities will be allocated (alternative method). Additionally, the partnership may first allocate an excess nonrecourse liability to a partner up to the amount of built-in gain that is allocable to the partner on section 704(c) property (as defined under § 1.704–3(a)(3)(ii)) or property for which reverse section 704(c) allocations are applicable (as described in § 1.704–3(a)(6)(i)) where such property is subject to the nonrecourse liability to the extent that such built-in gain exceeds the gain described in paragraph (a)(2) of this section with respect to such property (additional method). The significant item method, alternative method, and additional method do not apply for purposes of § 1.707–5(a)(2). * * *

* * * * *

(d) *Effective/applicability dates.* The third, fourth, fifth, and sixth sentences of paragraph (a)(3) of this section apply to liabilities that are incurred, taken subject to, or assumed by a partnership on or after October 5, 2016, other than liabilities incurred, taken subject to, or assumed by a partnership pursuant to a written binding contract in effect prior to October 5, 2016. For liabilities that are incurred, taken subject to, or assumed by a partnership before October 5, 2016, the third, fourth, fifth, and sixth sentences of paragraph (a)(3) of this section as contained in 26 CFR part 1 revised as of April 1, 2016, apply.

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

Approved: August 29, 2016.

Mark M. Mazur,

Assistant Secretary of the Treasury (Tax Policy).

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–122855–15]

RIN 1545–BM83

Liabilities Recognized as Recourse Partnership Liabilities Under Section 752

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Partial withdrawal of notice of proposed rulemaking and notice of proposed rulemaking, including by cross reference to temporary regulations.

SUMMARY: This document contains proposed regulations that incorporate the text of related temporary regulations and withdraws a portion of a notice of proposed rulemaking (REG–119305–11) to the extent not adopted by final regulations. This document also contains new proposed regulations addressing when certain obligations to restore a deficit balance in a partner's capital account are disregarded under section 704 of the Internal Revenue Code (Code) and when partnership liabilities are treated as recourse liabilities under section 752. These regulations would affect partnerships and their partners.

DATES: The notice of proposed rulemaking under sections 707 and 752 that was published in the **Federal Register** on January 30, 2014 (REG–119305–11, 79 FR 4826), is partially withdrawn as of October 5, 2016. Written or electronic comments and requests for a public hearing must be received by January 3, 2017.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–122855–15), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG–122855–15), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal site at *http://www.regulations.gov* (indicate IRS and REG–122855–15).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Caroline E. Hay or Deane M. Burke, (202) 317–5279; concerning submissions of comments and requests for a public hearing, Regina L. Johnson, (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: In addition to these proposed regulations, the Treasury Department and the IRS are publishing in the Rules and Regulations section in this issue of the **Federal Register**: (1) Final regulations under section 707 concerning disguised sales and under section 752 regarding the allocation of excess nonrecourse liabilities and (2) temporary regulations concerning a partner's share of partnership liabilities for purposes of section 707 and the treatment of certain payment obligations under section 752.

Paperwork Reduction Act

The collection of information related to these proposed regulations under section 752 is reported on Form 8275, Disclosure Statement, and has been reviewed in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) and approved by the Office of Management and Budget under control number 1545–0889. Comments concerning the collection of information and the accuracy of estimated average annual burden and suggestions for reducing this burden should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the burden associated with this collection of information should be received by December 5, 2016.

The collection of information in these proposed regulations is in proposed § 1.752–2(b)(3)(ii)(D) (which cross references the requirement in § 1.752–2T(b)(3)(ii)(D)). This information is required by the IRS to ensure that section 752 of the Code and applicable regulations are properly applied for allocations of partnership liabilities. The respondents will be partners and partnerships.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103.

Background

1. Overview

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under sections 704, 707, and 752 of the Code. On January 30, 2014, the Treasury Department and the IRS published a notice of proposed rulemaking in the **Federal Register** (REG–119305–11, 79 FR 4826) to amend the then existing regulations under section 707 relating to disguised sales of property to or by a partnership and under section 752 concerning the treatment of partnership liabilities (the 2014 Proposed Regulations). The 2014 Proposed Regulations provided certain technical rules intended to clarify the application of the disguised sale rules under section 707. The 2014 Proposed Regulations also contained rules regarding the sharing of partnership recourse and nonrecourse liabilities under section 752.

A public hearing on the 2014 Proposed Regulations was not requested or held, but the Treasury Department and the IRS received written comments. After consideration of, and in response to, the comments on the 2014 Proposed Regulations, the Treasury Department and the IRS are withdrawing the 2014 Proposed Regulations under § 1.752–2 and publishing new proposed regulations under § 1.752–2, as well as proposed regulations under section 704. Concurrently in this issue of the **Federal Register**, the Treasury Department and the IRS are also publishing final regulations that adopt, as modified, the 2014 Proposed Regulations under section 707 and § 1.752–3, and temporary regulations under sections 707 and 752.

2. Summary of Applicable Law

Section 752 separates partnership liabilities into two categories: recourse liabilities and nonrecourse liabilities. Section 1.752–1(a)(1) provides that a partnership liability is a recourse liability to the extent that any partner or related person bears the economic risk of loss (EROL) for that liability under § 1.752–2. Section 1.752–1(a)(2) provides that a partnership liability is a nonrecourse liability to the extent that no partner or related person bears the EROL for that liability under § 1.752–2.

A partner generally bears the EROL for a partnership liability if the partner or related person has an obligation to make a payment to any person within the meaning of § 1.752–2(b). For purposes of determining the extent to which a partner or related person has an obligation to make a payment, an obligation to restore a deficit capital account upon liquidation of the partnership under the section 704(b) regulations is taken into account. Further, for this purpose, § 1.752–2(b)(6)

of the existing regulations presumes that partners and related persons who have payment obligations actually perform those obligations, irrespective of their net worth, unless the facts and circumstances indicate a plan to circumvent or avoid the obligation (the satisfaction presumption). However, the satisfaction presumption is subject to an anti-abuse rule in § 1.752–2(j) pursuant to which a payment obligation of a partner or related person may be disregarded or treated as an obligation of another person if facts and circumstances indicate that a principal purpose of the arrangement is to eliminate the partner's EROL with respect to that obligation or create the appearance of the partner or related person bearing the EROL when the substance is otherwise. Under the existing rules, the satisfaction presumption is also subject to a disregarded entity net value requirement under § 1.752–2(k) pursuant to which, for purposes of determining the extent to which a partner bears the EROL for a partnership liability, a payment obligation of a disregarded entity is taken into account only to the extent of the net value of the disregarded entity as of the allocation date that is allocated to the partnership liability.

3. 2014 Proposed Regulations

As discussed in greater detail in the Summary of Comments and Explanation of Provisions section of this preamble, § 1.752–2 of the 2014 Proposed Regulations generally, among other things, (1) provided that a partner's or related person's obligation to make a payment with respect to a partnership liability (excluding those imposed by state law) would not be recognized for purposes of section 752 unless each recognition factor was satisfied; (2) applied the list of recognition factors to all payment obligations under § 1.752–2(b), including a partner's obligation to restore a deficit capital account upon liquidation of a partnership (deficit restoration obligations, or DROs) as provided under the section 704(b) regulations; and (3) provided generally that a payment obligation would be recognized to the extent of the net value of a partner or related person as of the allocation date.

After consideration of the comments received on the 2014 Proposed Regulations, the Treasury Department and the IRS are reconsidering the rules under section 752 regarding payment obligations that are recognized under § 1.752–2(b)(3), the satisfaction presumption under § 1.752–2(b)(6), the anti-abuse rule provided in § 1.752–2(j), and the net value requirement as provided in § 1.752–2(k). Accordingly, the Treasury Department and the IRS are withdrawing § 1.752–2 of the 2014 Proposed Regulations and publishing these new proposed regulations that would amend existing regulations under sections 704 and 752. These new provisions, and comments received on the 2014 Proposed Regulations that are pertinent to these new provisions, are discussed in the Summary of Comments and Explanation of Provisions section of the preamble that follows.

4. Final and Temporary Regulations Under Section 707 and Requests for Comments

As previously mentioned, the Treasury Department and the IRS are concurrently publishing temporary regulations under section 707 (concerning disguised sales) (the 707 Temporary Regulations) and section 752 (concerning recourse liabilities, in particular bottom dollar payment obligations) (the 752 Temporary Regulations), and final regulations under section 707 and § 1.752–3. The temporary regulations are incorporated by cross reference in these proposed regulations. Notably, the 707 Temporary Regulations provide that, for disguised sale purposes, partners determine their share of any partnership liability in the manner in which excess nonrecourse liabilities are allocated under § 1.752–3(a)(3) (with certain limitations). Generally, a partner's share of the excess nonrecourse liability is determined in accordance with the partner's share of partnership profits taking into account all the facts and circumstances relating to the economic arrangement of the partners. The Treasury Department and the IRS recognize that taxpayers may require further guidance regarding reasonable methods for determining a partner's share of partnership profits under § 1.752–3(a)(3) for disguised sale purposes, especially given that a partner's share may change from year to year or differ with respect to different partnership assets and believe it may be appropriate to issue administrative guidance for this purpose. Accordingly, comments are requested regarding possible safe harbors and reasonable methods for determining a partner's share of profits, taking into account all of the relevant facts and circumstances relating to the economic arrangement of the partners. The preamble to the temporary regulations describes the provisions in greater detail. In addition, the final regulations under section 707 also include a request for comments concerning the exception for reimbursements of preformation capital expenditures under § 1.707–4(d), which is described in greater detail in the preamble to the final regulations.

Summary of Comments and Explanation of Provisions

1. Rights of Reimbursement

Section 1.752–2(b)(1) provides that, except as otherwise provided in § 1.752–2, a partner bears the EROL for a partnership liability to the extent that, if the partnership constructively liquidated, the partner or related person would be obligated to make a payment to any person (or a contribution to the partnership) because that liability becomes due and payable and the partner or related person would not be entitled to reimbursement from another partner or a person that is a related person to another partner. Section 1.752–2(b)(1) presumes that, in the constructive liquidation, the partnership has a value of zero with which to pay its liabilities. Under the 2014 Proposed Regulations, a partner would not bear the EROL under § 1.752–2(b)(1) if the partner or related person is entitled to a reimbursement from ''any person.'' Commenters noted that a reimbursement from ''any person'' would include a reimbursement from the partnership, which is contrary to the intent of the regulations under section 752. A right to be reimbursed by the partnership should be disregarded, as § 1.752–2(b)(1) presumes that the partnership would not be able to pay the liability or reimburse the partner. The Treasury Department and the IRS agree with the concerns expressed in the comments; therefore, these proposed regulations do not include the changes to § 1.752–2(b)(1) that were in the 2014 Proposed Regulations.

2. Arrangements Part of a Plan To Circumvent or Avoid an Obligation

The 2014 Proposed Regulations provided that a partner's or related person's obligation to make a payment with respect to a partnership liability (excluding those imposed by state law) will not be recognized for purposes of section 752 unless: (1) The partner or related person is (A) required to maintain a commercially reasonable net worth throughout the term of the payment obligation or (B) subject to commercially reasonable contractual restrictions on transfers of assets for inadequate consideration; (2) the partner or related person is required periodically to provide commercially reasonable documentation regarding the partner's or related person's financial condition; (3) the term of the payment obligation does not end prior to the term

of the partnership liability; (4) the payment obligation does not require that the primary obligor or any other obligor with respect to the partnership liability directly or indirectly hold money or other liquid assets in an amount that exceeds the reasonable needs of such obligor; (5) the partner or related person received arm's length consideration for assuming the payment obligation; and (6) the obligation is not a bottom dollar guarantee or indemnity (recognition factors).

Commenters expressed concerns with the all-or-nothing approach in the 2014 Proposed Regulations. One commenter noted that a partner could cause an obligation to deliberately fail one of the recognition factors so as to cause a liability to be treated as nonrecourse if such characterization potentially would be beneficial to such partner, even if that partner did, in fact, bear the EROL. This commenter also noted that commercial arrangements rarely satisfy each and every one of the recognition factors and commercial practices tend to change over time, thereby rendering the recognition factors out of date. This commenter recommended that regulations instead provide a nonexclusive list of facts and circumstances containing as factors many of the items identified in the 2014 Proposed Regulations.

The Treasury Department and the IRS believe that the concerns expressed by the commenters are valid and thus propose to move the list of factors to an anti-abuse rule in § 1.752–2(j), other than the recognition factors concerning bottom dollar guarantees and indemnities, which are addressed in the 752 Temporary Regulations. Under the anti-abuse rule, factors are weighed to determine whether a payment obligation should be respected. The list of factors in the anti-abuse rule in these proposed regulations is nonexclusive, and the weight to be given to any particular factor depends on the particular case. Furthermore, the presence or absence of any particular factor, in itself, is not necessarily indicative of whether or not a payment obligation is recognized under § 1.752–2(b).

In addition to comments addressing the recognition factor approach in the 2014 Proposed Regulations, the Treasury Department and the IRS received specific comments regarding the individual recognition factors. With respect to the first recognition factor regarding commercially reasonable net worth or restrictions on transfers, one commenter agreed that an obligor should have the wherewithal to make a payment to the extent required for the entire duration of its obligation, but believed that this concern is alleviated by the anti-abuse rule in the current regulations under § 1.752–2(j). This commenter suggested that the anti-abuse rule in § 1.752–2(j) contain additional examples to illustrate abusive or problematic situations. Another commenter noted that the 2014 Proposed Regulations did not address the consequences if a partner or related person breaches its payment obligation under an agreement regarding net worth or restrictions on transfers and suggested that the regulations address such consequences in an anti-abuse rule (for example, a partner's or related person's payment obligation may be disregarded if it is determined that the creditor lacked the intent to enforce its rights under the agreement).

With respect to the first two recognition factors, commenters expressed concerns with the use of the terms ''commercially reasonable'' and ''commercially reasonable documentation.'' One commenter believed that these terms are vague and subjective and would require partnerships to make difficult judgments as to whether these recognition factors have been met prior to allocating any partnership liability. Another commenter noted that the ''commercially reasonable documentation'' recognition factor did not specify who should receive the documentation and that such documentation should be provided to the lender.

Moving the list of factors to an anti-abuse rule should alleviate some of the concerns expressed regarding both whether a payment obligor has the wherewithal to pay and the use of the term ''commercially reasonable.'' The proposed regulations also revise the first two factors to provide clarity by limiting the first factor to examine solely whether the partner or related person is subject to commercially reasonable contractual restrictions that protect the likelihood of payment, such as restrictions on transfers for inadequate consideration or equity distributions. In addition, the proposed regulations do not retain the subjective commercially reasonable net worth factor, but instead include a new factor that examines whether the payment obligation restricts the creditor from promptly pursuing payment following a default on the partnership liability or whether there are other arrangements that indicate a plan to delay collection.

The proposed regulations retain the use of the ''commercially reasonable'' standard, however, because different facts may require a different standard of whether contractual restrictions and documentation are ''commercially reasonable'' with respect to a particular industry, and the flexible nature of the term is helpful in informing partnerships and their partners that obligations should be consistent with what is customary in the marketplace. With respect to the second recognition factor regarding documentation, these proposed regulations also clarify that the factor examines whether commercially reasonable documentation was provided to the party that benefits from the payment obligation (for example, the creditor in the case of a guarantee or the indemnified party in the case of an indemnification arrangement).

Commenters also noted that certain recognition factors do not take into account industry specific practices. One commenter pointed out that the requirement that a payment obligation last throughout the full term of the partnership's loan is contrary to commercial practice in some cases. In particular, the commenter noted that, in the real estate industry context, it is common for a construction loan to be guaranteed until the property reaches a required level of stabilization. This commenter did believe, however, that a payment obligation should be disregarded if the guarantor or other obligor has an unrestricted unilateral right to terminate the obligation at will, including immediately before the obligation becomes due and payable. Commenters also noted that the recognition factor that would require arm's length consideration is not commercial, as a partner is often willing to enter into a guarantee or other payment obligation with respect to a partnership liability because the partner will benefit from the liability in the obligor's capacity as a partner. The Treasury Department and the IRS agree with these recommendations; thus, these proposed regulations take into account industry practice with respect to terminations of payment obligations and do not include the arm's length consideration factor.

A commenter also expressed concerns regarding the recognition factor that examines whether a primary obligor or any other obligor with respect to the partnership liability is required to hold assets in an amount that exceeds the reasonable needs of the obligor. The commenter noted that partnership agreements often include restrictions on distributions before certain hurdles are satisfied for a variety of reasons, such as to protect the interests of preferred partners or for prudent business management. Another commenter agreed with the legal theory

underpinning the recognition factor (to address fact patterns in which the taxpayer intended and acted to ensure the partnership maintained sufficient collateral to repay the creditor without exposing the obligor to meaningful liability) but suggested that commercially required or prudent reserves not be considered. Both commenters suggested that an example illustrating the restrictions that violate this factor would be helpful.

The commenters' concerns should be largely addressed by making this recognition factor one of many examined under the anti-abuse rule that looks to whether there is a plan to circumvent or avoid the obligation. Under the anti-abuse rule, an obligor's retention of assets for its reasonable foreseeable needs (such as for commercial or prudent business reasons) generally would not, on its own, indicate that there is a plan to circumvent or avoid the obligation.

Finally, the proposed regulations provide two additional factors that indicate when a plan to circumvent or avoid an obligation exists. The first provides that, in the case of a guarantee or similar arrangement, the terms of the liability would be substantially the same had the partner or related person not agreed to provide the guarantee. This factor indicates that the guarantee was not required by the lender, presumably because the partnership had sufficient assets to satisfy its obligation. The second additional factor examines whether the creditor or other party benefiting from the obligation received executed documents with respect to the payment obligation from the partner or related person before, or within a commercially reasonable time after, the creation of the obligation.

3. Deficit Restoration Obligations

The 2014 Proposed Regulations applied the list of recognition factors discussed in Section 2 of this Summary of Comments and Explanation of Provisions to all payment obligations under § 1.752–2(b), including a DRO, as provided under the section 704(b) regulations. Commenters explained that not all of the recognition factors could be satisfied with respect to a DRO. In addition, commenters suggested that the regulations under section 704(b) be amended to clarify that if a DRO is not given effect under section 752, it should not be given effect under section 704(b).

A DRO is an obligation to the partnership that is imposed by the partnership agreement. In contrast, a guarantee or indemnity is a contractual obligation outside the partnership agreement. As a result of this difference and based on the comments on the 2014 Proposed Regulations, the proposed regulations refine the list of factors applicable to DROs and clarify the interaction of section 752 with section 704 regarding DROs. Under § 1.704–1(b)(2)(ii)(*c*)(*2*) of the existing regulations, a partner's DRO is not respected if the facts and circumstances indicate a plan to circumvent or avoid the partner's DRO. These proposed regulations add a list of factors to § 1.704–1(b)(2)(ii)(*c*) that are similar to the factors in the proposed anti-abuse rule under § 1.752–2(j), but specific to DROs, to indicate when a plan to circumvent or avoid an obligation exists. Under the proposed regulations, the following factors indicate a plan to circumvent or avoid an obligation: (1) The partner is not subject to commercially reasonable provisions for enforcement and collection of the obligation; (2) the partner is not required to provide (either at the time the obligation is made or periodically) commercially reasonable documentation regarding the partner's financial condition to the partnership; (3) the obligation ends or could, by its terms, be terminated before the liquidation of the partner's interest in the partnership or when the partner's capital account as provided in § 1.704–1(b)(2)(iv) is negative; and (4) the terms of the obligation are not provided to all the partners in the partnership in a timely manner.

Notwithstanding the proposed factors, the Treasury Department and the IRS have concerns with whether and to what extent it is appropriate to recognize DROs (and certain partner notes treated as DROs) as meaningful payment obligations. Many DROs are triggered only on the liquidation of a partnership. However, some partnerships are intended to have perpetual life and other partnerships can effectively cease operations but not actually liquidate; therefore, a partner's DRO may never be required to be satisfied. In addition, some DROs can be terminated or significantly reduced in a manner that may not be appropriate, and therefore, the DRO similarly may never be triggered. The Treasury Department and the IRS request comments on the extent to which such DROs should be recognized. In addition, certain partner notes are treated as DROs under § 1.704–1(b)(2)(ii)(*c*)(*1*) and (*3*) of these proposed regulations. The Treasury Department and the IRS also request comments concerning whether these obligations should continue to be treated as DROs.

4. Exculpatory Liabilities

One commenter suggested that the 2014 Proposed Regulations would result in more liabilities being characterized as nonrecourse liabilities, in particular, so-called, ''exculpatory liabilities,'' and urged the Treasury Department and the IRS to provide guidance with respect to such liabilities. An exculpatory liability is a liability that is recourse to an entity under state law and section 1001, but no partner bears the EROL within the meaning of section 752. Thus, the liability is treated as nonrecourse for section 752 purposes. The Treasury Department and the IRS are studying the treatment of exculpatory liabilities under sections 704 and 752 and agree that guidance is warranted in this area. However, the treatment of exculpatory liabilities is beyond the scope of these proposed regulations. The Treasury Department and the IRS seek additional comments regarding the proper treatment of an exculpatory liability under regulations under section 704(b) and the effect of such a liability's classification under section 1001. Further, the Treasury Department and the IRS request additional comments addressing the allocation of an exculpatory liability among multiple assets and possible methods for calculating minimum gain with respect to such liability, such as the so-called ''floating lien'' approach (whereby all the assets in the entity, including cash, are considered to be subject to the exculpatory liability) or a specific allocation approach.

5. Net Value

Section 1.752–2(b)(6) of the existing regulations provides that, for purposes of determining the extent to which a partner or related person has a payment obligation and the EROL, it is assumed that all partners and related persons who have obligations to make payments actually perform those obligations, irrespective of their actual net worth, unless the facts and circumstances indicate a plan to circumvent or avoid the obligation. See § 1.752–2(b)(6), cross referencing § 1.752–2(j) and (k). Under the anti-abuse rule in § 1.752–2(j), a payment obligation is disregarded if there is a plan to circumvent or avoid such obligation. Section 1.752–2(k)(1) provides that, when determining the extent to which a partner bears the EROL for a partnership liability, a payment obligation of a business entity that is disregarded as an entity separate from its owner under section 856(i), section 1361(b)(3), or §§ 301.7701–1 through 301.7701–3 of the Procedure and Administration Regulations (a

disregarded entity) is taken into account only to the extent of the net value of the disregarded entity as of the allocation date that is allocated to the partnership liability. Section 1.752–2(k)(2)(i) provides, in part, that net value is the fair market value of all assets owned by the disregarded entity that may be subject to creditors' claims under local law less all obligations of the disregarded entity that do not constitute § 1.752–2(b)(1) payment obligations of the disregarded entity.

The 2014 Proposed Regulations provided that, in determining the extent to which a partner or related person other than an individual or a decedent's estate bears the EROL for a partnership liability other than a trade payable, a payment obligation is recognized only to the extent of the net value of the partner or related person that, as of the allocation date, is allocated to the liability, as determined under § 1.752–2(k). The 2014 Proposed Regulations also provided that the partner must provide a statement concerning the net value of the payment obligor to the partnership. The preamble to the 2014 Proposed Regulations requested comments concerning whether the net value rule should also apply to individuals and estates and whether the regulations should consolidate these rules under § 1.752–2(k).

Commenters expressed concerns that an expansion of the net value rule would add considerable burden and expense to taxpayers and would likely lead to time consuming and costly disputes regarding valuations. Another commenter explained that taxpayers have often avoided the net value regulations (by not using disregarded entities) or have applied the regulations only when the disregarded entity has minimal or no assets.

Commenters suggested that if the net value rule is retained, § 1.752–2(k) should be extended to all partners and related persons other than individuals. One commenter expressed concerns that a partner who may be treated as bearing the EROL with respect to a partnership liability would have to provide information regarding the net value of the payment obligor, which is unnecessarily intrusive. Another commenter believed that if the rules requiring net value were extended to all partners in partnerships, the attempt to achieve more realistic substance would be accompanied by a corresponding increase in the potential for manipulation.

The Treasury Department and the IRS remain concerned with ensuring that a partner or related person only be presumed to satisfy its payment obligation to the extent that such partner or related person would be able to pay on the obligation. After consideration of the comments, however, the Treasury Department and the IRS agree that expanding the application of the net value rules under § 1.752–2(k) may lead to more litigation and may unduly burden taxpayers. Furthermore, net value as provided in § 1.752–2(k) may not accurately take into account the future earnings of a business entity, which normally factor into lending decisions. Therefore, the Treasury Department and the IRS propose to remove § 1.752–2(k) and instead create a new presumption under the anti-abuse rule in § 1.752–2(j). Under the presumption in the proposed regulations, evidence of a plan to circumvent or avoid an obligation is deemed to exist if the facts and circumstances indicate that there is not a reasonable expectation that the payment obligor will have the ability to make the required payments if the payment obligation becomes due and payable. A payment obligor includes disregarded entities (including grantor trusts). These proposed regulations also add an example to illustrate the application of the anti-abuse rule when the payment obligor is an underfunded entity. Under these proposed regulations, § 1.752–2(b)(6) continues to presume that payment obligations with respect to a partnership liability will be satisfied unless evidence of a plan to circumvent or avoid the obligation exists as determined under § 1.752–2(j). If evidence of a plan to circumvent or avoid the obligation exists or is deemed to exist, the obligation is not recognized under § 1.752–2(b) and therefore the partnership liability is treated as a nonrecourse liability under § 1.752–1(a)(2).

Proposed Applicability Dates

The amendments to § 1.704–1 are proposed to apply on or after the date these regulations are published as final regulations in the **Federal Register**. The amendments to § 1.752–2 are proposed to apply to liabilities incurred or assumed by a partnership and to payment obligations imposed or undertaken with respect to a partnership liability on or after the date these regulations are published as final regulations in the **Federal Register**. Partnerships and their partners may rely on these proposed regulations prior to the date they are published as final regulations in the **Federal Register**. However, the rules in § 1.752–2(k) still apply to disregarded entities until the proposed regulations are published as final regulations in the **Federal Register**.

Some commenters were concerned that the 2014 Proposed Regulations ''delinked'' the regulations under sections 704 and 752 concerning DROs, that is, that a DRO may somehow still be recognized under section 704 despite not meeting the requirements to be recognized as a payment obligation under section 752. DROs are subject to the bottom dollar payment obligation rules in the 752 Temporary Regulations, but the rules in these proposed regulations concerning DROs will not be effective prior to the date they are published as final regulations in the **Federal Register**. However, these proposed regulations allow partnerships and their partners to rely on the proposed regulations, which should address this concern.

Special Analyses

Certain IRS regulations, including this one, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that the collection of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the amount of time necessary to report the required information will be minimal in that it requires partnerships (including partnerships that may be small entities) to provide information they already maintain or can easily obtain to the IRS. Moreover, it should take a partnership no more than 2 hours to satisfy the information requirement in these regulations. Accordingly, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. All comments will be available for public inspection

and copying at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by a person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place of the hearing will be published in the **Federal Register**.

Drafting Information

The principal authors of these regulations are Caroline E. Hay and Deane M. Burke of the Office of the Associate Chief Counsel (Passthroughs & Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

Withdrawal of Proposed Regulations

Accordingly, under the authority of 26 U.S.C. 7805, § 1.752–2 of the notice of proposed rulemaking (REG–119305–11) that was published in the **Federal Register** on January 30, 2014 (79 FR 4826) is withdrawn.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Sections 1.707–2 through 1.707–9 also issued under 26 U.S.C. 707(a)(2)(B).

■ **Par. 2.** Section 1.704–1 is amended by:

■ 1. Adding two sentences to the end of paragraph (b)(1)(ii)(*a*).

■ 2. Adding a sentence to the end of paragraph (b)(2)(ii)(*b*)(*3*) introductory text.

■ 3. Removing the undesignated paragraph following paragraph (b)(2)(ii)(*b*)(*3*).

■ 4. Adding paragraphs (b)(2)(ii)(*b*)(*4*) through (*7*).

■ 5. Revising paragraph (b)(2)(ii)(*c*).

The additions and revisions read as follows:

§ 1.704–1 Partner's distributive share.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(*a*) * * * Furthermore, the last sentence of paragraph (b)(2)(ii)(*b*)(*3*) of this section and paragraphs (b)(2)(ii)(*b*)(*4*) through (*7*) and (b)(2)(ii)(*c*) of this section apply on or after the date these regulations are published as final regulations in the **Federal Register**. However, taxpayers may rely on the last sentence of paragraph (b)(2)(ii)(*b*)(*3*) of this section and paragraphs (b)(2)(ii)(*b*)(*4*) through (*7*) and (b)(2)(ii)(*c*) of this section on or after October 5, 2016 and before the date these regulations are published as final regulations in the **Federal Register**.

* * * * *

(2) * * *

(ii) * * *

(*b*) * * *

(*3*) * * * Notwithstanding the partnership agreement, an obligation to restore a deficit balance in a partner's capital account, including an obligation described in paragraph (b)(2)(ii)(*c*)(*1*) of this section, will not be respected for purposes of this section to the extent the obligation is disregarded under paragraph (b)(2)(ii)(*c*)(*4*) of this section.

(*4*) For purposes of paragraphs (b)(2)(ii)(*b*)(*1*) through (*3*) of this section, a partnership taxable year shall be determined without regard to section 706(c)(2)(A).

(*5*) The requirements in paragraphs (b)(2)(ii)(*b*)(*2*) and (*3*) of this section are not violated if all or part of the partnership interest of one or more partners is purchased (other than in connection with the liquidation of the partnership) by the partnership or by one or more partners (or one or more persons related, within the meaning of section 267(b) (without modification by section 267(e)(1)) or section 707(b)(1), to a partner) pursuant to an agreement negotiated at arm's length by persons who at the time such agreement is entered into have materially adverse interests and if a principal purpose of such purchase and sale is not to avoid the principles of the second sentence of paragraph (b)(2)(ii)(*a*) of this section.

(*6*) The requirement in paragraph (b)(2)(ii)(*b*)(*2*) of this section is not violated if, upon the liquidation of the partnership, the capital accounts of the partners are increased or decreased pursuant to paragraph (b)(2)(iv)(*f*) of this section as of the date of such liquidation and the partnership makes liquidating distributions within the time set out in the requirement in paragraph (b)(2)(ii)(*b*)(*2*) of this section in the ratios of the partners' positive capital accounts, except that it does not distribute reserves reasonably required to provide for liabilities (contingent or otherwise) of the partnership and installment obligations owed to the partnership, so long as such withheld amounts are distributed as soon as practicable and in the ratios of the partners' positive capital account balances.

(*7*) See examples (1)(i) and (ii), (4)(i), (8)(i), and (16)(i) of paragraph (b)(5) of this section for issues concerning paragraph (b)(2)(ii)(*b*) of this section.

(*c*) *Obligation to restore deficit*—(*1*) *Other arrangements treated as obligations to restore deficits.* If a partner is not expressly obligated to restore the deficit balance in such partner's capital account, such partner nevertheless will be treated as obligated to restore the deficit balance in his capital account (in accordance with the requirement in paragraph (b)(2)(ii)(*b*)(*3*) of this section and subject to paragraph (b)(2)(ii)(*c*)(*2*) of this section) to the extent of—

(*A*) The outstanding principal balance of any promissory note (of which such partner is the maker) contributed to the partnership by such partner (other than a promissory note that is readily tradable on an established securities market), and

(*B*) The amount of any unconditional obligation of such partner (whether imposed by the partnership agreement or by state or local law) to make subsequent contributions to the partnership (other than pursuant to a promissory note of which such partner is the maker).

(*2*) *Satisfaction requirement.* For purposes of paragraph (b)(2)(ii)(*c*)(*1*) of this section, a promissory note or unconditional obligation is taken into account only if it is required to be satisfied at a time no later than the end of the partnership taxable year in which such partner's interest is liquidated (or, if later, within 90 days after the date of such liquidation). If a promissory note referred to in paragraph (b)(2)(ii)(*c*)(*1*) of this section is negotiable, a partner will be considered required to satisfy such note within the time period specified in this paragraph (b)(2)(ii)(*c*)(*2*) if the partnership agreement provides that, in lieu of actual satisfaction, the partnership will retain such note and such partner will contribute to the partnership the excess, if any, of the outstanding principal balance of such note over its fair market value at the time of liquidation. See paragraph (b)(2)(iv)(*d*)(*2*) of this section. See examples (1)(ix) and (x) of paragraph (b)(5) of this section.

(*3*) *Related party notes.* For purposes of paragraph (b)(2) of this section, if a partner contributes a promissory note to the partnership during a partnership taxable year beginning after December 29, 1988, and the maker of such note is a person related to such partner (within the meaning of § 1.752–4(b)(1)), then such promissory note shall be treated as

a promissory note of which such partner is the maker.

(*4*) *Obligations disregarded*—(*A*) *General rule.* A partner in no event will be considered obligated to restore the deficit balance in his capital account to the partnership (in accordance with the requirement in paragraph (b)(2)(ii)(*b*)(*3*) of this section) to the extent such partner's obligation is a bottom dollar payment obligation that is not recognized under § 1.752–2(b)(3) or is not legally enforceable, or the facts and circumstances otherwise indicate a plan to circumvent or avoid such obligation. See paragraphs (b)(2)(ii)(*f*), (b)(2)(ii)(*h*), and (b)(4)(vi) of this section for other rules regarding such obligation. To the extent a partner is not considered obligated to restore the deficit balance in the partner's capital account to the partnership (in accordance with the requirement in paragraph (b)(2)(ii)(*b*)(*3*) of this section), the obligation is disregarded and paragraph (b)(2) of this section and § 1.752–2 are applied as if the obligation did not exist.

(*B*) *Factors indicating plan to circumvent or avoid obligation.* In the case of an obligation to restore a deficit balance in a partner's capital account upon liquidation of a partnership, paragraphs (b)(2)(ii)(*c*)(*4*)(*B*)(*i*) through (*iv*) of this section provide a non-exclusive list of factors that may indicate a plan to circumvent or avoid the obligation. For purposes of making determinations under this paragraph (b)(2)(ii)(*c*)(*4*), the weight to be given to any particular factor depends on the particular case and the presence or absence of any particular factor is not, in itself, necessarily indicative of whether or not the obligation is respected. The following factors are taken into consideration for purposes of this paragraph (b)(2):

(*i*) The partner is not subject to commercially reasonable provisions for enforcement and collection of the obligation.

(*ii*) The partner is not required to provide (either at the time the obligation is made or periodically) commercially reasonable documentation regarding the partner's financial condition to the partnership.

(*iii*) The obligation ends or could, by its terms, be terminated before the liquidation of the partner's interest in the partnership or when the partner's capital account as provided in § 1.704–1(b)(2)(iv) is negative.

(*iv*) The terms of the obligation are not provided to all the partners in the partnership in a timely manner.

* * * * *

■ **Par. 3.** Section 1.707–0 is amended by revising the entries for § 1.707–5(a)(2)(i) and (ii) to read as follows:

§ 1.707–0 Table of contents.

* * * * *

§ 1.707–5 Disguised sales of property to partnership; special rules relating to liabilities.

(a) * * *

(2) * * *

(i) In general.

(ii) Partner's share of § 1.752–7 liability.

* * * * *

* * * * *

■ **Par. 4.** Section 1.707–5 is amended by revising paragraph (a)(2) and *Examples 2, 3, 7,* and *8* of paragraph (f) to read as follows:

§ 1.707–5 Disguised sales of property to partnership; special rules relating to liabilities.

(a) * * *

(2) [The text of proposed § 1.707–5(a)(2) is the same as the text of § 1.707–5T(a)(2) published elsewhere in this issue of the **Federal Register**].

* * * * *

(f) * * *

Example 2. [The text of proposed § 1.707–5(f) *Example 2* is the same as the text of § 1.707–5T(f) *Example 2* published elsewhere in this issue of the **Federal Register**].

Example 3. [The text of proposed § 1.707–5(f) *Example 3* is the same as the text of § 1.707–5T(f) *Example 3* published elsewhere in this issue of the **Federal Register**].

* * * * *

Example 7. [The text of proposed § 1.707–5(f) *Example 7* is the same as the text of § 1.707–5T(f) *Example 7* published elsewhere in this issue of the **Federal Register**].

Example 8. [The text of proposed § 1.707–5(f) *Example 8* is the same as the text of § 1.707–5T(f) *Example 8* published elsewhere in this issue of the **Federal Register**].

* * * * *

■ **Par. 5.** Section 1.707–9 is amended by adding paragraph (a)(5) to read as follows:

§ 1.707–9 Effective dates and transitional rules.

(a) * * *

(5) [The text of proposed § 1.707–9(a)(5) is the same as the text of § 1.707–9T(a)(5) published elsewhere in this issue of the **Federal Register**].

* * * * *

■ **Par. 6.** Section 1.752–0 is amended by:

■ 1. Adding entries for § 1.752–2(b)(3)(i) and (ii), (b)(3)(ii)(A) and (B), (b)(3)(ii)(C), (b)(3)(ii)(C)(*1*) through (*3*), (b)(3)(ii)(D), and (b)(3)(iii).

■ 2. Adding entries for § 1.752–2(j)(2)(i) and (ii).

■ 3. Adding entries for § 1.752–2(j)(3)(i) through (iii).

■ 4. Revising the entries for § 1.752–2(j)(3) and (4).

■ 5. Adding an entry for § 1.752–2(k).

The revisions and additions read as follows:

§ 1.752–0 Table of contents.

* * * * *

§ 1.752–2 Partner's share of recourse liabilities.

* * * * *

(b) * * *

(3) * * *

(i) In general.

(ii) Special rules for bottom dollar payment obligations.

(A) In general.

(B) Exception.

(C) Definition of bottom dollar payment obligation.

(*1*) In general.

(*2*) Exceptions.

(*3*) Benefited party defined.

(D) Disclosure of bottom dollar payment obligations.

(iii) Special rule for indemnities and reimbursement agreements.

* * * * *

(j) * * *

(2) * * *

(i) In general.

(ii) Economic risk of loss.

(3) Plan to circumvent or avoid an obligation.

(i) General rule.

(ii) Factors indicating plan to circumvent or avoid an obligation.

(iii) Deemed plan to circumvent or avoid an obligation.

(4) Examples.

(k) Effective/applicability dates.

* * * * *

■ **Par. 7.** Section 1.752–2 is amended by:

■ 1. Revising the last sentence of paragraph (a).

■ 2. Revising paragraph (b)(3) and the last sentence of paragraph (b)(6).

■ 3. Adding a sentence to the end of paragraph (f) introductory text and adding *Examples 10* and *11* to paragraph (f).

■ 4. Revising paragraphs (j)(2) and (3).

■ 5. Adding paragraph (j)(4).

■ 6. Removing paragraph (k).

■ 7. Redesignating paragraph (l) as paragraph (k) and revising it.

The revisions and additions read as follows:

§ 1.752–2 Partner's share of recourse liabilities.

(a) * * * The determination of the extent to which a partner bears the economic risk of loss for a partnership liability is made under the rules in paragraphs (b) through (j) of this section.

(b) * * *

(3) [The text of proposed § 1.752–2(b)(3) is the same as the text of § 1.752–2T(b)(3) published elsewhere in this issue of the **Federal Register**].

* * * * *

(6) * * * See paragraph (j) of this section.

* * * * *

(f) *Examples.* * * * Unless otherwise provided, for purposes of the following examples, assume that any obligation of a partner or related person to make a payment is recognized under paragraph (b)(3) of this section.

* * * * *

Example 10. [The text of proposed § 1.752–2(f) *Example 10* is the same as the text of § 1.752–2T(f) *Example 10* published elsewhere in this issue of the **Federal Register**].

Example 11. [The text of proposed § 1.752–2(f) *Example 11* is the same as the text of § 1.752–2T(f) *Example 11* published elsewhere in this issue of the **Federal Register**].

* * * * *

(j) * * *

(2) [The text of proposed § 1.752–2(j)(2) is the same as the text of § 1.752–2T(j)(2) published elsewhere in this issue of the **Federal Register**].

(3) *Plan to circumvent or avoid an obligation*—(i) *General rule.* An obligation of a partner or related person to make a payment is not recognized under paragraph (b) of this section if the facts and circumstances evidence a plan to circumvent or avoid the obligation.

(ii) *Factors indicating plan to circumvent or avoid an obligation.* In the case of a payment obligation, other than an obligation to restore a deficit capital account upon liquidation of a partnership, paragraphs (j)(3)(ii)(A) through (G) of this section provide a non-exclusive list of factors that may indicate a plan to circumvent or avoid the payment obligation. The presence or absence of a factor is based on all of the facts and circumstances at the time the partner or related person makes the payment obligation or if the obligation is modified, at the time of the modification. For purposes of making determinations under this paragraph (j)(3), the weight to be given to any particular factor depends on the particular case and the presence or absence of a factor is not necessarily indicative of whether a payment obligation is or is not recognized under paragraph (b) of this section.

(A) The partner or related person is not subject to commercially reasonable contractual restrictions that protect the likelihood of payment, including, for example, restrictions on transfers for inadequate consideration or distributions by the partner or related person to equity owners in the partner or related person.

(B) The partner or related person is not required to provide (either at the time the payment obligation is made or periodically) commercially reasonable documentation regarding the partner's or related person's financial condition to the benefited party.

(C) The term of the payment obligation ends prior to the term of the partnership liability, or the partner or related person has a right to terminate its payment obligation, if the purpose of limiting the duration of the payment obligation is to terminate such payment obligation prior to the occurrence of an event or events that increase the risk of economic loss to the guarantor or benefited party (for example, termination prior to the due date of a balloon payment or a right to terminate that can be exercised because the value of loan collateral decreases). This factor typically will not be present if the termination of the obligation occurs by reason of an event or events that decrease the risk of economic loss to the guarantor or benefited party (for example, the payment obligation terminates upon the completion of a building construction project, upon the leasing of a building, or when certain income and asset coverage ratios are satisfied for a specified number of quarters).

(D) There exists a plan or arrangement in which the primary obligor or any other obligor (or a person related to the obligor) with respect to the partnership liability directly or indirectly holds money or other liquid assets in an amount that exceeds the reasonable foreseeable needs of such obligor.

(E) The payment obligation does not permit the creditor to promptly pursue payment following a payment default on the partnership liability, or other arrangements with respect to the partnership liability or payment obligation otherwise indicate a plan to delay collection.

(F) In the case of a guarantee or similar arrangement, the terms of the partnership liability would be substantially the same had the partner or related person not agreed to provide the guarantee.

(G) The creditor or other party benefiting from the obligation did not receive executed documents with respect to the payment obligation from the partner or related person before, or within a commercially reasonable period of time after, the creation of the obligation.

(iii) *Deemed plan to circumvent or avoid an obligation.* Evidence of a plan to circumvent or avoid an obligation is deemed to exist if the facts and circumstances indicate that there is not a reasonable expectation that the payment obligor will have the ability to make the required payments if the payment obligation becomes due and payable. For purposes of this section, a payment obligor includes an entity disregarded as an entity separate from its owner under section 856(i), section 1361(b)(3), or §§ 301.7701–1 through 301.7701–3 of this chapter (a disregarded entity), and a trust to which subpart E of part I of subchapter J of chapter 1 of the Code applies.

(4) *Examples.* The following examples illustrate the principles of paragraph (j) of this section.

Example 1. Gratuitous guarantee. (i) In 2016, A, B, and C form a domestic limited liability company (LLC) that is classified as a partnership for federal tax purposes. Also in 2016, LLC receives a loan from a bank. A, B, and C do not bear the economic risk of loss with respect to that partnership liability, and, as a result, the liability is treated as nonrecourse under § 1.752–1(a)(2) in 2016. In 2018, A guarantees the entire amount of the liability. The bank did not request the guarantee and the terms of the loan did not change as a result of the guarantee. A did not provide any executed documents with respect to A's guarantee to the bank. The bank also did not require any restrictions on asset transfers by A and no such restrictions exist.

(ii) Under paragraph (j)(3) of this section, A's 2018 guarantee (payment obligation) is not recognized under paragraph (b)(3) of this section if the facts and circumstances evidence a plan to circumvent or avoid the payment obligation. In this case, the following factors indicate a plan to circumvent or avoid A's payment obligation: (1) The partner is not subject to commercially reasonable contractual restrictions that protect the likelihood of payment, such as restrictions on transfers for inadequate consideration or equity distributions; (2) the partner is not required to provide (either at the time the payment obligation is made or periodically) commercially reasonable documentation regarding the partner's or related person's financial condition to the benefited party; (3) in the case of a guarantee or similar arrangement, the terms of the liability are the same as they would have been without the guarantee; and (4) the creditor did not receive executed documents with respect to the payment obligation from the partner or related person at the time the obligation was created. Absent the existence of other facts or circumstances that would weigh in favor of respecting A's guarantee, evidence of a plan to circumvent or avoid the obligation exists and, pursuant to paragraph (j)(3)(i) of this section, A's guarantee is not recognized under paragraph (b) of this section. As a result, LLC's liability continues to be treated as nonrecourse.

Example 2. Underfunded disregarded entity payment obligor. (i) In 2016, A forms a wholly owned domestic limited liability

company, LLC, with a contribution of $100,000. A has no liability for LLC's debts, and LLC has no enforceable right to a contribution from A. Under § 301.7701–3(b)(1)(ii) of this chapter, LLC is a treated for federal tax purposes as a disregarded entity. Also in 2016, LLC contributes $100,000 to LP, a limited partnership with a calendar year taxable year, in exchange for a general partnership interest in LP, and B and C each contributes $100,000 to LP in exchange for a limited partnership interest in LP. The partnership agreement provides that only LLC is required to restore any deficit in its capital account. On January 1, 2017, LP borrows $300,000 from a bank and uses $600,000 to purchase nondepreciable property. The $300,000 is secured by the property and is also a general obligation of LP. LP makes payments of only interest on its $300,000 debt during 2017. LP has a net taxable loss in 2017, and, under §§ 1.705–1(a) and 1.752–4(d), LP determines its partners' shares of the $300,000 debt at the end of its taxable year, December 31, 2017. As of that date, LLC holds no assets other than its interest in LP.

(ii) Because LLC is a disregarded entity, A is treated as the partner in LP for federal income tax purposes. Only LLC has an obligation to make a payment on account of the $300,000 debt if LP were to constructively liquidate as described in paragraph (b)(1) of this section. Therefore, paragraph (j)(3)(iii) of this section is applied to the LLC and not to A. LLC has no assets with which to pay if the payment obligation becomes due and payable. As such, evidence of a plan to circumvent or avoid the obligation is deemed to exist and, pursuant to paragraph (j)(3)(i) of this section, LLC's obligation to restore its deficit capital account is not recognized under paragraph (b) of this section. As a result, LP's $300,000 debt is characterized as nonrecourse under § 1.752–1(a)(2) and is allocated among A, B, and C under § 1.752–3.

(k) *Effective/applicability dates.* (1) Paragraph (h)(3) of this section applies to liabilities incurred or assumed by a partnership on or after October 11, 2006, other than liabilities incurred or assumed by a partnership pursuant to a written binding contract in effect prior to that date. The rules applicable to liabilities incurred or assumed (or pursuant to a written binding contract in effect) prior to October 11, 2006, are contained in § 1.752–2 in effect prior to October 11, 2006, (see 26 CFR part 1 revised as of April 1, 2006). The last sentence of paragraphs (a), (b)(6), and (f) of this section and paragraphs (j)(3) and (4) of this section apply to liabilities incurred or assumed by a partnership and to payment obligations imposed or undertaken with respect to a partnership liability on or after the date these regulations are published as final regulations in the **Federal Register**, other than liabilities incurred or assumed by a partnership and payment obligations imposed or undertaken pursuant to a written binding contract in effect prior to that date. Taxpayers may rely on these regulations for the period between October 5, 2016 and the date these regulations are published as final regulations in the **Federal Register**.

(2) [The text of proposed § 1.752–2(k)(2) is the same as the text of § 1.752–2T(l)(2) published elsewhere in this issue of the **Federal Register**.]

(3) [The text of proposed § 1.752–2(k)(3) is the same as the text of § 1.752–2T(l)(3) published elsewhere in this issue of the **Federal Register**.]

John Dalrymple,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2016–23390 Filed 10–4–16; 8:45 am]

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Part V

Department of the Interior

Fish and Wildlife Service
50 CFR Part 17
Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Kentucky Arrow Darter; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2015–0133; 4500030113]

RIN 1018–BB05

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Kentucky Arrow Darter

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the Kentucky arrow darter (*Etheostoma spilotum*) under the Endangered Species Act (Act). In total, approximately 398 stream kilometers (skm) (248 stream miles (smi)) fall within the boundaries of the critical habitat designation.

DATES: This rule becomes effective on November 4, 2016.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov* and *http://www.fws.gov/frankfort/.* Comments and materials we received, as well as supporting documentation we used in preparing this proposed rule, are available for public inspection at *http://www.regulations.gov* in Docket No. FWS–R4–ES–2015–0133. All of the comments, materials, and documentation that we considered in this rulemaking are available by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Kentucky Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

The coordinates, plot points, or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at *http://www.fws.gov/frankfort/,* at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2015–0133, and at the Kentucky Ecological Services Field Office) (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the Fish and Wildlife Service Web site and field office set out above, and may also be included at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Virgil Lee Andrews, Jr., Field Supervisor, U.S. Fish and Wildlife Service, Kentucky Ecological Services Field Office, 330 West Broadway, Suite 265, Frankfort, KY 40601; telephone 502–695–0468, x108; facsimile 502–695–1024. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (ESA or Act), when we determine that a species is threatened or endangered, we must designate critical habitat to the maximum extent prudent and determinable. Designations of critical habitat can only be completed by issuing a rule.

On October 8, 2015, we published in the **Federal Register** a proposed critical habitat designation for the Kentucky arrow darter (80 FR 61030). Section 4(b)(2) of the Act states that the Secretary shall designate critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat.

This document consists of a final rule to designate critical habitat for the Kentucky arrow darter. We list the Kentucky arrow darter as a threatened species elsewhere in this **Federal Register**.

Summary of the rule. The critical habitat areas we are designating in this rule constitute our current best assessment of the areas that meet the definition of critical habitat for Kentucky arrow darter. Here we are designating approximately 398 stream kilometers (skm) (248 stream miles (smi)) in Breathitt, Clay, Harlan, Jackson, Knott, Lee, Leslie, Owsley, Perry, and Wolfe Counties, Kentucky.

Economic analysis. We have prepared an economic analysis of the designation of critical habitat. In order to consider economic impacts, we have prepared an incremental effects memorandum (IEM) and screening analysis which, together with our narrative and interpretation of effects, constitute our draft economic analysis (DEA) of the proposed critical habitat designation and related factors (Abt Associates 2015). The analysis, dated September 11, 2015, was made available for public review from October 8, 2015, through December 7, 2015 (80 FR 61030). Following the close of the comment period, we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. We have incorporated the comments into this final determination.

Peer review and public comment. We sought comments from seven independent specialists to ensure that our designation was based on scientifically sound data, assumptions, and analyses. We received comments from five of the seven peer reviewers. The peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve this final rule. Information we received from peer review is incorporated into this final revised designation. We also considered all comments and information received from the public during the comment period.

Previous Federal Actions

We proposed listing the Kentucky arrow darter as threatened under the Act (80 FR 60902) and designation of critical habitat for the species (80 FR 61030) on October 8, 2015. For a complete history of all Federal actions related to the Kentucky arrow darter, please refer to the October 8, 2015, proposed listing rule (80 FR 60902).

Summary of Comments and Recommendations

We requested written comments from the public on the proposed designation of critical habitat for the Kentucky arrow darter and associated DEA during a comment period that opened with the publication of the proposed rule (80 FR 60962) on October 8, 2015, and closed on December 7, 2015. We also contacted appropriate Federal, State, and local agencies, scientific organizations, and other interested parties, and invited them to comment on the proposed rule and DEA during the comment period. We did not receive any requests for a public hearing.

During the comment period, we received 3,897 comment letters in response to the proposed critical habitat designation: 5 from peer reviewers and 3,892 from organizations or individuals. Of these, 3,882 were nonsubstantive form letters submitted by one nongovernmental organization in support of the proposed critical habitat designation. None of the comment letters objected to the proposed designation of critical habitat for the Kentucky arrow darter. All substantive information provided during the comment period has either been incorporated directly into this final determination or is addressed below.

Peer Review

In accordance with our peer review policy published on July 1, 1994 (59 FR 34270), we solicited expert opinions from seven knowledgeable individuals with scientific expertise that included familiarity with the species, the geographic region in which the species occurs, and conservation biology principles. We received responses from five of the peer reviewers.

We reviewed all comments received from the peer reviewers for substantive issues and new information regarding critical habitat for the Kentucky arrow darter. All of the peer reviewers generally concurred with our methods and conclusions and provided additional information, clarifications, and suggestions to improve the final critical habitat rule. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

Peer Reviewer Comments

(1) Comment: One peer reviewer stated that the Service should substantiate its claim in the *Physical or Biological Features* section of the preamble that the Kentucky arrow darter requires relatively clean, cool, flowing water to successfully complete its life cycle.

Our Response: We made this claim based on the best and most current scientific data available, and we have added supporting references (Thomas 2008, entire; Service 2014, entire; Hitt et al. 2016, pp. 46–52) under the *Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements* section of this final critical habitat determination. These references describe the general water quality and habitat conditions of streams occupied by Kentucky arrow darters.

(2) Comment: One peer reviewer commented that he had observed Kentucky arrow darters in streams with conductivities exceeding 980 microsiemens (µS)/cm, even though the Service concluded that Kentucky arrow darters are generally absent when conductivity levels exceed 350 µS/cm.

Our Response: We concur with the peer reviewer that Kentucky arrow darters are sometimes observed in streams with conductivity values greater than 350 µS/cm; however, we consider all of these individuals to be transients that have simply migrated from a nearby source stream (or refugium) where conductivity levels are lower. This is not common and likely occurs as dispersing individuals move through an area in search of better habitat conditions. The best and most current scientific data available to the Service indicate the species' abundance decreases sharply as conductivities exceed 261 µS/cm (Hitt et al. 2016, pp. 46–52), and the species is generally absent when conductivities exceed 350 µS/cm (Service 2012, pp. 1–4).

(3) Comment: One peer reviewer stated that the Service should include any new information on growth, feeding, reproduction, or spawning of the Kentucky arrow darter obtained from recent captive-propagation efforts by Conservation Fisheries, Inc. (CFI) in Knoxville, Tennessee.

Our Response: New observations on spawning behavior and the growth and viability of eggs and larvae were made by CFI during recent captive-propagation efforts (2010 to present). We have incorporated language summarizing these findings under the *Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring* section of this final rule.

(4) Comment: Two peer reviewers recommended that we discuss the detectability of the Kentucky arrow darter during survey efforts and how this could affect our conclusions regarding its occurrence and distribution and our delineation of critical habitat areas. The peer reviewers raised the issue of imperfect detection, which is the inability of the surveyor to detect a species (even if present) due to surveyor error, low density or rareness of the target species, or confounding variables such as environmental conditions (*e.g.,* stream flow). The peer reviewers asked the Service to explain how it accounted for imperfect detection when evaluating the species' current distribution and status.

Our Response: We recognize the importance and significance of imperfect detection when conducting surveys for rare or low-density species, and we agree with the peer reviewer that it is possible a species can go undetected within a particular survey reach when it is actually present, especially when a species is in low numbers. However, we are also required, by statute and regulation, to base our determinations solely on the basis of the best scientific data available. We are confident that the survey data available to us at the time we prepared our proposed critical habitat designation represented the best scientific and commercial data available.

These data were collected by well-trained, professional biologists, who employed similar sampling techniques (single-pass electrofishing) across the entire potential range of the Kentucky arrow darter, which included historical darter locations, random locations, and locations associated with regulatory permitting, such as mining or transportation. Nearly 245 surveys were conducted for the species between 2007 and 2015, and the results of these surveys provided an accurate depiction of the species' current range and revealed a clear trend of habitat degradation and range curtailment for the species. Kentucky arrow darters may have gone undetected in a few sampling reaches, but the species' overall decline and pattern of associated habitat degradation (*e.g.,* elevated conductivity) was clear based on our review of available survey data.

(5) Comment: One peer reviewer commented that the Service should recognize water clarity (turbidity) as a factor under PCE (primary constituent element) 4 because the Kentucky arrow darter is a visual feeder.

Our Response: We concur with the peer reviewer that the Kentucky arrow darter is a visual feeder, and water clarity (or turbidity) may influence its feeding behavior; however, we currently have no specific data demonstrating how water clarity influences the species' feeding behavior. Increased stream turbidity is a common occurrence across the species' range, especially during and immediately after high stream flow events. Even streams supporting the most robust populations of Kentucky arrow darters are subjected to periods of high turbidity and poor water clarity, yet these populations have been able to persist. Poor water clarity may be important, but we have not quantified the level at which turbidity can be detrimental to the species' feeding behavior. The Service must rely on the best and most current scientific data available when identifying the specific elements (PCEs) of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species. Without specific data or more detailed information on how water clarity influences the species, we cannot include it as an important factor under PCE 4.

(6) Comment: One peer reviewer commented on the importance of riparian buffers and stated the designation of critical habitat for the Kentucky arrow darter should be expanded to include areas outside of the stream channel.

Our Response: We concur with the peer reviewer that lands outside of designated critical habitat play an important role in the conservation of the species. Intact riparian buffers help support the PCEs and biological features by protecting against soil erosion and

instream sedimentatiom and providing shade that lowers stream temperatures. We limited our designation of critical habitat to the stream channel (areas within the ordinary high-water mark) because this is where the species occurs and these areas contain one or more of the physical or biological features essential to the species' conservation.

(7) Comment: One peer reviewer recommended that critical habitat unit 6 be expanded by moving the downstream terminus to the confluence of Middle Fork Quicksand Creek and Quicksand Creek. The peer reviewer provided new occurrence information that included observations of the Kentucky arrow darter approximately 100 m (328 ft) upstream of the mouth of Middle Fork Quicksand Creek.

Our Response: We concur with the peer reviewer that Unit 6 should be modified, and we appreciate receipt of new collection data documenting the species' occurrence in downstream reaches of Middle Fork Quicksand Creek. Based on collection data provided by the peer reviewer, we have expanded Unit 6 by moving the downstream terminus 2.7 skm (1.7 smi) to the mouth of Middle Fork Quicksand Creek. The species' total number of designated stream kilometers (miles) has been adjusted accordingly.

Public Comments

(8) Comment: One commenter questioned our assertion that activities within Robinson Forest may require special management considerations or protections to address minor siltation associated with management activities, road use, and limited off-road vehicle use. The commenter stated that off-road vehicle use is not a potential threat in Robinson Forest as no off-road vehicle paths or trails are present. The commenter also explained that 40 years of forest management and research activities in Robinson Forest are consistent with the maintenance of Kentucky arrow darter populations in both the Clemons Fork and Coles Fork watersheds. The commenter suggested that if major increases in activities occur in or around the riparian corridors, special management considerations may be required to address minor siltation associated with these activities.

Our Response: We concur with the commenter that off-road vehicle use is not a threat in Robinson Forest, and we have modified this final rule accordingly. We also agree with the commenter that management activities and general use of the Forest over the last 40 years have been consistent with the maintenance of Kentucky arrow darter populations in the Clemons Fork and Coles Fork watersheds. The robust populations of Kentucky arrow darters in both watersheds indicate that these management activities are working to protect the species and its habitats. Therefore, it is clear that these special management considerations are required to maintain the features essential to the species' conservation.

(9) Comment: One commenter stated that the economic analysis did not consider or discuss the possible economic effects on the local economy, and in particular, the coal production industry.

Our Response: In the economic screening analysis, we evaluated the ''without critical habitat'' baseline versus the ''with critical habitat'' scenario, to identify those effects expected to occur solely due to the designation of critical habitat and not from the protections that are in place due to the species being listed under the Act. This method, known as the ''incremental effects'' approach, focuses on the incremental economic impact of the regulatory change being considered. All of the proposed critical habitat units for the Kentucky arrow darter are considered to be within the geographical area occupied by the species at the time of listing. As described in our Incremental Effects Memo, we do not anticipate differences in the outcome of section 7 consultations in occupied habitat because actions that adversely affect occupied habitat would typically also jeopardize the existence of the species. Therefore, in the economic screening analysis, the Service concluded that the only incremental costs anticipated are the administrative costs due to the additional consideration of the adverse modification of critical habitat during section 7 consultations.

The Service took steps in its economic screening analysis to determine what, if any, industries would be affected by the designation of critical habitat. Any project with a Federal nexus (*e.g.,* receiving Federal funding or requiring a Federal permit) that may affect the listed species or its designated habitat requires Federal agencies to consult with the Service and could thus be potentially impacted by the regulation. The Service gathered information on the estimated number of section 7 consultations addressing the Kentucky arrow darter and its critical habitat from various Federal agencies that distribute permits or fund projects within the proposed critical habitat units. These results are present in Exhibit 3 (Summary of Estimated Number of Section 7 Consultations Addressing the Kentucky Arrow Darter and its Critical Habitat) of the Screening Memo.

One of the agencies that the Service contacted was the U.S. Army Corps of Engineers (USACE), which is responsible for distributing permits for a variety of land activities including coal mining. Any coal mining projects that may be affected by the critical habitat designation would be affected only through incremental administrative costs associated with a section 7 consultation. USACE noted that adding critical habitat to a consultation already considering the jeopardy standard does not substantially increase administrative costs (reported in Exhibit 4 of the Screening Memo: Summary of Estimated Incremental Administrative Costs of Section 7 Consultations). Therefore, any activities that require a USACE permit and consultation with the Service, such as coal mining, should experience minimal incremental economic impacts from critical habitat designation for the Kentucky arrow darter.

(10) Comment: One commenter stated that the Service did not discuss how it would regulate the protection of streams on private lands or specify whose responsibility it was to inform the public of new regulations.

Our Response: Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The Act does not authorize the Service to regulate private actions (*i.e.,* actions without a Federal nexus) on private lands or confiscate private property as a result of critical habitat designation.

The designation of critical habitat does not prevent access to any land, whether private, tribal, State, or Federal. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to

implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

The Service believes that restrictions alone are neither an effective nor a desirable means for achieving the conservation of listed species. We prefer to work collaboratively with private landowners, and strongly encourage individuals with listed species or designated critical habitat on their property to work with us to develop incentive-based measures such as Safe Harbor Agreements or Habitat Conservation Plans (HCPs), which have the potential to provide conservation measures that effect positive results for the species and its habitat while providing regulatory relief for landowners. The conservation and recovery of endangered and threatened species, and the ecosystems upon which they depend, is the ultimate objective of the Act, and the Service recognizes the vital importance of voluntary, nonregulatory conservation measures that provide incentives for landowners in achieving that objective.

(11) Comment: One commenter stated that the proposed critical habitat rule did not sufficiently discuss the threat posed by mountaintop coal mining or acknowledge the presence of hydraulic fracturing (fracking) within some critical habitat units.

Our Response: The Service did not specifically discuss mountaintop coal mining or hydraulic fracking in the proposed critical habitat rule; however, we did identify these activities indirectly in the *Special Management Considerations or Protection* section of the proposed rule. In that section and in several unit descriptions, we identified resource extraction (*e.g.,* surface coal mining, logging, natural gas and oil exploration) as a threat that may affect one or more of the physical or biological features essential to the Kentucky arrow darter and may require special management considerations or protection. Potential threats associated with surface coal mining and natural gas and oil exploration were discussed thoroughly in the species' proposed listing rule (80 FR 60962, October 8, 2015).

Summary of Changes From Proposed Rule

We have considered all comments and information received during the open comment period for the proposed designation of critical habitat for the Kentucky arrow darter. In the Critical Habitat section of this document, we provide new or revised information and references on feeding behavior, the species' water quality requirements (*e.g.,* elevated conductivity, temperature), spawning behavior, development and viability of eggs, and special management considerations or protection for Units 3 and 4. Under the Final Critical Habitat Designation section, we expanded Unit 6 (Middle Fork Quicksand Creek) by extending its downstream terminus 2.7 skm (1.7 smi) to the mouth of Middle Fork Quicksand Creek. The total number of designated stream kilometers (miles) were adjusted accordingly.

Based on further review and an effort to clarify our descriptions of the Primary Constituent Elements (PCEs), we modified PCEs 1 and 4 by adding additional descriptive information.

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) essential to the conservation of the species, and

(b) which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species but that was not occupied at the time of listing may be essential for the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation

limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, or experts' opinions or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the listed species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. If we list the Kentucky arrow darter, these protections and conservation tools would continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, HCPs, or other species conservation planning efforts if new information available at the time of these planning efforts calls for a different outcome.

On February 11, 2016, we published a final rule in the **Federal Register** (81 FR 7413) to amend our regulations concerning the procedures and criteria we use to designate and revise critical habitat. That rule became effective on March 14, 2016, but, as stated in that rule, the amendments it sets forth apply to ''rules for which a proposed rule was published after March 14, 2016.'' We published our proposed critical habitat designation for the Kentucky arrow darter on October 8, 2015 (80 FR 61030); therefore, the amendments set forth in the February 11, 2016, final rule at 81 FR 7413 do not apply to this final designation of critical habitat for the Kentucky arrow darter.

Physical or Biological Features

In accordance with section 3(5)(A)(i) of the Act and regulations in title 50 of the Code of Federal Regulations at 50 CFR 424.12(b), in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of a species.

We derive the specific physical or biological features essential for the Kentucky arrow darter from studies of its habitat, ecology, and life history as described below. Additional information can be found in the final listing rule published elsewhere in this **Federal Register**. To identify the physical or biological features essential to the conservation of the species, we have relied on current conditions at locations where the species survives, the limited information available on the species and its closest relatives, and factors associated with the decline of other fishes that occupy similar habitats in the Southeast. We have determined that the following physical or biological features are essential to the Kentucky arrow darter.

Space for Individual and Population Growth and for Normal Behavior

Little is known about the specific space requirements of the Kentucky arrow darter; however, the species is typically observed in moderate- to high-gradient, first- to third-order geomorphically stable streams (Lotrich 1973, p. 382; Thomas 2008, p. 6). Geomorphically stable streams transport sediment while maintaining their horizontal and vertical dimensions (width to depth ratio and cross-sectional area), pattern (sinuosity), and longitudinal profile (riffles, runs, and pools), thereby conserving the physical characteristics of the stream, including bottom features such as riffles, runs, and pools and the transition zones between these features (Rosgen 1996, pp. 1–3). The protection and maintenance of these habitat features accommodate spawning, rearing, growth, migration, and other normal behaviors of the species.

During most of the year (late spring through winter), Kentucky arrow darters occupy shallow pools between 10–45 centimeters (cm) (4–18 inches (in)) or transitional areas between riffles and pools (runs and glides) with cobble and boulder substrates that are interspersed with clean (relatively silt free) sand and gravel (Lotrich 1973, p. 382; Thomas 2008, p. 6). Most individuals are encountered near some type of instream cover: Large cobble, boulders, bedrock ledges, or woody debris piles (Thomas 2008, p. 6). During the spawning period (April through June), Kentucky arrow darters utilize riffle habitats with relatively silt free, gravel, cobble, and sand substrates (Kuehne and Barbour 1983, p. 71). Streams inhabitated by Kentucky arrow darters tend to be clear and cool (generally less than or equal to 24 degrees Celsius (°C) (75 degrees Fahrenheit (°F))), with shaded corridors and naturally vegetated, intact riparian zones (Lotrich 1973, p. 378; Thomas 2008, pp. 7, 23).

Limited information exists about upstream or downstream movements of Kentucky arrow darters; however, there is evidence that the species can utilize

relatively long stream reaches. Observations by Lowe (1979, pp. 26–27) of potential dispersal behavior for a related species (the Cumberland arrow darter (*Etheostoma sagitta*)) in Tennessee, preliminary findings from a movement study at Eastern Kentucky University (EKU), and recent survey results by Kentucky Department of Fish and Wildlife Resources (KDFWR) suggest that Kentucky arrow darters can utilize stream reaches of over 4 skm (2.5 smi) and disperse to other tributaries (Baxter 2015,entire; Thomas 2015, pers. comm.) (see ''Habitat and Life History'' section of our final listing rule published elsewhere in this **Federal Register**).

The current range of the Kentucky arrow darter has been reduced from 74 historically occupied streams to 47 currently occupied streams due to destruction, modification, and fragmentation of habitat. Fragmentation of the species' habitat has subjected these small populations to genetic isolation, reduced space for rearing and reproduction, reduced adaptive capabilities, and an increased likelihood of local extinctions (Burkhead *et al.* 1997, pp. 397–399; Hallerman 2003, pp. 363–364). Genetic variation and diversity within a species are essential to recovery, adaptation to environmental change, and long-term viability (capability to live, reproduce, and develop) (Noss and Cooperrider 1994, pp. 282–297; Harris 1984, pp. 93–107; Fluker *et al.* 2007, p. 2). The long-term viability of a species is founded on the conservation of numerous local populations throughout its geographic range (Harris 1984, pp. 93–104). Connectivity of these habitats is essential in preventing further fragmentation and isolation of Kentucky arrow darter populations and promoting species movement and genetic flow between populations.

Therefore, based on the information above, we identify connected riffle-pool complexes (with alternating runs and glides) of geomorphically stable, first- to third-order streams to be physical or biological features essential to the conservation of the Kentucky arrow darter. The maintenance of these habitats is essential in accommodating feeding, breeding, growth, and other normal behaviors of the Kentucky arrow darter and in promoting gene flow within the species.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Feeding habits of the Kentucky arrow darter were documented by Lotrich (1973, pp. 380–382) in the Clemons Fork system, Breathitt County, Kentucky. The primary prey item was mayflies (Order Ephemeroptera), which comprised 77 percent of identifiable food items (420 of 542 items) in 57 Kentucky arrow darter stomachs (Lotrich 1973, p. 381). Large Kentucky arrow darters (greater than 70 milimeters (mm) (2.8 in) total length (TL)) utilized small crayfishes, as 7 of 8 stomachs examined by Lotrich (1973, p. 381) contained crayfishes ranging in size from 11 to 24 mm (0.4 to 0.9 in). Lotrich (1973, p. 381) considered this to be noteworthy because stomachs of small Kentucky arrow darters (less than 70 mm (2.8 in) TL) and stomachs of other darter species did not contain crayfishes. Other food items reported by Lotrich (1973, p. 381) and Etnier and Starnes (1993, p. 523) included larval blackflies (family Simuliidae) and midges (Chironomidae), with lesser amounts of caddisfly larvae, stonefly nymphs, and beetle larvae. Etnier and Starnes (1993, p. 523) reported that juvenile arrow darters feed on microcrustaceans and dipteran larvae.

Observations by Lowe (1979, pp. 32–34) for the closely related Cumberland arrow darter indicated that feeding strategies typically consisted of continuous prey searches, with little dependence on drift items. The general pattern observed by Lowe (1979, p. 34) was movement by adults to mid-stream, followed by active searches that included probing underneath and around rocks and chasing of prey. When spotted, prey items were picked off rocks, and pelvic and pectoral fins were often used to aid in climbing over rocks.

Like most other darters, the Kentucky arrow darter depends on perennial stream flows that create suitable habitat conditions needed for successful completion of its life cycle. An ample supply of flowing water provides a means of transporting nutrients and food items, moderating water temperatures and dissolved oxygen levels, removing fine sediments that could damage spawning or foraging habitats, and diluting nonpoint-source pollutants. Water withdrawals do not represent a significant threat to the species, but the species is faced with occasional low-flow conditions that occur during periods of drought.

Water quality is also important to the persistence of the Kentucky arrow darter. The species requires relatively clean (unpolluted), cool, flowing water to successfully complete its life cycle (Thomas 2008, entire; Service 2014, entire). Specific water quality requirements, such as temperature, dissolved oxygen, pH (a measure of the acidity or alkalinity of water), and conductivity (a measure of electrical conductance in the water column that increases as the concentration of dissolved solids increases), that define suitable habitat conditions for the Kentucky arrow darter have not been determined; however, the species is sensitive to elevated conductivity and is generally absent when levels exceed 350 microsiemens (µS)/cm (Service 2012, pp. 1–4; Hitt 2014, pp. 5–7, 11–13; Hitt *et al.* 2016, pp. 46–52). Kentucky arrow darters are sometimes observed in streams with conductivity values greater than 350 µS/cm; however, we consider all of these individuals to be transients that have simply migrated from a nearby source stream (or refugium) where conductivity levels are lower. This is not common and likely occurs as dispersing individuals move through an area in search of better habitat conditions. The best and most current scientific data available to the Service indicate the species' abundance decreases sharply as conductivities exceed 261 µS/cm (Hitt *et al.* 2016, pp. 46–52).

In general, optimal water quality conditions for fishes and other aquatic organisms are characterized by (1) moderate stream temperatures (generally less than or equal to 24 °C (75 °F) for the Kentucky arrow darter) (Thomas 2008, entire); (2) high dissolved-oxygen concentrations (generally greater than 6.0 mg/L); (3) moderate pH (generally 6.0–8.5), and (4) low levels of pollutants, such as inorganic contaminants (*e.g.,* sulfate, iron, manganese, selenium, and cadmium); organic contaminants such as human and animal waste products; pesticides and herbicides; nitrogen, potassium, and phosphorus fertilizers; and petroleum distillates.

Therefore, based on the information above, we identify aquatic macroinvertebrate prey items, which are typically dominated by larval mayflies but also include larval black flies, midges, caddisflies, stoneflies, beetles, and small crayfishes; permanent surface flows, as measured during average rainfall years; and adequate water quality to be physical or biological features essential to the conservaton of the Kentucky arrow darter.

Cover or Shelter

Kentucky arrow darters depend on specific habitats and bottom substrates for normal life processes such as spawning, rearing, resting, and foraging. As described above, the species typically inhabits shallow pools, riffles, runs, and glides dominated by cobble and boulder substrates and interspersed with clean sand and gravel and low

levels of siltation (Thomas 2008, p. 6; Service unpublished data). Kentucky arrow darters are typically observed near some type of cover (boulders, rock ledges, large cobble, or woody debris piles) and at depths ranging from 10 to 91 cm (4 to 36 in) (Thomas 2008, p. 6; Service unpublished data). Sedimentation (siltation) has been listed repeatedly as a threat to the Kentucky arrow darter (Kuehne and Barbour 1983, p. 71; Etnier and Starnes 1993, p. 523; Thomas 2008, pp. 3–7), and the species has suffered population declines and extirpations where sedimentation has been severe (Etnier and Starnes 1993, p. 524; Thomas 2008, p. 7; Service 2012, p. 1). Substrates with low levels of siltation are essential in accommodating the species' feeding, breeding, growth, and other normal behaviors. The term ''low levels of siltation'' is defined for the purpose of this rule as silt or fine sand within interstitial spaces of substrates in amounts low enough to have minimal impact (*i.e.,* that would have no appreciable reduction in spawning, breeding, growth, and feeding) to the species. Increased levels of siltation (interstitial spaces of substrates filled with large amounts of fine sediment) would reduce the species' ability to feed (*e.g.,* reduced abundance of prey items) and reproduce (*e.g.,* lack of appropriate spawning sites, smothering of eggs).

Therefore, based on the information above, we identify stable, shallow pools, runs, and glides with boulder and cobble substrates, relatively low levels of siltation, and ample cover (*e.g.,* slab rocks, bedrock ledges, woody debris piles) to be physical or biological features essential to the conservation of the Kentucky arrow darter.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

Little information is available on the reproductive biology and early life history of the Kentucky arrow darter; however, general details were provided by Kuehne and Barbour (1983, p. 71), and more specific information can be elucidated from research conducted by Bailey (1948, pp. 82–84) and Lowe (1979, pp. 44–50), both of whom studied the closely related Cumberland arrow darter. Prior to spawning, male Kentucky arrow darters establish territories over riffles from March to May, when they are quite conspicuous in water 5 to 15 cm (2 to 6 in) deep. Males fan out a depression in the substrate (typically a mixtue of cobble, gravel, and sand) and defend these sites vigorously.

The spawning period extends from April to June, but peak activity occurs when water temperatures reach 13 °C (55 °F), typically in mid-April. As mentioned above, substrates with low levels of siltation are essential in accommodating the species' normal behaviors, including breeding, reproduction, and rearing. The species has suffered population declines and extirpations where sedimentation has been severe (Etnier and Starnes 1993, p. 524; Thomas 2008, p. 7; Service 2012, p. 1).

Juvenile arrow darters can be found throughout the channel but are often observed in shallow water along stream margins near root mats, rock ledges, or some other cover. As stream flow lessens and riffles begin to shrink, most arrow darters move into pools and tend to remain there even when summer and autumn rains restore stream flow (Kuehne and Barbour 1983, p. 71).

Therefore, based on the information above, we identify first- to third-order streams containing moderately flowing riffle, pool, run, and glide habitats with gravel and cobble substrates, root mats along the bank, undercut banks, and low levels of siltation to be physical or biological features essential to the conservation of the Kentucky arrow darter.

Habitats Protected From Disturbance or Representative of the Historic, Geographical, and Ecological Distributions of the Species

As described above, stable substrates with low levels of siltation, adequate water quality, and healthy aquatic insect populations are habitat features essential to the Kentucky arrow darter. Historically, first- to third-order streams across the species' range would have contained these habitat features.

All current and historical capture locations of the Kentucky arrow darter are from first- to third-order order, warmwater streams within the upper Kentucky River drainage (Gilbert 1887, pp. 53–54; Woolman 1892, pp. 275–281; Kuehne and Bailey 1961, pp. 3–4; Kuehne 1962, pp. 608–609; Thomas 2008, entire; Service 2012, entire). The species was historically distributed in at least six sub-basins of the Kentucky River, but it is now extirpated from at least 36 historical streams within those sub-basins. Most remaining populations are highly fragmented and restricted to short stream reaches. Given the species' reduced range and fragmented distribution, it is vulnerable to extirpation from intentional or accidental toxic chemical spills, habitat modification, progressive degradation from runoff (nonpoint-source pollutants), natural catastrophic changes to their habitat (*e.g.,* flood scour, drought), and other stochastic disturbances, such as loss of genetic variation and inbreeding (Soulé 1980, pp. 157–158; Hunter 2002, pp. 97–101; Allendorf and Luikart 2007, pp. 117–146). In addition, the level of isolation seen in this species makes natural repopulation following localized extirpations virtually impossible without human intervention. Greater connectivity within extant populations is needed to provide some protection against these threats and would be more representative of the historic, geographical distribution of the species.

Based on the biological information and needs discussed above, we identify stable, undisturbed stream beds and banks, and ability for populations to be distributed in multiple first- to third-order streams throughout the upper Kentucky River drainage that are protected from disturbance or are representative of the historic, geographical, and ecological distributions of the species to be physical or biological features essential to the conservation of the Kentucky arrow darter.

Primary Constituent Elements for the Kentucky Arrow Darter

According to 50 CFR 424.12(b), we are required to identify the physical or biological features essential to the conservation of the Kentucky arrow darter in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to the Kentucky arrow darter are:

(1) Primary Constituent Element 1—Riffle-pool complexes and transitional areas (glides and runs) of geomorphically stable, first- to third-order streams of the upper Kentucky River drainage with connectivity between spawning, foraging, and resting sites to promote gene flow throughout the species' range.

(2) Primary Constituent Element 2—Stable bottom substrates composed of gravel, cobble, boulders, bedrock ledges, and woody debris piles with low levels of siltation.

(3) Primary Constituent Element 3—An instream flow regime (magnitude, frequency, duration, and seasonality of

discharge over time) sufficient to provide permanent surface flows, as measured during years with average rainfall, and to maintain benthic habitats utilized by the species.

(4) Primary Constituent Element 4—Adequate water quality characterized by seasonally moderate stream temperatures (generally ≤24 °C or 75 °F), high dissolved oxygen concentrations (generally ≥6.0 mg/L), moderate pH (generally 6.0 to 8.5), low stream conductivity (species' abundance decreases sharply as conductivities exceed 261 µS/cm and species is typically absent above 350 µS)/cm (Service 2012, pp. 1–4; Hitt *et al.* 2016, pp. 46–52)), and low levels of pollutants. Adequate water quality is defined for the purpose of this rule as the quality necessary for normal behavior, growth, and viability of all life stages of the Kentucky arrow darter.

(5) Primary Constituent Element 5—A prey base of aquatic macroinvertebrates, including mayfly nymphs, midge larvae, blackfly larvae, caddisfly larvae, stonefly nymphs, and small crayfishes.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing, and which contain features which are essential to the conservation of the species, may require special management considerations or protection. The 38 units we are designating as critical habitat for the Kentucky arrow darter will require some level of management to address the current and future threats to the physical or biological features of the species. Due to their location on the Daniel Boone National Forest (DBNF), at least a portion of 20 critical habitat units (Units 15–16, 18–32, and 36–38) are being managed and protected under DBNF's land and resource management plan (LRMP) (United States Forest Service (USFS) 2004, pp. 1–14), and additional conservation measures will be provided upon completion of a candidate conservation agreement (CCA) between DBNF and the Service (see Available Conservation Measures section of the final listing rule published elsewhere in this **Federal Register**).

Two of the 38 critical habitat units (Units 3 and 4) are located wholly (Unit 3) or partially (Unit 4) on State property, specifically Robinson Forest, a 4,047-hectare (10,000-acre) research, education, and extension forest in Breathitt and Knott Counties owned by the University of Kentucky (UK) and managed by the Department of Forestry in the College of Agriculture, Food, and Environment. Management guidelines approved by UK's Board of Trustees in 2004 provide general land use allocations, sustainable allowances for active research and demonstration projects involving overstory manipulation, allocations of net revenues from research and demonstration activities, and management and oversight responsibilities (Stringer 2015, pers. comm.). Based on our knowledge of Kentucky arrow darter populations in Clemons Fork and Coles Fork, there is adequate evidence indicating that forestry and hydrology research and management activities, including road use, over the last 40 years at Robinson Forest are consistent with the maintenance of these populations in both watersheds. The robust poulations in both watersheds indicate that these management activities are working to protect the species and its habitats. Therefore, it is clear that these special management considerations are required to maintain the features essential to the species' conservation.

At least portions of 32 critical habitat units are located on private property (16 are located entirely on private property) and are not presently under the protection provided by DBNF's LRMP or the CCA developed by the DBNF and the Service. Activities in or adjacent to these areas of critical habitat may affect one or more of the physical or biological features essential to the Kentucky arrow darter. For example, features in these critical habitat units may require special management due to threats associated with resource extraction (coal surface mining, logging, natural gas and oil exploration), agricultural runoff (livestock, row crops), lack of adequate riparian buffers, construction and maintenance of State and county roads, land development, off-road vehicle use, and other nonpoint-source pollution. These threats are in addition to adverse effects of drought, floods, or other natural phenomena. Other activities that may affect physical and biological features in the critical habitat units include those listed in the Effects of Critical Habitat Designation section, below.

Management activities that could ameliorate these threats include, but are not limited to, the use of best management practices (BMPs) designed to reduce sedimentation, erosion, and stream bank destruction; development of alternatives that avoid and minimize stream bed disturbances; an increase of stormwater management and reduction of stormwater flows into stream systems; preservation of headwater springs and streams; regulation of off-road vehicle use; and reduction of other watershed and floodplain disturbances that release sediments, pollutants, or nutrients into the water.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. In accordance with the Act and our implementing regulations at 50 CFR 424.12(b) we review available information pertaining to the habitat requirements of the species and identify occupied areas at the time of listing that contain the features essential to the conservation of the species. The following discussion describes how we identified and delineated those occupied areas.

We began our analysis by considering the historical and current ranges of the Kentucky arrow darter. We used various sources including published literature, museum collection databases, surveys, reports, and collection records obtained from the KDFWR, Kentucky State Nature Preserves Commission, Kentucky Division of Water, and our own files (see ''Historical Range and Distribution'' and ''Current Range and Distribution'' sections of our final listing rule published elsewhere in this **Federal Register**). Within these ranges, we then identified the specific areas that are occupied by the species and that contain one or more of the physical or biological features essential to the species' conservation. We defined occupied habitat as those stream reaches known to be currently occupied by the species.

To identify these currently occupied stream reaches, we used post-2006 survey data that provided information on distribution and habitat condition (Thomas 2008, entire; Service 2012, entire; Service unpublished data). Generally, if the species was collected or observed in a particular stream during our recent rangewide surveys (2007–2014), the stream reach was considered to be occupied. A few transient individuals were observed in streams with unsuitable habitat conditions (*e.g.,* elevated conductivity), but these streams were not considered to be occupied due to the poor habitat conditions and the high likelihood that these individuals had simply migrated from a nearby source stream. To identify the unoccupied stream reaches, we evaluated historical data (late 1880s–2006) and the results of our recent surveys (2007–2014) (Thomas 2008, entire; Service 2012, entire; Service unpublished data). If the species was

known to occur in a stream prior to 2007, but was not observed during our recent rangewide survey, the stream reach was considered to be unoccupied.

Based on our review, we made a determination not to designate any unoccupied stream reaches as critical habitat. We concluded that the designated units occupied by the species at the time of listing are representative of the species' historical range and include both the core population areas of Kentucky arrow darters, as well as remaining peripheral population areas. We further determined that there was sufficient area for the conservation of the species within the occupied areas. Therefore, we are not designating any areas outside the geographic area occupied by the species.

Following the identification of occupied stream reaches, the next step was to delineate the probable upstream and downstream extent of the species' distribution within those reaches. We used U.S. Geological Survey (USGS) 1:100,000 digital stream maps to delineate these boundaries of the critical habitat units according to the criteria explained below. We set the upstream and downstream limits of each critical habitat unit by identifying landmarks (bridges, confluences, and road crossings), and in some instances latitude and longitude coordinates and section lines, above and below the upper and lowermost reported locations of the Kentucky arrow darter in each stream reach to ensure incorporation of all potential sites of occurrence.

We considered stream order and watershed size to select the upstream terminus. The species can occur in small, first-order reaches (Thomas 2008, entire; Service 2012, entire), but recent surveys have also demonstrated that the species is typically absent in these reaches once the watershed size (the upstream basin or catchment) falls below 1.3 square kilometers (km^2) (0.5 square miles (mi^2)). Consequently, we searched for this point within the watershed and selected the nearest tributary confluence as the upstream terminus. When a tributary was not available, a road-crossing (bridge or ford) or dam was used to mark the boundary.

For the downstream boundary of a unit, we typically selected a stream confluence of a named tributary below the downstream-most occurrence record and within a third-order or smaller stream reach. In the unit descriptions, distances between landmarks used to identify the upstream or downstream extent of a stream segment are given in stream kilometers and equivalent miles, as measured tracing the course of the stream, not straight-line distance. The critical habitat areas were then mapped using ArcGIS software to produce the critical habitat unit maps.

Because fishes are naturally restricted by certain physical conditions within a stream reach (*i.e.,* flow, substrate, cover), they may be unevenly distributed within these habitat units. Uncertainty on some downstream distributional limits for some populations (*e.g.,* Frozen Creek) may have resulted in small areas of occupied habitat not being included in, or areas of unoccupied habitat included in, the designation. We recognize that both historical and recent collection records upon which we relied are incomplete, and that there may be stream segments or small tributaries not included in this designation that harbor small, limited populations of the species considered in this designation, or that others may become suitable in the future. The omission of such areas does not diminish their potential individual or cumulative importance to the conservation of the Kentucky arrow darter. The habitat areas contained within the designated units described below constitute our best evaluation of areas needed for the conservation of this species at this time.

The critical habitat designation is defined by the map or maps, as modified by any accompanying regulatory text, presented at the end of this document in the Regulation Promulgation section. We include more detailed information on the boundaries of the critical habitat designation in the individual unit descriptions below. We will make the coordinates, plot points, or both on which each map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R4–ES–2015–0133, on our Internet site at *http://www.fws.gov/frankfort/,* and at the field office responsible for the designation (see **FOR FURTHER INFORMATION CONTACT**, above).

The areas designated as critical habitat include only stream channels within the ordinary high-water mark and do not contain any developed areas or structures. As defined at 33 CFR 329.11, the ordinary high-water mark on nontidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics, such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; or other appropriate means that consider the characteristics of the surrounding areas. For each stream reach within a critical habitat unit, the upstream and downstream boundaries are described generally below.

When determining critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such areas usually lack physical and biological features essential to the conservation of the species. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas. Any such areas inadvertently left inside critical habitat boundaries shown on the maps of this final rule have been excluded by text and are not designated as critical habitat. Therefore, a Federal action involving these areas would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat. Further, the designation of critical habitat does not imply that lands outside of critical habitat do not play an important role in the conservation of the species.

Final Critical Habitat Designation

We are designating approximately 398 skm (248 smi) in 38 units in Kentucky as critical habitat in Kentucky for the Kentucky arrow darter. These stream reaches comprise the entire currently known range of the species (and all extant populations). All units are considered to be occupied at the time of listing and contain the physical or biological features in the appropriate quantity and spatial arrangement essential to the conservation of this species and support multiple life-history processes for the Kentucky arrow darter. The 38 areas we designate as critical habitat are listed in table 1 below.

Critical habitat units are either in private, Federal (DBNF), or State (UK) ownership. In Kentucky, adjacent landowners also own the land under streams (*e.g.,* the stream channel or bottom), but the water is under State jurisdiction. Portions of the public-to-private boundary for Units 16, 18, 19, 21, 22, 24, 32, and 36 were located along the mid-line of the stream channel; lengths for these segments were divided equally between public and private ownership. Ownership and lengths of Kentucky arrow darter critical habitat units are provided in table 1.

TABLE 1—LOCATION, OWNERSHIP, AND LENGTHS FOR KENTUCKY ARROW DARTER CRITICAL HABITAT UNITS

[In stream kilometers (skm) and stream miles (smi)]

Unit	Stream	County	Ownership—skm (smi)			Total length skm (smi)
			Private	Federal	State	
1	Buckhorn Creek and Prince Fork	Knott	1.1 (0.7)	0	0	1.1 (0.7)
2	Eli Fork	Knott	1.0 (0.6)	0	0	1.0 (0.6)
3	Coles Fork and Snag Ridge Fork	Breathitt, Knott	0	0	11.0 (6.8)	11.0 (6.8)
4	Clemons Fork	Breathitt	0.1 (0.1)	0	6.9 (4.3)	7.0 (4.4)
5	Laurel Fork Quicksand Creek and Tributaries.	Knott	19.8 (12.4)	0	0	19.8 (12.4)
6	Middle Fork Quicksand Creek and Tributaries.	Knott	25.2 (15.6)	0	0	25.2 (15.6)
7	Spring Fork Quicksand Creek	Breathitt	2.2 (1.4)	0	0	2.2 (1.4)
8	Hunting Creek and Tributaries	Breathitt	15.6 (9.7)	0	0	15.6 (9.7)
9	Frozen Creek and Tributaries	Breathitt	26.4 (16.4)	0	0	26.4 (16.4)
10	Holly Creek and Tributaries	Wolfe	18.3 (11.5)	0	0	18.3 (11.5)
11	Little Fork	Lee, Wolfe	3.8 (2.3)	0	0	3.8 (2.3)
12	Walker Creek and Tributaries	Lee, Wolfe	25.0 (15.5)	0	0	25.0 (15.5)
13	Hell Creek and Tributaries	Lee	12.0 (7.4)	0	0	12.0 (7.4)
14	Big Laurel Creek	Harlan	9.1 (5.7)	0	0	9.1 (5.7)
15	Laurel Creek	Leslie	0.7 (0.5)	3.4 (2.1)	0	4.1 (2.6)
16	Hell For Certain Creek and Tributaries.	Leslie	11.4 (7.0)	4.4 (2.8)	0	15.8 (9.8)
17	Squabble Creek	Perry	12.0 (7.5)	0	0	12.0 (7.5)
18	Blue Hole Creek and Left Fork Blue Hole Creek.	Clay	0	5.7 (3.5)	0	5.7 (3.5)
19	Upper Bear Creek and Tributaries	Clay	0.2 (0.1)	6.6 (4.2)	0	6.8 (4.3)
20	Katies Creek	Clay	1.7 (1.0)	4.0 (2.5)	0	5.7 (3.5)
21	Spring Creek and Little Spring Creek	Clay	3.6 (2.2)	5.6 (3.5)	0	9.2 (5.7)
22	Bowen Creek and Tributaries	Leslie	2.0 (1.2)	11.6 (7.3)	0	13.6 (8.5)
23	Elisha Creek and Tributaries	Leslie	3.0 (1.9)	6.6 (4.0)	0	9.6 (5.9)
24	Gilberts Big Creek	Clay, Leslie	2.0 (1.2)	5.2 (3.3)	0	7.2 (4.5)
25	Sugar Creek	Clay, Leslie	1.1 (0.7)	6.1 (3.8)	0	7.2 (4.5)
26	Big Double Creek and Tributaries	Clay	0	10.3 (6.4)	0	10.3 (6.4)
27	Little Double Creek	Clay	0	3.4 (2.1)	0	3.4 (2.1)
28	Jacks Creek	Clay	5.4 (3.4)	0.5 (0.3)	0	5.9 (3.7)
29	Long Fork	Clay	0	2.2 (1.4)	0	2.2 (1.4)
30	Horse Creek	Clay	3.0 (1.9)	2.0 (1.2)	0	5.0 (3.1)
31	Bullskin Creek	Clay, Leslie	21.3 (13.3)	0.4 (0.2)	0	21.7 (13.5)
32	Buffalo Creek and Tributaries	Owsley	23.2 (14.5)	14.9 (9.3)	0	38.1 (23.8)
33	Lower Buffalo Creek	Lee, Owsley	7.3 (4.6)	0	0	7.3 (4.6)
34	Silver Creek	Lee	6.2 (3.9)	0	0	6.2 (3.9)
35	Travis Creek	Jackson	4.1 (2.5)	0	0	4.1 (2.5)
36	Wild Dog Creek	Jackson, Owsley	4.3 (2.7)	3.8 (2.4)	0	8.1 (5.1)
37	Granny Dismal Creek	Lee, Owsley	4.4 (2.7)	2.5 (1.6)	0	6.9 (4.3)
38	Rockbridge Fork	Wolfe	0	4.5 (2.8)	0	4.5 (2.8)
Total			276.5 (172.0)	103.7 (64.7)	17.9 (11.1)	398.1 (247.8)

We present brief descriptions of all units below. Each unit contains all the physical or biological features and PCEs identified above that are essential to the conservation of the species. In general, stream channels within these units are stable, with ample pool, glide, riffle, and run habitats (PCE 1) that maintain surface flows year round (PCE 3) and contain gravel, cobble, and boulder substrates with low levels of siltation (PCE 2). Such characteristics are necessary for reproductive, foraging, and sheltering requirements of Kentucky arrow darters. We consider water quality in each of these units to be characterized by moderate temperatures, relatively high dissolved oxygen concentrations, moderate pH, and low levels of pollutants (PCE 4). These conditions support abundant populations of aquatic macroinvertebrates that serve as prey items for Kentucky arrow darters (PCE 5).

More precise definitions are provided in the Regulation Promulgation section at the end of this final rule.

Unit 1: Buckhorn Creek and Prince Fork, Knott County, Kentucky

Unit 1 is located off Buckhorn Road in the headwaters of the Buckhorn Creek drainage and between Kentucky Highway 1098 (KY 1098) and KY 1087. It includes 0.7 skm (0.4 smi) of Prince Fork from its confluence with Mart Branch downstream to its confluence with Buckhorn Creek and 0.4 skm (0.3 smi) of Buckhorn Creek from its confluence with Prince Fork downstream to its confluence with Emory Branch. Live Kentucky arrow darters have been collected from Unit 1 in Prince Fork and just upstream of the confluence of Buckhorn Creek and Emory Branch (ATS 2011, p. 6; Service 2012, pp. 1–4). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements. The watershed surrounding Unit 1 is dominated by forest and remains relatively undisturbed; however, downstream reaches of Buckhorn Creek have been degraded by siltation and nonpoint-source pollutants associated with

surface coal mining, oil and gas exploration, logging, and runoff from unpaved roads (Service 2012, pp. 1–4).

Within Unit 1, the physical and biological features may require special management considerations or protection to address potential adverse effects (*e.g.,* water pollution, siltation) associated with surface coal mining, logging (timber harvests on private land), natural gas and oil exploration, construction and maintenance of county roads (Buckhorn Road), the lack of adequate riparian buffers (near the confluence with Emory Branch), and off-road vehicle use. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species (adds population redundancy), and provides opportunity for population growth.

Unit 2: Eli Fork, Knott County, Kentucky

This unit is located in the headwaters of the Buckhorn Creek drainage between KY 1098 and KY 1087. It includes 1.0 skm (0.6 smi) of Eli Fork from its confluence with Stonecoal Branch downstream to its confluence with Boughcamp Branch (of Buckhorn Creek). Live Kentucky arrow darters have been collected from Unit 2 near the confluence of Eli Fork and Boughcamp Branch (ATS 2011, p. 6). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements. The watershed surrounding Unit 2 is dominated by forest and remains relatively undisturbed; however, its receiving stream, Boughcamp Branch, and adjacent watersheds have been degraded by siltation and nonpoint-source pollutants associated with surface coal mining and logging (Service 2012, pp. 1–4).

Within Unit 2, the physical and biological features may require special management considerations or protection to address potential adverse effects (*e.g.,* water pollution, siltation) associated with surface coal mining, logging, natural gas and oil exploration, off-road vehicle use, and construction and maintenance of county roads. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species (adds population redundancy), and provides opportunity for population growth.

Unit 3: Coles Fork and Snag Ridge Fork, Breathitt and Knott Counties, Kentucky

This unit is located entirely within Robinson Forest, a 4,047-hectare (10,000-acre) research, education, and extension forest in Breathitt and Knott Counties owned by UK and managed by the Department of Forestry in the College of Agriculture, Food, and Environment. Unit 3 includes 2.1 skm (1.3 smi) of Snag Ridge Fork from its headwaters downstream to its confluence with Coles Fork and 8.9 skm (5.5 smi) of Coles Fork from its confluence with Saddle Branch downstream to its confluence with Buckhorn Creek. Live Kentucky arrow darters have been observed throughout Unit 3 (Thomas 2008, p. 5; Service 2012, pp. 1–4), and Coles Fork continues to be one of the species' best remaining habitats. This unit is located entirely on lands owned by UK. The watershed surrounding Unit 3 is intact and densely forested, water quality conditions are excellent (very close to baseline levels), and instream habitats are ideal for the species.

Within Unit 3, the physical and biological features may require special management considerations or protection to address siltation associated with timber management (on Robinson Forest) and stormwater runoff from unpaved roads; however, we consider these threats to be minor as management activities and general use of Robinson Forest over the last 40 years have been consistent with the maintenance of Kentucky arrow darter populations in the Clemons Fork watershed. These minor threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, represents a stronghold for the species (core population), and likely contributes to range expansion (source population).

Unit 4: Clemons Fork, Breathitt County, Kentucky

Unit 4 is located along Clemons Fork Road in southeastern Breathitt County. This unit includes 7.0 skm (4.4 smi) of Clemons Fork from its confluence with Maple Hollow downstream to its confluence with Buckhorn Creek. Live Kentucky arrow darters have been observed throughout Unit 4 (Lotrich 1973, p. 380; Thomas 2008, p. 5; Service 2012, pp. 1–4). A portion of this unit near the mouth of Clemons Fork is privately owned (0.1 skm (0.1 smi)), but the majority is located on lands owned by UK (see description for Unit 3). The watershed surrounding Unit 4 is intact and densely forested, water quality conditions are excellent (very close to baseline levels), and instream habitats are ideal for the species. Clemons Fork continues to be one of the species' best remaining habitats.

Within Unit 4, the physical and biological features may require special management considerations or protection to address siltation associated with timber management (on Robinson Forest) and stormwater runoff from unpaved roads; however, we consider these threats to be minor as management activities and general use of Robinson Forest over the last 40 years have been consistent with the maintenance of Kentucky arrow darter populations in the Clemons Fork watershed. These minor threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, represents a stronghold for the species (core population), and likely contributes to range expansion (source population).

Unit 5: Laurel Fork Quicksand Creek and Tributaries, Knott County, Kentucky

Unit 5 generally runs parallel to KY 1098 and Laurel Fork Road in northern Knott County. This unit includes 1.2 skm (0.8 smi) of Fitch Branch from its headwaters downstream to its confluence with Laurel Fork Quicksand Creek, 2.7 skm (1.7 smi) of Newman Branch from its headwaters downstream to its confluence with Laurel Fork Quicksand Creek, 2.1 skm (1.3 smi) of Combs Branch from its headwaters downstream to its confluence with Laurel Fork Quicksand Creek, and 13.8 skm (8.6 smi) of Laurel Fork Quicksand Creek from KY 80 downstream to its confluence with Patten Fork. Live Kentucky arrow darters have been captured within Unit 5 just upstream of the Laurel Fork and Patten Fork confluence and farther upstream at the first Laurel Fork Road crossing (Thomas 2008, p. 5; Service 2012, pp. 1–4). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements. Hillsides and ridgetops above Unit 5 are forested, but the valley is more developed with scattered residences along Laurel Fork Road.

Within Unit 5, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with logging, inadequate sewage treatment, surface coal mining, natural gas and oil exploration activities, inadequate riparian buffers, construction and maintenance of county

roads, and off-road vehicle use. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species (adds population redundancy), and likely serves as a source population within the Quicksand Creek watershed.

Unit 6: Middle Fork Quicksand Creek and Tributaries, Knott County, Kentucky

Unit 6 is located along Middle Fork of Quicksand Creek Road in northeastern Knott County. This unit includes 0.8 skm (0.5 smi) of Big Firecoal Branch from its headwaters downstream to its confluence with Middle Fork Quicksand Creek, 2.1 skm (1.3 smi) of Bradley Branch from its headwaters downstream to its confluence with Middle Fork Quicksand Creek, 2.0 skm (1.2 smi) of Lynn Log Branch from its headwaters downstream to its confluence with Middle Fork Quicksand Creek, and 20.3 skm (12.6 smi) of Middle Fork Quicksand Creek from its headwaters downstream to its confluence with Quicksand Creek. Live Kentucky arrow darters have been captured within Unit 6 near the confluence of Middle Fork and Jack Branch, the confluence of Middle Fork and Upper Bear Pen Branch, and near the confluence of Middle Fork and Quicksand Creek (Thomas 2008, p. 5; Service 2012, pp. 1–4; Eisenhour pers. comm. 2015). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements. The watershed surrounding Unit 6 is dominated by forest and continues to be relatively undisturbed. An unpaved road traverses the length of the unit, but the rough condition of the road limits its use to off-road vehicles.

Within Unit 6, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with natural gas and oil exploration activities, logging, surface coal mining, inadequate riparian buffers, construction and maintenance of county roads, and off-road vehicle use. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species (adds population redundancy), and likely serves as a source population within the Quicksand Creek watershed.

Unit 7: Spring Fork Quicksand Creek, Breathitt County, Kentucky

Unit 7 is located off KY 2465 in southeastern Breathitt County and includes 2.2 skm (1.4 smi) of Spring Fork Quicksand Creek from its headwaters downstream to its confluence with an unnamed tributary. Live Kentucky arrow darters have been captured within Unit 7 (Service unpublished data). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements. Most of the watershed surrounding Unit 7 is forested, but mine reclamation activities have created open, pasture-like habitats along ridgetops and slopes to the north.

Within Unit 7, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with surface coal mining, natural gas and oil exploration activities, logging, and off-road vehicle use. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species within the Quicksand Creek watershed (adds population redundancy), and provides opportunity for population growth.

Unit 8: Hunting Creek and Tributaries, Breathitt County, Kentucky

Unit 8 is located along KY 1094 in eastern Breathitt County and includes 0.9 skm (0.5 smi) of Wolf Pen Branch from its headwaters downstream to its confluence with Hunting Creek, 2.3 skm (1.4 smi) of Fletcher Fork from its headwaters downstream to its confluence with Hunting Creek, 1.6 skm (1.0 smi) of Negro Fork from its headwaters downstream to its confluence with Hunting Creek, 3.1 skm (1.9 smi) of Licking Fork from its headwaters downstream to its confluence with Hunting Creek, and 7.7 skm (4.8 smi) of Hunting Creek from its confluence with Wells Fork downstream to its confluence with Quicksand Creek. Live Kentucky arrow darters have been captured within Unit 8 near the confluence with Winnie Branch (Service unpublished data). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements. The narrow valley surrounding Unit 8 contains a few scattered residences and fields along Hunting Creek Road, but the majority of the watershed is relatively intact and dominated by forest.

Within Unit 8, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with natural gas and oil exploration activities, logging, surface coal mining, inadequate sewage treatment, inadequate riparian buffers, construction and maintenance of county roads, and off-road vehicle use. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species within the Quicksand Creek watershed (adds population redundancy), and provides opportunity for population growth.

Unit 9: Frozen Creek and Tributaries, Breathitt County, Kentucky

Unit 9 is located along KY 378 in northern Breathitt County. This unit includes 4.7 skm (2.9 smi) of Clear Fork from its headwaters downstream to its confluence with Frozen Creek, 3.6 skm (2.3 smi) of Negro Branch from its headwaters downstream to its confluence with Frozen Creek, 4.2 skm (2.6 smi) of Davis Creek from its headwaters downstream to its confluence with Frozen Creek, and 13.9 skm (8.6 smi) of Frozen Creek from its headwaters downstream to its confluence with Morgue Fork. Live Kentucky arrow darters have been captured within Unit 9 upstream of Rock Lick in the headwaters of Frozen Creek (Thomas 2008, p. 5; Service unpublished data). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements. The individual valleys surrounding Unit 9 are relatively narrow (approximately 100–160 meters (m) (328–525 feet (ft)) at their widest) and composed of small farms and scattered residences. The ridgetops and hillsides are relatively undisturbed and dominated by forest.

Within Unit 9, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with inadequate sewage treatment, canopy loss, agricultural runoff, inadequate riparian buffers, construction and maintenance of county roads, logging, natural gas and oil exploration activities, surface coal mining (legacy effects), and off-road vehicle use. These threats are in addition to random effects of drought,

floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species (adds population redundancy), contributes to genetic exchange between several streams in the Frozen Creek watershed, and likely serves as an important source population in the northern limits of the species' range.

Unit 10: Holly Creek and Tributaries, Wolfe County, Kentucky

Unit 10 is located along KY 1261 in southern Wolfe County and includes 2.8 skm (1.8 smi) of Spring Branch from its headwaters downstream to its confluence with Holly Creek, 2.0 skm (1.3 smi) of Pence Branch from its headwaters downstream to its confluence with Holly Creek, 4.0 skm (2.5 smi) of Cave Branch from its headwaters downstream to its confluence with Holly Creek, and 9.5 skm (5.9 smi) of Holly Creek from KY 1261 (first bridge crossing north of KY 15) downstream to its confluence with the North Fork Kentucky River. Live Kentucky arrow darters have been captured within Unit 10 near the confluence of Holly Creek and Spring Branch (Thomas 2008, p. 5). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements.

The valley bottom surrounding Unit 10 is consistently wider (approximately 320 m (1,050 ft) at its widest) than other occupied stream valleys (*e.g.,* Frozen Creek), and agricultural land use is more extensive. Multiple small farms (*e.g.,* pasture, row crops, hayfields) and residences are scattered along KY 1261, while the ridgetops and hillsides are dominated by forest. We are not designating critical habitat in upstream reaches of the drainage (*e.g.,* Kelse Holland Fork, Mandy Holland Fork, Terrell Fork) because these streams do not contain the PCEs essential to the species' conservation. Habitat conditions in these upstream reaches are poor, as characterized by straightened, incised channels; a lack of canopy cover; and unstable substrates.

Within Unit 10, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with agricultural runoff, canopy loss, inadequate riparian buffers, construction and maintenance of county roads, inadequate sewage treatment, logging, surface coal mining (legacy effects), and off-road vehicle use. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species, and provides opportunity for population growth.

Unit 11: Little Fork, Lee and Wolfe Counties, Kentucky

This unit is located between KY 2016 and Booth Ridge Road in southern Wolfe County and includes 3.8 skm (2.3 smi) of Little Fork from its headwaters downstream to its confluence with Lower Devil Creek. Live Kentucky arrow darters have been captured within Unit 11 just upstream of the confluence of Little Fork and Lower Devil Creek (Thomas 2008, p. 5; Service 2012, pp. 1–4). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements. The valley bottom surrounding this unit is densely forested, but a network of unpaved roads and oil and gas well sites are located along the ridgetops to the east and west of the stream.

Within Unit 11, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with oil and gas exploration activities, off-road vehicle use, road runoff, canopy loss, logging, and surface coal mining (legacy effects). These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species (population redundancy), and provides opportunity for population growth.

Unit 12: Walker Creek and Tributaries, Lee and Wolfe Counties, Kentucky

Unit 12 is located between KY 11 and Shumaker Road to the west and KY 2016 to the east in northern Lee County and southwestern Wolfe County. This unit includes 3.9 skm (2.4 smi) of an unnamed tributary of Walker Creek from its headwaters downstream to its confluence with Walker Creek, 2.4 skm (1.5 smi) of Cowan Fork from its headwaters downstream to its confluence with Hell for Certain Creek, 2.0 skm (1.2 smi) of Hell for Certain Creek from the outflow of an unnamed reservoir downstream to its confluence with Walker Creek, 0.8 skm (0.5 smi) of Boonesboro Fork from its headwaters downstream to its confluence with Walker Creek, 2.2 skm (1.4 smi) of Peddler Creek from its headwaters downstream to its confluence with Walker Creek, 1.1 skm (0.7 smi) of Huff Cave Branch from its headwaters downstream to its confluence with Walker Creek, and 12.6 skm (7.8 smi) of Walker Creek from its headwaters (reservoir) downstream to its confluence with North Fork Kentucky River. Live Kentucky arrow darters have been captured at several locations within Unit 12 (Thomas 2008, p. 5; Service 2012, pp. 1–4), including the Old Fincastle Road low-water crossing, a site upstream near the confluence with Boonesboro Fork, and in the headwaters just upstream of the confluence of Walker Creek with Hell For Certain Creek. This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements.

Land use surrounding this unit is similar to that of Little Fork (Unit 11) and Hell Creek (Unit 13). The valley bottom is densely forested, but numerous unpaved roads, oil and gas well sites, and scattered residences occur along the ridgetops to the east and west of the stream. A narrow, unmaintained dirt road (Walker Creek Road) runs parallel to and east of this unit for its entire length; off-road vehicle use is common.

Within Unit 12, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with oil and gas exploration activities, off-road vehicle use, road runoff, canopy loss, and legacy effects of previous oil and gas well development. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species (adds population redundancy), contributes to genetic exchange between several streams in the Walker Creek watershed, and likely serves as an important source population in the northern limits of the species' range.

Unit 13: Hell Creek and Tributaries, Lee County, Kentucky

Unit 13 is located between KY 11 and Shumaker Road in northern Lee County. This unit includes 2.3 skm (1.4 smi) of Miller Fork from its headwaters downstream to its confluence with Hell Creek, 0.7 skm (0.4 smi) of Bowman Fork from its headwaters downstream to its confluence with Hell Creek, 1.9 skm (1.2 smi) of an unnamed tributary of Hell Creek from its headwaters downstream to its confluence with Hell Creek, and 7.1 skm (4.4 smi) of Hell Creek from the outflow of an unnamed

reservoir downstream to its confluence with North Fork Kentucky River. Live Kentucky arrow darters have been captured within Unit 13 from the Hell Creek mainstem near the Hell Creek Road low-water crossing and from an unnamed triburary of Hell Creek near the Hell Creek Road low-water crossing (Thomas 2008, p. 5; Service 2012, pp. 1–4). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements.

Land use surrounding this unit is similar to that of Little Fork (Unit 11) and Walker Creek (Unit 12). The valley bottom surrounding this unit is forested, but numerous unpaved roads, oil and gas well sites, and scattered residences occur along the ridgetops to the east and west of the stream. A narrow, unmaintained dirt road runs parallel to and east of Unit 13 upstream of the Hell Creek Road crossing; off-road vehicle use is common.

Within Unit 13, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with oil and gas exploration activities, off-road vehicle use, road runoff, canopy loss, and legacy effects of previous oil and gas well development. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species (population redundancy), and provides opportunity for population growth.

Unit 14: Big Laurel Creek, Harlan County, Kentucky

Unit 14 is located off KY 221 and Big Laurel Creek Road in northern Harlan County and includes 9.1 skm (5.7 smi) of Big Laurel Creek from its confluence with Combs Fork downstream to its confluence with Greasy Creek. Live Kentucky arrow darters have been captured from this unit near its confluence with White Oak Branch (Thomas 2008, p. 5; Service 2012, pp. 1–4). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements. The valley bottom and hillsides surrounding Unit 14 are densely forested, but extensive surface coal mining within the watershed has created clearings along the ridgetops and has resulted in five valley (hollow) fills that are located within tributaries of Big Laurel Creek.

Within Unit 14, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with historical surface coal mining, off-road vehicle use, road runoff, logging, and canopy loss. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding and adds population redundancy at the southeastern edge of the species' range.

Unit 15: Laurel Creek, Leslie County, Kentucky

Unit 15 is located south of US 421/KY 80 in western Leslie County and includes 4.1 skm (2.6 smi) of Laurel Creek from its confluence with Sandlick Branch downstream to its confluence with Left Fork Rockhouse Creek. A single live Kentucky arrow darter has been captured from this unit, approximately 0.48 skm (0.3 smi) from the confluence with Left Fork Rockhouse Creek (Thomas 2013, pers. comm.). A small portion of this unit is privately owned (0.7 skm (0.5 smi)), but the remainder of the unit is in Federal ownership (administered by DNBF). Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14). The watershed surrounding Unit 15 is entirely forested, with no private residences or other structures.

Within Unit 15, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with illegal off-road vehicle use, road runoff, and timber management. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, adds population redundancy, and provides opportunity for population growth.

Unit 16: Hell For Certain Creek and Tributaries, Leslie County, Kentucky

Unit 16 is located off Hell For Certain Road between KY 1482 and KY 257 in northern Leslie County. This unit includes 1.3 skm (0.8 smi) of Cucumber Branch from its headwaters downstream to its confluence with Hell For Certain Creek, 3.1 skm (1.9 smi) of Big Fork from its headwaters downstream to its confluence with Hell For Certain Creek, and 11.4 skm (7.1 smi) of Hell For Certain Creek from its headwaters downstream to its confluence with Middle Fork Kentucky River. Live Kentucky arrow darters have been captured from Unit 16 at multiple locations upstream of its confluence with Big Fork (Thomas 2008, p. 4; Service unpublished data). A portion of this unit is in Federal ownership (administered by DBNF) (4.4 skm (2.8 smi)), but the majority of the unit is in private ownership. For the portion of the unit in Federal ownership, land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14). The valley bottom surrounding Unit 16 is narrow (approximately 100 m (328 ft) at its widest) and composed of a mixture of small farms (*e.g.,* pasture, hayfields) and scattered residences along Hell For Certain Road. The ridgetops and hillsides are relatively undisturbed and dominated by forest.

Within Unit 16, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, inadequate sewage treatment, inadequate riparian buffers, construction and maintenance of county roads, agricultural runoff, illegal off-road vehicle use, logging, and timber management (on DBNF). These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, represents a stronghold for the species within the Middle Fork Kentucky River sub-basin, and likely acts as a source population. This unit is also important for maintaining the distribution and genetic diversity of the species within the Middle Fork sub-basin.

Unit 17: Squabble Creek, Perry County, Kentucky

This unit is located south of KY 28, just downstream of Buckhorn Lake Dam and near the community of Buckhorn in northwestern Perry County. Unit 17 includes 12.0 skm (7.5 smi) of Squabble Creek from its confluence with Long Fork downstream to its confluence with Middle Fork Kentucky River. Live Kentucky arrow darters have been captured from this unit near its confluence with Big Branch (Service unpublished data). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements.

The valley surrounding Unit 17 is narrow (approximately 113 m (370 ft) at its widest) and composed of a mixture of residences (many in clusters) and small farms (*e.g.,* pasture, hayfields) scattered along KY 2022, which parallels Squabble Creek for much of its

length. Ridgetops and hillsides in most of the Squabble Creek valley are relatively undisturbed and dominated by forest; however, surface coal mining has occurred along ridgetops (to the north and south of Squabble Creek) in the downstream half of the drainage.

Within Unit 17, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, inadequate sewage treatment, agricultural runoff, inadequate riparian buffers, construction and maintenance of county roads, illegal off-road vehicle use, logging, and historical surface coal mining. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species, and provides opportunity for population growth.

Unit 18: Blue Hole Creek and Left Fork Blue Hole Creek, Clay County, Kentucky

Unit 18 is located along KY 1524 in southeastern Clay County. This unit includes 1.8 skm (1.1 smi) of Left Fork from its headwaters downstream to its confluence with Blue Hole Creek and 3.9 skm (2.4 smi) of Blue Hole Creek from its confluence with Dry Branch downstream to its confluence with the Red Bird River. Live Kentucky arrow darters have been captured from Unit 18 near the mouth of Cow Hollow (Thomas 2008, p. 4). This unit is entirely in Federal ownership (administered by DNBF). Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed surrounding Unit 18 is entirely forested, with no private residences or other structures. The only interruption in the canopy is the KY 1525 corridor, which traverses most of the valley. One additional road, Blue Hole School Road, is located at the headwaters of Blue Hole Creek, leading to a small cemetery site. Blue Hole Creek is 1 of 11 Red Bird River tributaries (Units 18–28) that support Kentucky arrow populations (Thomas 2008, entire; Service 2012, entire). Collectively, these streams represent the largest, most significant cluster of occupied streams and are characterized by intact riparian zones with negligible residential development, high gradients with abundant riffles, cool temperatures, low conductivities (less than 100 µS/cm), and stable channels with clean cobble and boulder substrates (Thomas 2008, p. 4; Service 2014, p. 6).

Within Unit 18, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, illegal off-road vehicle use, and timber management (on DBNF). These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, comprises a portion of the species' core population within the Red Bird River watershed, and contributes to connectivity of streams within the watershed.

Unit 19: Upper Bear Creek and Tributaries, Clay County, Kentucky

Unit 19 is located along KY 1524 and Upper Bear Creek Road in southeastern Clay County. This unit includes 1.5 skm (1.0 smi) of Left Fork Upper Bear Creek from its headwaters downstream to its confluence with Upper Bear Creek, 0.8 skm (0.5 smi) of Right Fork Upper Bear Creek from its headwaters downstream to its confluence with Upper Bear Creek, and 4.5 skm (2.8 smi) of Upper Bear Creek from its confluence with Left Fork and Right Fork Upper Bear Creek downstream to its confluence with the Red Bird River. Live Kentucky arrow darters have been captured from Unit 19 in two locations downstream of the Left and Right Forks (Thomas 2008, p. 4). A small portion of this unit is privately owned (0.2 skm (0.1 smi)), but the majority of the unit is in Federal ownership (administered by DNBF). Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed surrounding Unit 19 is primarily forested, but a few scattered residences and small farms are located along KY 1524 in the upstream (western) half of the watershed. Upper Bear Creek is 1 of 11 Red Bird River tributaries (Units 18–28) that support Kentucky arrow populations (Thomas 2008, entire; Service 2012, entire). See the description of Unit 18 for more information regarding the characterization of the streams within this drainage.

Within Unit 19, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, illegal off-road vehicle use, agricultural runoff, and timber management (on DBNF). These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, comprises a portion of the species' core population within the Red Bird River watershed, and contributes to connectivity of streams within the watershed.

Unit 20: Katies Creek, Clay County, Kentucky

Unit 20 is located along Katies Creek Road in southeastern Clay County and includes 5.7 skm (3.5 smi) of Katies Creek from its confluence with Cave Branch downstream to its confluence with the Red Bird River. Live Kentucky arrow darters have been captured from this unit approximately 0.2 skm (0.12 smi) upstream of the mouth of Katies Creek (Thomas 2008, p. 4). A small portion of this unit is privately owned (1.7 skm (1 smi)), but the majority of the unit is in Federal ownership (administered by DNBF). Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed surrounding Unit 20 is entirely forested, with no private residences or other structures. The only interruption in the canopy is the Katies Creek Road corridor, which traverses the valley. Katies Creek is 1 of 11 Red Bird River tributaries (Units 18–28) that support Kentucky arrow populations (Thomas 2008, entire; Service 2012, entire). See the description of Unit 18 for more information regarding the characterization of the streams within this drainage.

Within Unit 20, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, illegal off-road vehicle use, logging (on private land), and timber management (on DBNF). These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, comprises a portion of the species' core population within the Red Bird River watershed, and contributes to connectivity of streams within the watershed.

Unit 21: Spring Creek and Little Spring Creek, Clay County, Kentucky

Unit 21 is located west of KY 66 in southeastern Clay County. This unit includes 1.0 skm (0.6 smi) of Little Spring Creek from its headwaters downstream to its confluence with Spring Creek and 8.2 skm (5.1 smi) of Spring Creek from its headwaters downstream to its confluence with the

Red Bird River. Live Kentucky arrow darters have been captured within Unit 21 approximately 0.2 skm (0.1 smi) upstream of the mouth of Spring Creek (Thomas 2008, p. 4). A portion of this unit is privately owned (3.6 skm (2.2 smi)), but the majority of the unit is in Federal ownership (administered by DNBF). Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed surrounding Unit 21 is relatively undisturbed and dominated by forest; however, a few scattered residences are located along a short segment (approximately 0.8 skm (0.5 smi)) of Lower Spring Creek Road near its junction with KY 66 and along Sand Hill Road and Spring Creek Road at the western (upstream) end of the drainage. The stream corridor between these two areas, an approximate 6.4-skm (4-smi) segment, is inaccessible except by off-road vehicle. About 10 oil wells are located along ridgetops and hillsides near the mouth of Spring Creek, and these sites are connected by a network of unpaved roads. Spring Creek is 1 of 11 Red Bird River tributaries (Units 18–28) that support Kentucky arrow populations (Thomas 2008, entire; Service 2012, entire). See the description of Unit 18 for more information regarding the characterization of the streams within this drainage.

Within Unit 21, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, off-road vehicle use, inadequate sewage treatment, logging (on private land), timber management (on DBNF), and oil and gas exploration activities. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, comprises a portion of the species' core population within the Red Bird River watershed, and contributes to connectivity of streams within the watershed.

Unit 22: Bowen Creek and Tributaries, Leslie County, Kentucky

Unit 22 is located east of KY 66 and adjacent to Bowen Creek Road in western Leslie County. This unit includes 2.2 skm (1.4 smi) of Laurel Fork from its headwaters downstream to its confluence with Bowen Creek, 1.8 skm (1.1 smi) of Amy Branch from its headwaters downstream to its confluence with Bowen Creek, and 9.6 skm (6.0 smi) of Bowen Creek from its headwaters downstream to the Red Bird River. Live Kentucky arrow darters have been captured from Unit 22 near its confluence with Blevins Branch and Hurricane Branch (Service unpublished data). A portion of this unit is privately owned (2.0 skm (1.2 smi)), but the majority of the unit is in Federal ownership (administered by DNBF). Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed surrounding this unit is relatively undisturbed and dominated by forest. A few scattered residences are located along Bowen Creek Road near the mid-point of the valley, and others are located further upstream along KY 406. Bowen Creek is 1 of 11 Red Bird River tributaries (Units 18–28) that support Kentucky arrow darter populations (Thomas 2008, entire; Service 2012, entire). See the description of Unit 18 for more information regarding the characterization of the streams within this drainage.

Within Unit 22, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, illegal off-road vehicle use, inadequate sewage treatment, logging (on private land), and timber management (on DBNF). These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, comprises a portion of the species' core population within the Red Bird River watershed, and contributes to connectivity of streams within the watershed.

Unit 23: Elisha Creek and Tributaries, Leslie County, Kentucky

Unit 23 is located east of KY 66 and adjacent to Elisha Creek Road in western Leslie County. This unit includes 4.4 skm (2.7 smi) of Right Fork Elisha Creek from its headwaters downstream to its confluence with Elisha Creek, 2.3 skm (1.4 smi) of Left Fork Elisha Creek from its headwaters downstream to its confluence with Elisha Creek, and 2.9 skm (1.8 smi) of Elisha Creek from its confluence with Right Fork Elisha Creek downstream to its confluence with the Red Bird River. Live Kentucky arrow darters have been captured throughout Unit 23 (Service unpublished data). A portion of this unit is privately owned (3.0 skm (1.9 smi)), but the majority of the unit is in Federal ownership (administered by DNBF). Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed surrounding Unit 23 is relatively undisturbed and dominated by forest. A few scattered residences are located along Elisha Creek Road at the downstream end of the Elisha Creek valley (near the mouth of Elisha Creek). A few oil and gas wells are scattered throughout the drainage. Elisha Creek is 1 of 11 Red Bird River tributaries (Units 18–28) that support Kentucky arrow populations (Thomas 2008, entire; Service 2012, entire). See the description of Unit 18 for more information regarding the characterization of the streams within this drainage.

Within Unit 23, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, illegal off-road vehicle use, logging (on private land), timber management (on DBNF), inadequate sewage treatment, and natural gas and oil exploration activities. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, comprises a portion of the species' core population within the Red Bird River watershed, and contributes to connectivity of streams within the watershed.

Unit 24: Gilberts Big Creek, Clay and Leslie Counties, Kentucky

Unit 24 is located east of KY 66 and generally parallel to Gilberts Creek Road in southeastern Clay County and western Leslie County. This unit includes 7.2 skm (4.5 smi) of Gilberts Big Creek from its headwaters downstream to its confluence with the Red Bird River. Live Kentucky arrow darters have been captured throughout this unit. A portion of this unit is privately owned (2.0 skm (1.2 smi)), but the majority of the unit is in Federal ownership (administered by DNBF). Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed surrounding Unit 24 is relatively undisturbed and dominated by forest. A few scattered residences and small farms are located along Gilberts Creek Road at the downstream end of the valley near the mouth of Gilberts Big Creek. Several gas and oil wells are also scattered throughout the valley. Gilberts Big Creek is 1 of 11 Red Bird River tributaries (Units 18–28) that support Kentucky arrow darter populations (Thomas 2008, entire;

Service 2012, entire). See the description of Unit 18 for more information regarding the characterization of the streams within this drainage.

Within Unit 24, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, off-road vehicle use, logging (on private land), timber management (on DBNF), inadequate sewage treatment, agricultural runoff, and natural gas and oil exploration activities. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, comprises a portion of the species' core population within the Red Bird River watershed, and contributes to connectivity of streams within the watershed.

Unit 25: Sugar Creek, Clay and Leslie Counties, Kentucky

Unit 25 is located off Sugar Creek Road in southeastern Clay County and western Leslie County and includes 7.2 skm (4.5 smi) of Sugar Creek from its headwaters downstream to its confluence with the Red Bird River. Live Kentucky arrow darters have been captured throughout this unit (Thomas 2008, p. 4; Thomas *et al.* 2014, p. 23). A portion of this unit is privately owned (1.1 skm (0.7 smi)), but the majority of the unit is in Federal ownership (administered by DNBF). Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed surrounding Unit 25 is relatively undisturbed and dominated by forest. A few scattered residences and small farms are located along Sugar Creek Road at the downstream end of the valley near the mouth of Sugar Creek. Several gas and oil wells are also scattered throughout the valley. Sugar Creek is 1 of 11 Red Bird River tributaries (Units 18–28) that support Kentucky arrow darter populations (Thomas 2008, entire; Service 2012, entire). See the description of Unit 18 for more information regarding the characterization of the streams within this drainage.

Within Unit 25, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, off-road vehicle use, logging (on private land), timber management (on DBNF), inadequate sewage treatment, agricultural runoff, and natural gas and oil exploration activities. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, comprises a portion of the species' core population within the Red Bird River watershed, and contributes to connectivity of streams within the watershed.

Unit 26: Big Double Creek and Tributaries, Clay County, Kentucky

Unit 26 is located adjacent to Big Double Creek Road in southeastern Clay County. This unit includes 1.4 skm (0.9 smi) of Left Fork Big Double Creek from its headwaters downstream to its confluence with Big Double Creek, 1.8 skm (1.1 smi) of Right Fork Big Double Creek from its headwaters downstream to its confluence with Big Double Creek, and 7.1 skm (4.4 smi) of Big Double Creek from its headwaters downstream to its confluence with the Red Bird River. Live Kentucky arrow darters have been captured from numerous localities in Unit 26, which has been surveyed regularly by KDFWR and Service personnel (Thomas 2008, p. 4; Thomas *et al.* 2014, p. 23; Service unpublished data). This unit is entirely in Federal ownership (administered by DNBF). Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed surrounding Unit 26 is relatively undisturbed and dominated by forest, with about 90 percent in Federal ownership (administered by DBNF). The only residential development is concentrated along Arnett Fork Road, which parallels Arnett Fork, a first order tributary of Big Double Creek. A USFS public use area (Big Double Creek Recreational Area) is located adjacent to Unit 26, approximately 1.6 skm (1.0 smi) upstream of Arnett Fork. This area consists of a gravel road and parking lot, a bathroom facility, several picnic tables, and two maintained fields connected by a pedestrian bridge over Big Double Creek. Upstream of the public use area, Big Double Creek can be accessed via USFS Road 1501, which extends upstream to the confluence of the Left and Right Forks. Big Double Creek is 1 of 11 Red Bird River tributaries (Units 18–28) that support Kentucky arrow darter populations (Thomas 2008, entire; Service 2012, entire). See the description of Unit 18 for more information regarding the characterization of the streams within this drainage.

Within Unit 26, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation) associated with road runoff, off-road vehicle use, and timber management (on DBNF). These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, comprises a portion of the species' core population within the Red Bird River watershed, and contributes to connectivity of streams within the watershed.

Unit 27: Little Double Creek, Clay County, Kentucky

Unit 27 is located adjacent to Little Double Creek Road in southeastern Clay County. This unit includes 3.4 skm (2.1 smi) of Little Double Creek from its headwaters downstream to its confluence with the Red Bird River. Live Kentucky arrow darters have been captured from two localities in Unit 27 (Thomas 2008, p. 4; Service unpublished data). One hundred percent of this unit is in Federal ownership (administered by DBNF), and the DBNF's Redbird Ranger District headquarters is located off KY 66 at the mouth of Little Double Creek. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed surrounding Unit 27 is entirely forested, with no private residences or other structures. The only interruption in the canopy of the watershed is the Little Double Creek Road corridor, which traverses the length of the valley. Little Double Creek is 1 of 11 Red Bird River tributaries (Units 18–28) that support Kentucky arrow darter populations (Thomas 2008, entire; Service 2012, entire). See the description of Unit 18 for more information regarding the characterization of the streams within this drainage.

Within Unit 27, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation) associated with road runoff, illegal off-road vehicle use, and timber management (on DBNF). These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, comprises a portion of the species' core population within the Red Bird River watershed, and contributes to connectivity of streams within the watershed.

Unit 28: Jacks Creek, Clay County, Kentucky

This unit is located along Jacks Creek Road, north of Hal Rogers Parkway and east of KY 66 in eastern Clay County. Unit 28 includes 5.9 skm (3.7 smi) of Jacks Creek from its headwaters downstream to its confluence with the Red Bird River. Live Kentucky arrow darters have been captured from Unit 28 just downstream of the Crib Branch confluence (Service 2012, entire). A small portion of this unit is in Federal ownership (0.5 skm (0.3 smi)), but the majority of the unit is privately owned. For the portion of the unit in Federal ownership (administered by DBNF), land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The valley bottom surrounding Unit 28 is composed of a mixture of residences (many in clusters) and small farms (*e.g.,* pasture, hayfields) scattered along Jacks Creek Road, which parallels Jacks Creek for most of its length. Ridgetops and hillsides in most of the valley are relatively undisturbed and dominated by forest. Jacks Creek is 1 of 11 Red Bird River tributaries (Units 18–28) that support Kentucky arrow darter populations (Thomas 2008, entire; Service 2012, entire). See the description of Unit 18 for more information regarding the characterization of the streams within this drainage.

Within Unit 28, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, inadequate sewage treatment, agricultural runoff, inadequate riparian buffers, construction and maintenance of county roads, illegal off-road vehicle use, logging (on private land), and timber management (on DBNF). These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, comprises a portion of the species' core population within the Red Bird River watershed, and contributes to connectivity of streams within the watershed.

Unit 29: Long Fork, Clay County, Kentucky

Unit 29 is located along USFS Road 1633, which is west of KY 149 and the Hal Rogers Parkway in eastern Clay County. Unit 29 includes 2.2 skm (1.4 smi) of Long Fork from its headwaters downstream to its confluence with Hector Branch. Live Kentucky arrow darters have been captured throughout Unit 29 as a result of a reintroduction effort by KDFWR and Conservation Fisheries, Inc. (CFI) of Knoxville, Tennessee (Thomas et al. 2014, p. 23) (see Available Conservation Measures section of our final listing rule published elsewhere in this **Federal Register**). One hundred percent of this unit is in Federal ownership (administered by DBNF). Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The watershed surrounding Unit 29 is entirely forested, with no private residences or other structures. The only minor interruption in the canopy of the watershed is the USFS Road 1633 corridor, which parallels Long Fork for part of its length. Habitats in Long Fork are similar to other occupied streams (Units 18–28) in the Red Bird River drainage. See the description of Unit 18 for more information regarding the characterization of the streams within the Red Bird drainage.

Within Unit 29, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation) associated with road runoff, illegal off-road vehicle use, and timber management (on DBNF). These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, comprises a portion of the species' core population within the Red Bird River watershed, and contributes to connectivity of streams within the watershed.

Unit 30: Horse Creek, Clay County, Kentucky

Unit 30 is located adjacent to Reynolds Road and Elijah Feltner Road in southwestern Clay County. It includes 5.0 skm (3.1 smi) of Horse Creek from its headwaters downstream to its confluence with Pigeon Roost Branch. Live Kentucky arrow darters have been captured within this unit approximately 1.9 skm (1.2 smi) downstream of the confluence of Horse Creek and Tuttle Branch (Service unpublished data). A portion of Unit 30 is in Federal ownership (2.0 skm (1.2 smi)), but the majority of the unit is privately owned. For the portion of the basin in Federal ownership (administered by DBNF), land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14). The valley bottom surrounding Unit 30 is composed of a mixture of forest, small farms, and residences. Ridgetops and hillsides in most of the valley are relatively undisturbed and dominated by forest.

Within Unit 30, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, agricultural runoff, inadequate sewage treatment, lack of riparian buffers, construction and maintenance of county roads, illegal off-road vehicle use, and logging on private land and timber management on DBNF. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species, and represents the only occupied habitat within the Goose Creek watershed.

Unit 31: Bullskin Creek, Clay and Leslie Counties, Kentucky

Unit 31 is located along KY 1482, east of the town of Oneida, Kentucky, in eastern Clay County and northwestern Leslie County. It includes 21.7 skm (13.5 smi) of Bullskin Creek from its confluence with Old House Branch downstream to its confluence with the South Fork Kentucky River. Live Kentucky arrow darters have been captured from Unit 31 at the confluence of Long Branch and just upstream of the confluence of Barger Branch (Thomas 2008, p. 4; Service 2012, entire). A small portion of this unit is in Federal ownership (0.4 skm (0.2 smi)), but the majority of the unit is privately owned. For the portion of the basin in Federal ownership (administered by DBNF), land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

The valley bottom surrounding Unit 31 is composed of a mixture of residences (many in clusters) and small farms (*e.g.,* pasture, hayfields) scattered along KY 1482, which parallels Bullskin Creek for its entire length. Ridgetops and hillsides in most of the valley are relatively undisturbed and dominated by forest, but a few watersheds show signs of active or recent disturbance. Surface coal mining is currently ongoing in the watersheds of Wiles Branch (Permit #826–0649), Barger Branch (Permit #826–0664), and a few unnamed tributaries of Bullskin Creek (Permit #826–0664). Recent logging activities have occurred in the watershed of Panco Branch.

Within Unit 31, the physical and biological features may require special management considerations or protection to address adverse effects

(*e.g.,* siltation, water pollution) associated with road runoff, surface coal mining, inadequate sewage treatment, agricultural runoff, lack of riparian buffers, construction and maintenance of county roads, illegal off-road vehicle use, and logging. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species, and provides opportunity for population growth.

Unit 32: Buffalo Creek and Tributaries, Owsley County, Kentucky

Unit 32 is located north of Oneida, Kentucky, and east of KY 11 in southeastern Owsley County. This unit includes 2.0 skm (1.2 smi) of Cortland Fork from its headwaters downstream to its confluence with Laurel Fork, 6.4 skm (4.0 smi) of Laurel Fork from its headwaters downstream to its confluence with Left Fork Buffalo Creek, 4.6 skm (2.9 smi) of Lucky Fork from its headwaters downstream to its confluence with Left Fork Buffalo Crfeek, 5.1 skm (3.2 smi) of Left Fork Buffalo Creek from its headwaters downstream to its confluence with Buffalo Creek, 17.3 skm (10.8 smi) of Right Fork Buffalo Creek from its headwaters downstream to its confluence with Buffalo Creek, and 2.7 skm (1.7 smi) of Buffalo Creek from its confluence with Left Fork Buffalo Creek, and Right Fork Buffalo Creek downstream to its confluence with the South Fork Kentucky River. Live Kentucky arrow darters have been captured from multiple locations throughout Unit 32 (Thomas 2008, p. 4; Service 2012, entire). A portion of this unit is in Federal ownership (administered by DBNF) (14.9 skm (9.3 smi)), but the majority of the unit is in private ownership. For the portion in Federal ownership, land and resource management decisions and activities are guided by DBNF's LRMP (USFS 2004, pp. 1–14).

Ridgetops and hillsides in most of the valley surrounding Unit 32 are relatively undisturbed and dominated by forest, but portions of the valley bottom surrounding Unit 32 have been cleared and consist of a mixture of residences (many in clusters) and small farms (*e.g.,* pasture, hayfields, row crops) scattered along roadways. Surface coal mining has been conducted recently or is currently ongoing in the headwaters of Left Fork Buffalo Creek, specifically Stamper Branch of Lucky Fork (Permit #895–0175), Cortland Fork of Laurel Fork (Permit #813–0271), and Joyce Fork of Laurel Fork (Permit #895–0175).

Within Unit 32, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, surface coal mining, inadequate sewage treatment, inadequate riparian buffers, agricultural runoff, construction and maintenance of roads, illegal off-road vehicle use, logging (on private land), and timber management (on DBNF). These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, represents a stronghold for the species within the lower half of the South Fork Kentucky River sub-basin, and likely acts as a source population.

Unit 33: Lower Buffalo Creek, Lee and Owsley Counties, Kentucky

Unit 33 is located along KY 1411 and Straight Fork-Zeke Branch Road in southern Lee and northern Owsley Counties. This unit includes 2.2 skm (1.4 smi) of Straight Fork from its headwaters downstream to its confluence with Lower Buffalo Creek and 5.1 skm (3.2 smi) of Lower Buffalo Creek from its confluence with Straight Fork downstream to its confluence with the South Fork Kentucky River. Live Kentucky arrow darters have been captured within Unit 33 at the confluence of Lower Buffalo Creek and Straight Fork (Thomas 2008, p. 4). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements.

Ridgetops and hillsides in most of the valley surrounding Unit 33 are relatively undisturbed and dominated by forest, but large portions of the valley bottom surrounding Unit 33 have been cleared and consist of a mixture of residences (many in clusters) and small farms (*e.g.,* pasture, hayfields, row crops). Extensive logging has occurred recently (within the last 7 years) within Jerushia Branch, a first-order tributary of Lower Buffalo Creek.

Within this unit, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, construction and maintenance of roads, inadequate sewage treatment, inadequate riparian buffers, agricultural runoff, illegal off-road vehicle use, and logging. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species, and provides opportunity for population growth.

Unit 34: Silver Creek, Lee County, Kentucky

Unit 34 is located along along Silver Creek Road, partially within the city limits of Beattyville in central Lee County. This unit includes 6.2 skm (3.9 smi) of Silver Creek from its headwaters downstream to its confluence with the Kentucky River. Live Kentucky arrow darters have been captured within Unit 34 approximately 1.4 skm (0.9 smi) upstream of the mouth of Silver Creek (Thomas 2008, p. 5). This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements.

The valley surrounding Unit 34 is unusual among occupied watersheds because it is not located in a rural area. The mouth of Silver Creek (downstream terminus of Unit 34) is located within the city limits of Beattyville, and the downstream half of the watershed is moderately developed, with numerous residences along Silver Creek Road. The upstream half of the watershed is less developed and dominated by forest.

Within this unit, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, construction and maintenance of roads, inadequate sewage treatment, inadequate riparian buffers, and illegal off-road vehicle use. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, helps to maintain the geographical range of the species, and provides opportunity for population growth.

Unit 35: Travis Creek, Jackson County, Kentucky

Unit 35 is located along Travis Creek Road in eastern Jackson County. This unit includes 4.1 skm (2.5 smi) of Travis Creek from its headwaters downstream to its confluence with Hector Branch. Live Kentucky arrow darters have been captured within Unit 35 approximately 1.8 skm (1.1 smi) upstream of the mouth of Travis Creek. This unit is located almost entirely on private land, except for any small amount that is publicly owned in the form of bridge crossings and road easements. A few agricultural fields are located near the mouth of Travis Creek, but most of the watershed

surrounding Unit 35 is forested, with no private residences or other structures. Some of the forest is early successional due to recent logging in the watershed.

Within Unit 35, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, off-road vehicle use, inadequate riparian buffers, construction and maintenance of county roads, agricultural runoff, and logging. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, increases population redundancy within the species' range, and provides the opportunity for population growth at the western extent of the species' range.

Unit 36: Wild Dog Creek, Jackson and Owsley Counties, Kentucky

Unit 36 is located west of Sturgeon Creek in eastern Jackson and northwestern Owsley Counties. This unit includes 8.1 skm (5.1 smi) of Wild Dog Creek from its headwaters downstream to its confluence with Sturgeon Creek. Live Kentucky arrow darters have been captured within Unit 36 just upstream of the mouth of Wild Dog Creek. A portion of this unit is in Federal ownership (3.8 skm (2.4 smi)), but the majority of the unit is in private ownership. For the portion of the unit in Federal ownership (administered by DBNF), land and resource management decisions and activities are guided by DBNF's LRMP (USFS 2004, pp. 1–14). The watershed surrounding Unit 36 is relatively undisturbed and dominated by forest, but a few scattered residences and small farms occur in the headwaters just east of KY 587.

Within Unit 36, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, construction and maintenance of roads, illegal off-road vehicle use, inadequate riparian buffers, agricultural runoff, logging (on private land), timber management (on DBNF), and inadequate sewage treatment. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, increases population redundancy within the species' range, and provides the opportunity for population growth at the western extent of the species' range.

Unit 37: Granny Dismal Creek, Lee and Owsley Counties, Kentucky

Unit 37 is located west of Sturgeon Creek in western Lee and eastern Owsley Counties. This unit includes 6.9 skm (4.3 smi) of Granny Dismal Creek from its confluence with Harris Branch downstream to its confluence with Sturgeon Creek. Live Kentucky arrow darters have been captured within Unit 37 approximately 1.1 skm (0.7 smi) upstream of the mouth of Granny Dismal Creek. A portion (2.5 skm (1.6 smi)) of this unit is in Federal ownership (administered by DBNF), but the majority of the unit is privately owned. Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14). The watershed surrounding Unit 37 is relatively undisturbed and dominated by forest, but a few scattered residences and small farms occur in the headwaters just east of KY 587.

Within Unit 37, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, construction and maintenance of roads, illegal off-road vehicle use, inadequate riparian buffers, agricultural runoff, logging (on private land), timber management (on DBNF), and inadequate sewage treatment. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, increases population redundancy within the species' range, and provides the opportunity for population growth at the western extent of the species' range.

Unit 38: Rockbridge Fork, Wolfe County, Kentucky

Unit 38 is located within the Red River Gorge region in northwestern Wolfe County and represents the only occupied habitat within the Red River drainage. This unit includes 4.5 skm (2.8 smi) of Rockbridge Fork from its confluence with Harris Branch downstream to its confluence with Sturgeon Creek. Live Kentucky arrow darters have been captured within Unit 38 approximately 0.2 skm (0.1 smi) upstream of the mouth of Rockbridge Fork. This unit is entirely in Federal ownership (administered by DBNF). Land and resource management decisions and activities within the DBNF are guided by DBNF's LRMP (USFS 2004, pp. 1–14). The watershed surrounding Unit 38 is relatively undisturbed and dominated by forest, but a few scattered residences and small farms occur in the headwaters of Rockbridge Fork near the Mountain Parkway (KY 402).

Within Unit 38, the physical and biological features may require special management considerations or protection to address adverse effects (*e.g.,* siltation, water pollution) associated with road runoff, illegal off-road vehicle use, agricultural runoff, timber management (on DBNF), and inadequate sewage treatment. These threats are in addition to random effects of drought, floods, or other natural phenomena. This unit provides habitat for reproduction and feeding, increases population redundancy within the species' range, and provides the opportunity for population growth at the western extent of the species' range.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action that is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

We published a final rule that sets forth a new definition of ''destruction or adverse modification'' on February 11, 2016 (81 FR 7214); that final rule became effective on March 14, 2016. ''Destruction or adverse modification'' means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33

U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action,

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,

(3) Are economically and technologically feasible, and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for the Kentucky arrow darter. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of this subspecies or that preclude or significantly delay development of such features. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the Kentucky arrow darter. These activities include, but are not limited to:

(1) Actions that would alter the geomorphology of stream habitats. Such activities could include, but are not limited to, instream excavation or dredging, impoundment, channelization, road and bridge construction, surface coal mining, and discharge of fill materials. These activities could cause aggradation or degradation of the channel bed elevation or significant bank erosion that would degrade or eliminate habitats necessary for growth and reproduction of the Kentucky arrow darter.

(2) Actions that would significantly alter the existing flow regime or water quantity. Such activities could include, but are not limited to, impoundment, water diversion, water withdrawal, and hydropower generation. These activities could eliminate or reduce the habitat necessary for growth and reproduction of this species.

(3) Actions that would significantly alter water quality (for example, temperature, pH, contaminants, and excess nutrients). Such activities could include, but are not limited to, the release of chemicals, biological pollutants, or heated effluents into surface water or connected groundwater at a point source or by dispersed release (non-point source). These activities could alter water conditions to levels that are beyond the tolerances of the Kentucky arrow darter (*e.g.,* elevated conductivity) and result in direct or cumulative adverse effects to the species and its life cycle.

(4) Actions that would significantly alter stream bed material composition and quality by increasing sediment deposition or filamentous algal growth. Such activities could include, but are not limited to, construction projects, channel alteration, livestock grazing, timber harvests, off-road vehicle use, and other watershed and floodplain disturbances that release sediments or nutrients into the water. These activities could eliminate or degrade habitats necessary for the growth and reproduction of the Kentucky arrow darter by increasing the sediment deposition to levels that would adversely affect its ability to complete its life cycle.

Exemptions

Application of Section 4(a)(3) of the Act

Section 4(a)(3)(B)(i) of the Act provides that: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan [INRMP] prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.'' There are no Department of Defense lands with a completed INRMP within the critical habitat designation.

Consideration of Impacts Under Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat.

The Secretary may exclude an area from critical habitat if she determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless she determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Consideration of Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we prepared an incremental effects memorandum (IEM) and screening analysis which, together with our narrative and interpretation of effects, constitutes our draft economic analysis (DEA) of the proposed critical habitat designation and related factors (Abt Associates 2015). The analysis, dated September 11, 2015, was made available for public review from October 8, 2015, through December 7, 2015 (80 FR 61030, October 8, 2015). Following the close of the comment period, we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Additional information relevant to the probable incremental economic impacts of critical habitat designation for the Kentucky arrow darter was summarized in the proposed critical habitat designation (80 FR 61030, October 8, 2015) and is also available in the screening analysis for the Kentucky arrow darter (Abt Associates 2015, entire), available at *http://www.regulations.gov* in Docket No. FWS–R4–ES–2015–0133.

The 2.7–km (1.7–mi) extension of Unit 6 was not evaluated in our original screeing analysis (Abt Associates 2015, entire), so we completed a review of the probable economic impacts associated with this area. Land use within this reach is similar to the rest of Unit 6 that was evaluated in our screening analysis (Abt Associates 2015, entire). Land ownership is almost entirely private, except for a small amount that is publicly owned in the form of bridge crossings and road easements. The watershed surrounding this area is dominated by forest, with a few scattered residences, hayfields, and gas wells. Based on our analysis, significant economic impacts are not expected in this portion of Unit 6. Any section 7-related incremental impacts of the designation will be limited to administrative costs only. With respect to indirect impacts, this critical habitat designation is unlikely to trigger other regulatory requirements or economic impacts outside of the ESA. That is, the rule is not expected to result in additional or different State or local regulations or permitting and land use management practices.

Because all of the units proposed as critical habitat for the Kentucky arrow darter are currently occupied by the species, any actions that may affect the species or its habitat would also affect critical habitat and it is unlikely that any additional conservation efforts would be recommended to address the adverse modification standard over and above those recommended as necessary to avoid jeopardizing the continued existence of the Kentucky arrow darter. Any anticipated incremental costs of the critical habitat designation will predominantly be administrative in nature and would not be significant. Critical habitat may impact property values indirectly if developers assume the designation will limit the potential use of that land. However, the designation of critical habitat is not likely to result in an increase of consultations, but rather only the additional administrative effort within each consultation to address the effects of each proposed agency action on critical habitat.

A copy of the IEM and screening analysis with supporting documents may be obtained by contacting the Kentucky Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**) or by downloading from the Internet at *http://www.regulations.gov* in Docket No. FWS–R4–ES–2015–0133.

Exclusion Based on Economic Impacts

Based on the Service's consideration of the economic impacts of the critical habitat designation above, the Secretary is not exercising her discretion to exclude any areas from this designation of critical habitat for the Kentucky arrow darter based on economic impacts.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are areas where designation of critical habitat might have an impact on national security. In preparing this final rule, we have determined that no lands within the designation of critical habitat for the Kentucky arrow darter are owned or managed by the Department of Defense or Department of Homeland Security, and, therefore, we anticipate no impact on national security. Consequently, the Secretary is not exercising her discretion to exclude any areas from the final designation based on impacts on national security.

Exclusions Based on Other Relevant Impacts

Under section 4(b)(2) of the Act, we also consider any other relevant impacts resulting from the designation of critical habitat. We consider a number of factors, including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this final rule, we have determined that there are currently no HCPs or other management plans for the Kentucky arrow darter, and the final designation does not include any tribal lands or trust resources. We anticipate no impact on partnerships from this critical habitat designation. Accordingly, the Secretary is not exercising her discretion to exclude any areas from this final designation based on other relevant impacts.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is not significant.

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

this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we considered the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

The Service's current understanding of the requirements under the RFA, as amended, and following recent court decisions, is that Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself and, therefore, not required to evaluate the potential impacts to indirectly regulated entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the agency is not likely to destroy or adversely modify critical habitat. Therefore, under section 7, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by a critical habitat designation. Consequently, it is our position that only Federal action agencies will be directly regulated by this designation. There is no requirement under the RFA to evaluate the potential impacts to entities not directly regulated. Moreover, Federal agencies are not small entities. Therefore, because no small entities are directly regulated by this rulemaking, the Service certifies that the final critical habitat designation will not have a significant economic impact on a substantial number of small entities.

During the development of this final rule we reviewed and evaluated all information submitted during the comment period that may pertain to our consideration of the probable incremental economic impacts of this critical habitat designation. Based on this information, we affirm our certification that this final critical habitat designation will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis is not required.

Energy Supply, Distribution, or Use—Executive Order 13211

E.O. 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. In our economic analysis, we found that the designation of critical habitat for the Kentucky arrow darter will not significantly affect energy supplies, distribution, or use. Natural gas and oil exploration and development activities occur or could potentially occur in all of the critical habitat units for the Kentucky arrow darter; however, compliance with State regulatory requirements or voluntary BMPs would be expected to minimize impacts of natural gas and oil exploration and development in the areas of critical habitat for the species. The measures for natural gas and oil exploration and development are generally not considered a substantial cost compared with overall project costs and are already being implemented by oil and gas companies.

Surface coal mining occurs or could potentially occur in all critical habitat units for the Kentucky arrow darter. Incidental take for listed species associated with surface coal mining activities is currently covered under a programmatic, non-jeopardy biological opinion between the Office of Surface Mining Reclamation and Enforcement and the Service completed in 1996 (Service 1996, entire). The biological opinion covers existing, proposed, and future endangered and threatened species that may be affected by the implementation and administration of surface coal mining programs under the Surface Mining Control and Reclamation Act (30 U.S.C. 1201 *et seq.*). Through its analysis, the Service concluded that the proposed action (surface coal mining and reclamation activities) was not likely to jeopardize the continued existence of any endangered or threatened species, or any species proposed for listing as an endangered or threatened species, or result in adverse modification of designated or proposed critical habitat. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal

governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule would significantly or uniquely affect small governments because this species occurs primarily in Federally owned river channels or in remote privately owned stream channels. Also, this rule would not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments and, as such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for Kentucky arrow darter in a takings implications assessment. The Act does not authorize the Service to regulate private actions on private lands or confiscate private property as a result of critical habitat designation. Designation of critical habitat does not affect land ownership, or establish any closures, or restrictions on use of or access to the designated areas. Furthermore, the designation of critical habitat does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. However, Federal agencies are prohibited from carrying out, funding, or authorizing actions that would destroy or adversely modify critical habitat. A takings implications assessment has been completed and concludes that this designation of critical habitat for Kentucky arrow darter does not pose significant takings implications for lands within or affected by the designation.

Federalism—Executive Order 13132

In accordance with E.O. 13132 (Federalism), this final rule does not have significant Federalism effects. A federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of the proposed critical habitat designation with, appropriate State resource agencies in Kentucky. We received comments from one State agency, the Kentucky State Nature Preserves Commission, and have addressed them in the Summary of Comments and Recommendations section of this document.

From a federalism perspective, the designation of critical habitat directly affects only the responsibilities of Federal agencies. The Act imposes no other duties with respect to critical habitat, either for States and local governments, or for anyone else. As a result, the rule does not have substantial direct effects either on the States, or on the relationship between the Federal Government and the States, or on the distribution of powers and responsibilities among the various levels of government. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the physical or biological features of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist these local governments in long-range planning (because these local governments no longer have to wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on maps, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act in connection with

designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), E.O. 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

We determined that there are no tribal lands occupied by the Kentucky arrow darter at the time of listing that contain the physical or biological features essential to conservation of the species, and no tribal lands unoccupied by the Kentucky arrow darter that are essential for the conservation of the species. Therefore, we are not designating critical habitat for the Kentucky arrow darter on tribal lands.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* in Docket No. FWS–R4–ES–2015–0133 and upon request from the Kentucky Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rulemaking are the staff members of the Kentucky Ecological Services Field Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

■ 2. In § 17.95, amend paragraph (e) by adding the entry ''Kentucky Arrow Darter (*Etheostoma spilotum*)'' after the entry for ''Fountain Darter (*Etheostoma fonticola)''* to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(e) *Fishes.*

* * * * *

Kentucky Arrow Darter (*Etheostoma Spilotum*)

(1) Critical habitat units are depicted on the maps below for Breathitt, Clay, Harlan, Jackson, Knott, Lee, Leslie, Owsley, Perry, and Wolfe Counties, Kentucky.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of the Kentucky arrow darter consist of five components:

(i) Primary Constituent Element 1—Riffle-pool complexes and transitional areas (glides and runs) of geomorphically stable, first- to third-order streams of the upper Kentucky River drainage with connectivity between spawning, foraging, and resting sites to promote gene flow throughout the species' range.

(ii) Primary Constituent Element 2—Stable bottom substrates composed of gravel, cobble, boulders, bedrock ledges, and woody debris piles with low levels of siltation.

(iii) Primary Constituent Element 3—An instream flow regime (magnitude, frequency, duration, and seasonality of discharge over time) sufficient to provide permanent surface flows, as measured during years with average rainfall, and to maintain benthic habitats utilized by the species.

(iv) Primary Constituent Element 4—Adequate water quality characterized by seasonally moderate stream temperatures (generally ≤ 24 °C or 75 °F), high dissolved oxygen concentrations (generally ≥ 6.0 mg/L), moderate pH (generally 6.0 to 8.5), low stream conductivity (species' abundance decreases sharply as conductivities exceed 261 µS/cm and species is typically absent above 350 µS)/cm, and low levels of pollutants. Adequate water quality is the quality necessary for normal behavior, growth, and viability of all life stages of the Kentucky arrow darter.

(v) Primary Constituent Element 5—A prey base of aquatic macroinvertebrates, including mayfly nymphs, midge larvae, blackfly larvae, caddisfly larvae, stonefly nymphs, and small crayfishes.

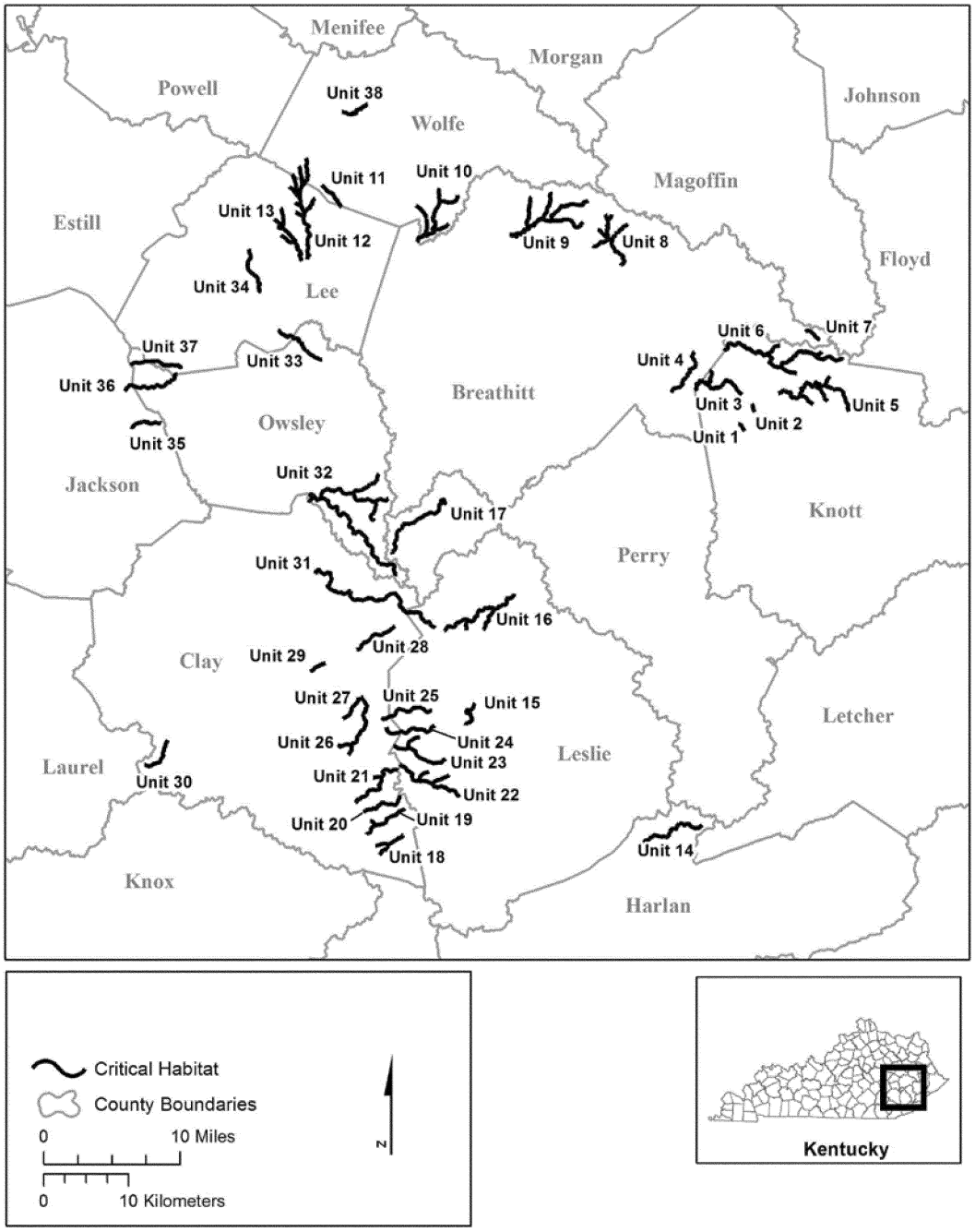
(3) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on November 4, 2016.

(4) *Critical habitat map units.* Data layers defining map units were created on a base of U.S. Geological Survey (USGS) National Hydrography Dataset (NHD+) GIS data. The 1:100,000 river reach (route) files were used to calculate river kilometers and miles. ESRIs ArcGIS 10.0 software was used to determine longitude and latitude coordinates using decimal degrees. The projection used in mapping all units was USA Contiguous Albers Equal Area Conic USGS version, NAD 83, meters. The following data sources were referenced to identify features (like roads and streams) used to delineate the upstream and downstream extents of critical habitat units: NHD+ flowline and waterbody data, 2011 Navteq roads data, USA Topo ESRI online basemap service, DeLorme Atlas and Gazetteers, and USGS 7.5 minute topographic maps. The maps in this entry, as modified by any accompanying regulatory text, establish the boundaries of the critical habitat designation. The coordinates, plot points, or both on which each map is based are available to the public at the Service's Internet site, (*http://fws.gov/frankfort/*), at *http://www.regulations.gov* at Docket No. FWS–R4–ES–2015–0133, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(5) *Note:* Index map follows:

BILLING CODE 4333–15–P

Index Map:Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)



(6) Unit 1: Buckhorn Creek and Prince Fork, and Unit 2: Eli Fork, Knott County, Kentucky.

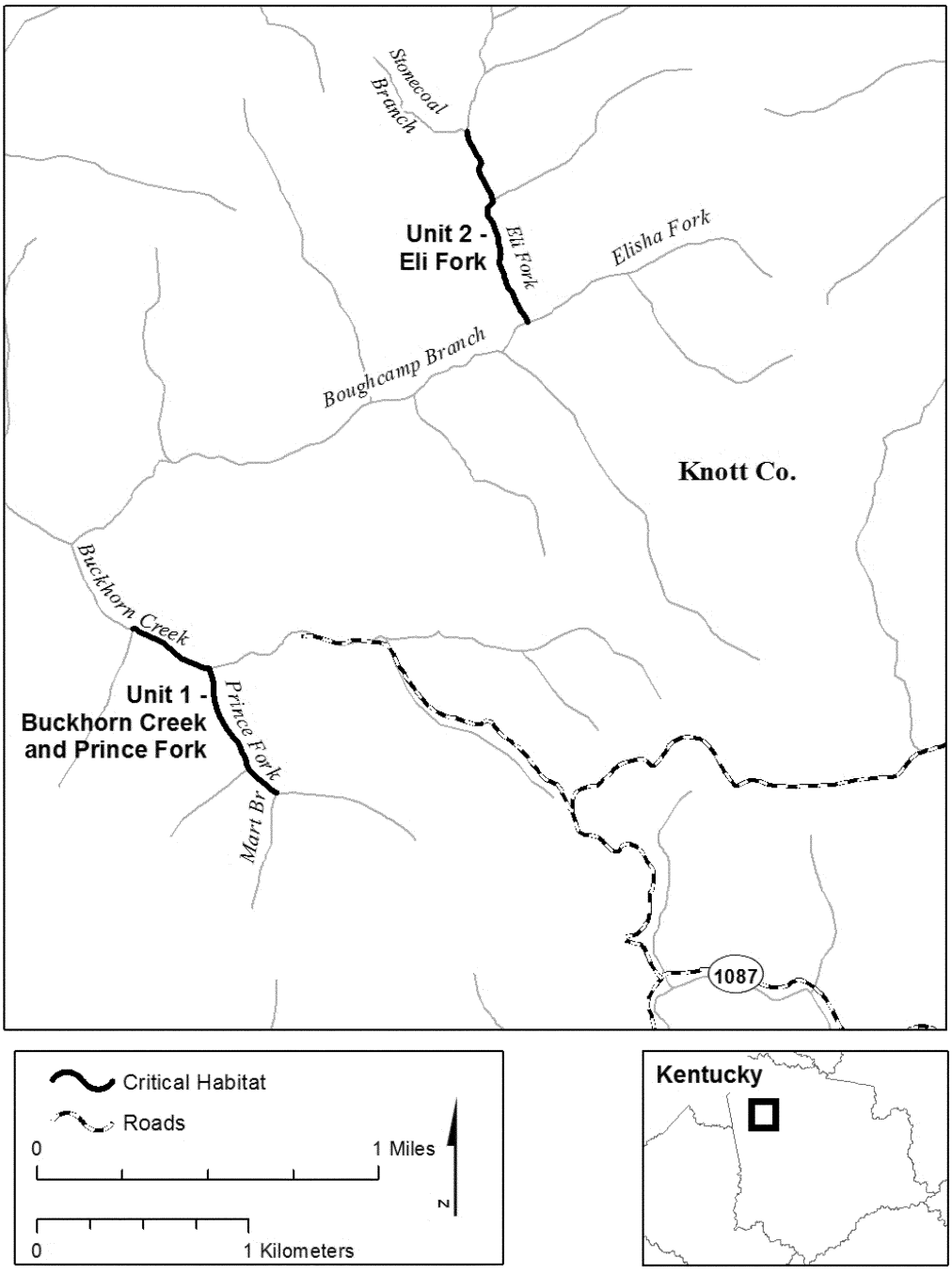
(i) Unit 1 includes 0.7 skm (0.4 smi) of Prince Fork from Mart Branch (37.41291, −83.07000) downstream to its confluence with Buckhorn Creek (37.41825, −83.07341), and 0.4 skm (0.3 smi) of Buckhorn Creek from its headwaters at (37.41825, −83.07341) downstream to its confluence with Emory Branch (37.42006, −83.07738) in Knott County, Kentucky.

(ii) Unit 2 includes 1.0 skm (0.6 smi) of Eli Fork from its headwaters at (37.44078, −83.05884), downstream to its confluence with Boughcamp Branch (37.43259, −83.05591) in Knott County, Kentucky.

(iii) Map of Units 1 and 2 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 1 - Buckhorn Creek and Prince Fork: Knott County, Kentucky
Unit 2 - Eli Fork: Knott County, Kentucky



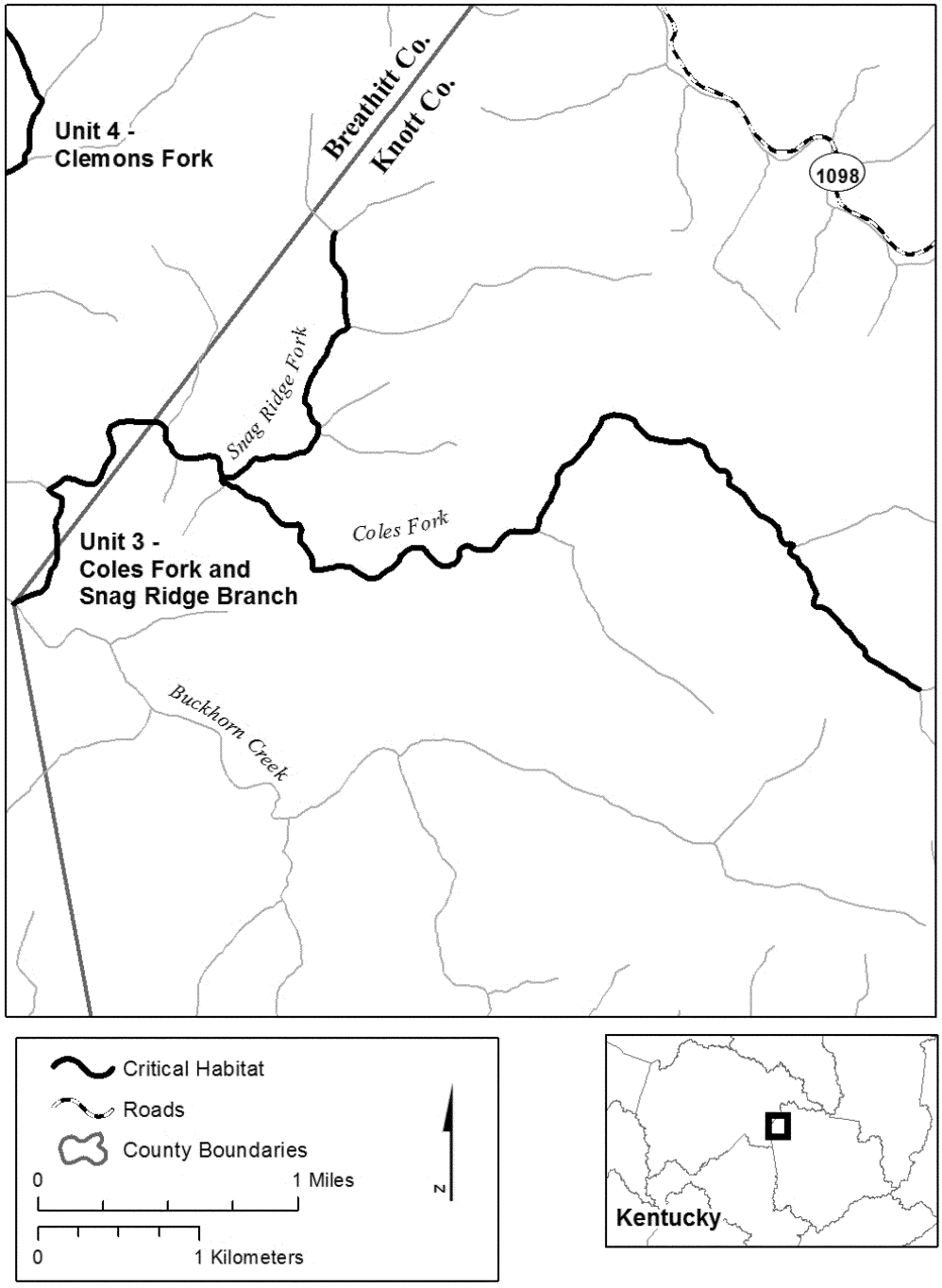
(7) Unit 3: Coles Fork and Snag Ridge Fork, Breathitt and Knott Counties, Kentucky.

(i) Unit 3 includes 2.1 skm (1.3 smi) of Snag Ridge Fork from its headwaters at (37.47746, −83.11139), downstream to its confluence with Coles Fork (37.46391, −83.13468) in Knott County; and 8.9 skm (5.5 smi) of Coles Fork from its headwaters at (37.45096, −83.07124), downstream to its confluence with Buckhorn Creek (37.45720, −83.13468) in Knott County, Kentucky.

(ii) Map of Unit 3 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 3 - Coles Fork and Snag Ridge Branch: Knott and Breathitt Counties, Kentucky



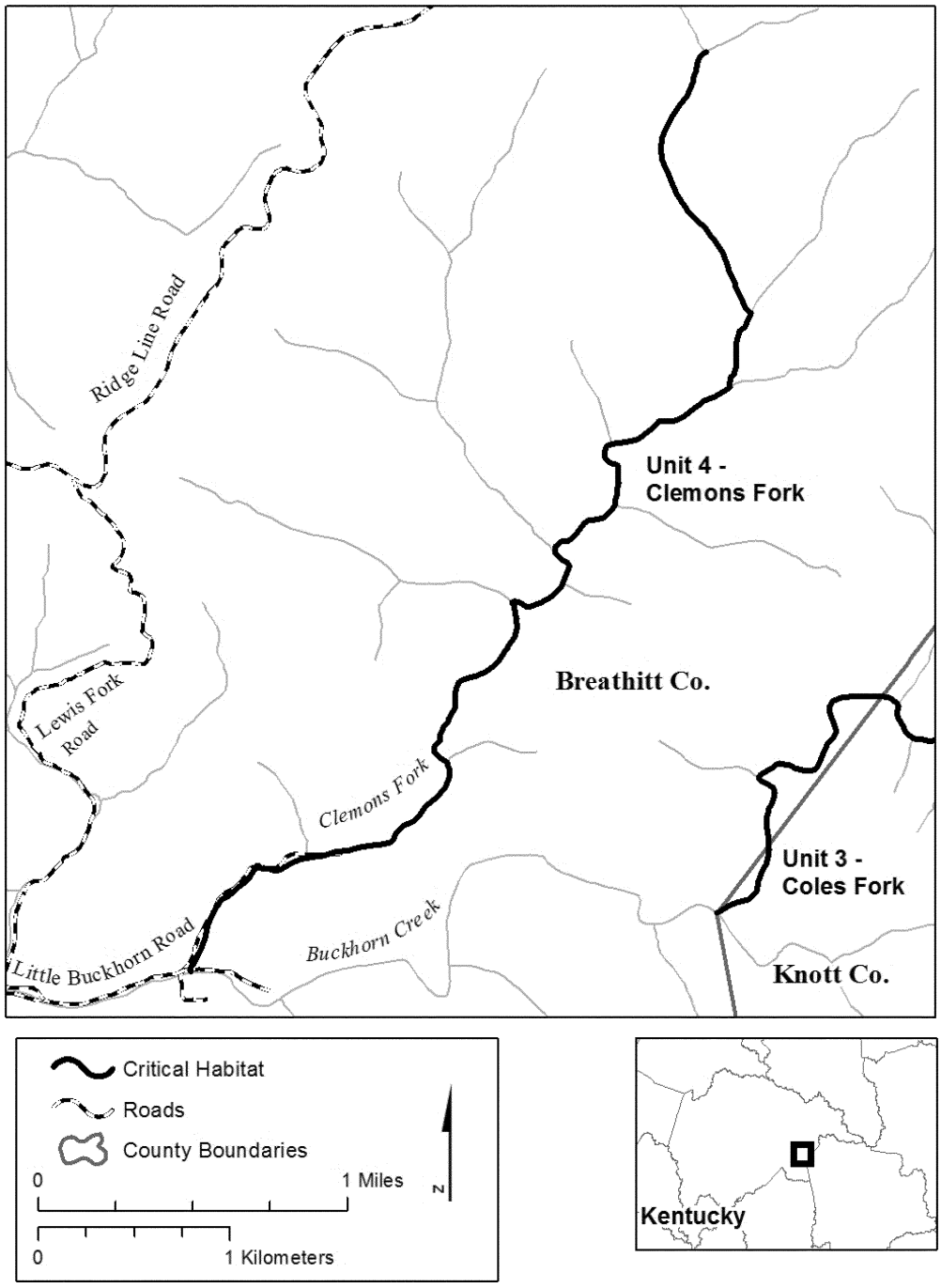
(8) Unit 4: Clemons Fork, Breathitt County, Kentucky.

(i) Unit 4 includes 7.0 skm (4.4 smi) of Clemons Fork from its headwaters at (37.49772, −83.13390), downstream to its confluence with Buckhorn Creek (37.45511, −83.16582) in Breathitt County, Kentucky.

(ii) Map of Unit 4 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 4 - Clemons Fork: Breathitt County, Kentucky



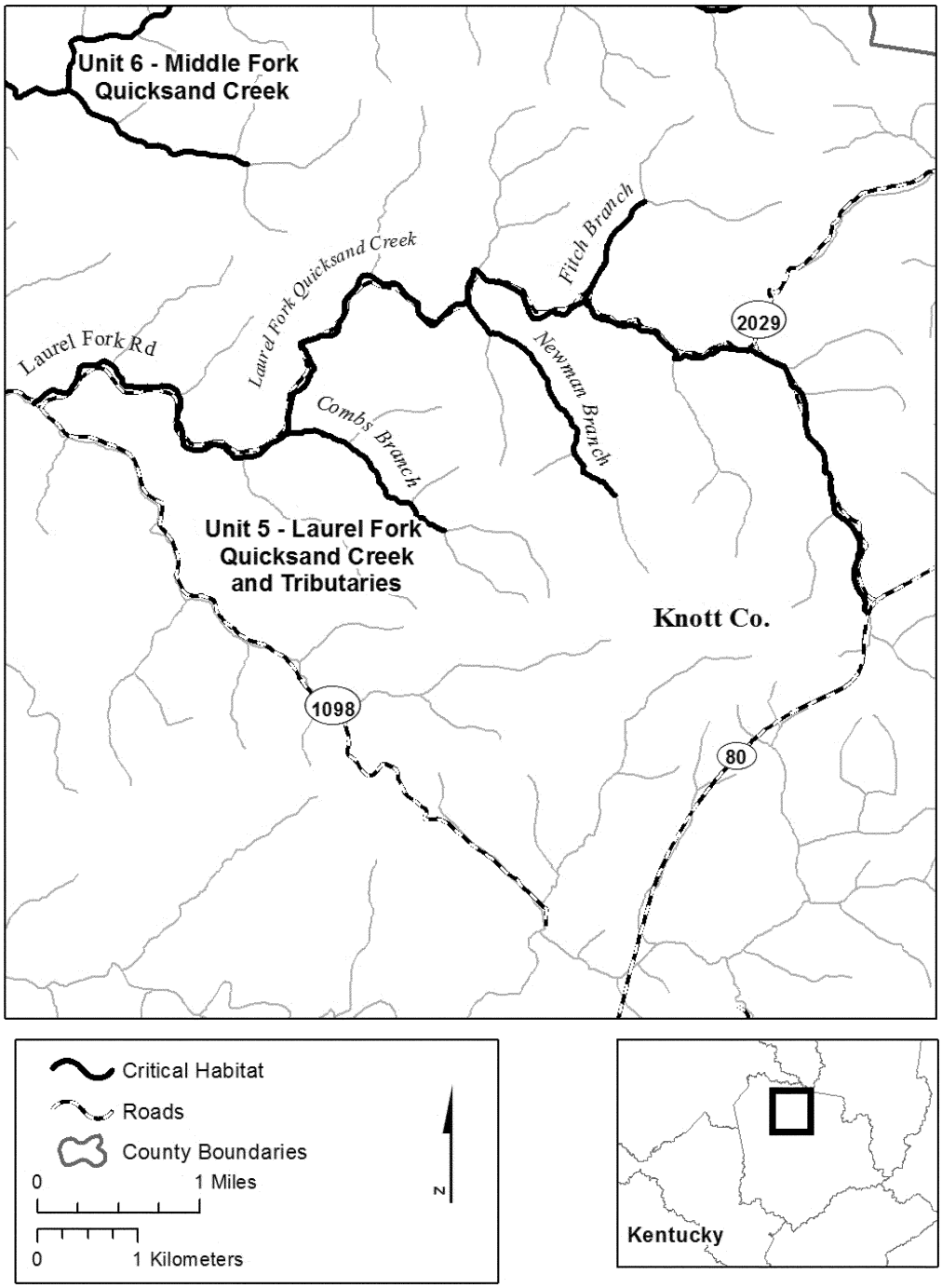
(9) Unit 5: Laurel Fork Quicksand Creek and Tributaries, Knott County, Kentucky.

(i) Unit 5 includes 1.2 skm (0.8 smi) of Fitch Branch from its headwaters at (37.46745, −82.95373), downstream to its confluence with Laurel Fork Quicksand Creek (37.45855, −82.96089); 2.7 skm (1.7 smi) of Newman Branch from its headwaters at (37.44120, −82.95810), downstream to its confluence with Laurel Fork Quicksand Creek (37.45893, −82.97417); 2.1 skm (1.3 smi) of Combs Branch from its headwaters at (37.43848, −82.97731), downstream to its confluence with Laurel Fork Quicksand Creek (37.44758, −82.99476); and 13.8 skm (8.6 smi) of Laurel Fork Quicksand Creek from its headwaters at (37.43001, −82.93016), downstream to its confluence with Quicksand Creek (37.45100, −83.02303) in Knott County, Kentucky.

(ii) Map of Unit 5 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 5 - Laurel Fork Quicksand Creek and Tributaries: Knott County, Kentucky



(10) Unit 6: Middle Fork Quicksand Creek and Tributaries, Knott County, and Unit 7: Spring Fork Quicksand Creek, Breathitt County, Kentucky.

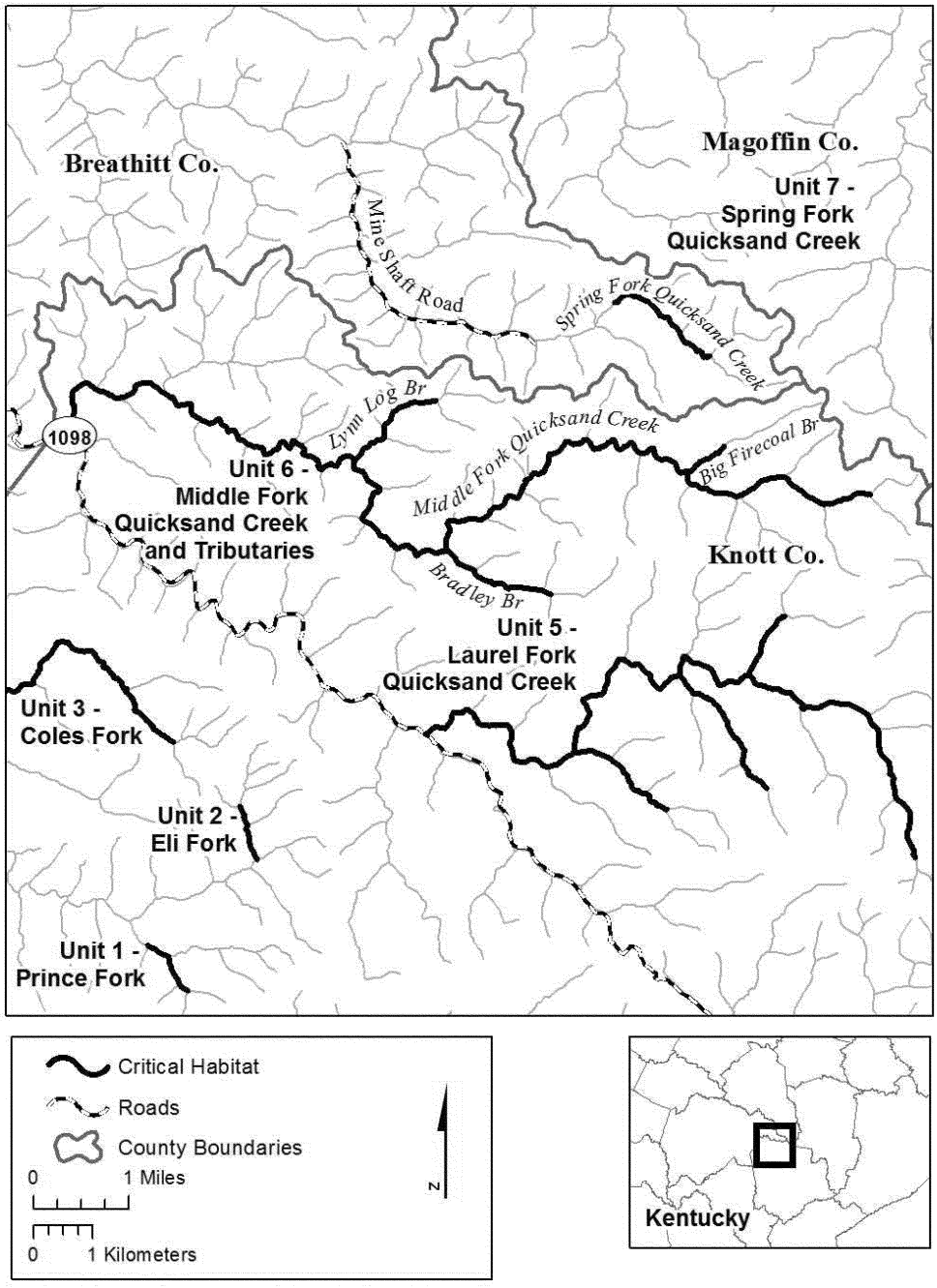
(i) Unit 6 includes 0.8 skm (0.5 smi) of Big Firecoal Branch from its headwaters at (37.49363, −82.96426), downstream to its confluence with Middle Fork Quicksand Creek (37.48990, −82.97148); 2.1 skm (1.3 smi) of Bradley Branch from its headwaters at (37.47180, −82.99819), downstream to its confluence with Middle Fork Quicksand Creek (37.47899, −83.01823); 2.0 skm (1.2 smi) of Lynn Log Branch from its headwaters at (37.50190, −83.01921), downstream to its confluence with Middle Fork Quicksand Creek (37.49286. −83.03524); and 20.3 skm (12.6 smi) of Middle Fork Quicksand Creek from its headwaters at (37.48562, −82.93667), downstream to its confluence with Quicksand Creek (37.498281, −83.092946) in Knott County, Kentucky.

(ii) Unit 7 includes 2.2 skm (1.4 smi) of Spring Fork Quicksand Creek from its headwaters at (37.50746, −82.96647), downstream to its confluence with Laurel Fork (37.51597, −82.98436) in Breathitt County, Kentucky.

(iii) Map of Units 6 and 7 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 6 - Middle Fork Quicksand Creek and Tributaries: Knott County, Kentucky
Unit 7 - Spring Fork Quicksand Creek: Breathitt County, Kentucky



(11) Unit 8: Hunting Creek and Tributaries, Breathitt County, Kentucky.

(i) Unit 8 includes 0.9 skm (0.5 smi) of Wolf Pen Branch from its headwaters at (37.64580, −83.23885), downstream to its confluence with Hunting Creek (37.64023, −83.24424); 1.6 skm (1.0 smi) of Negro Fork from its headwaters at (37.62992, −83.25760), downstream to its confluence with Hunting Creek (37.62121, −83.24433); 2.3 skm (1.4 smi) of Fletcher Fork from its headwaters at (37.61315, −83.26521), downstream to its confluence with Hunting Creek (37.61956, −83.24370); 3.1 skm (1.9 smi) of Licking Fork from its headwaters at (37.63553, −83.21754, −83.21754), downstream to its confluence with Hunting Creek (37.61794, −83.23938); and 7.7 skm (4.8 smi) of Hunting Creek from its

confluence with Wells Fork (37.64629, −83.24708), downstream to its confluence with Quicksand Creek (37.59235, −83.22803) in Breathitt County, Kentucky.

(ii) Map of Unit 8 follows:

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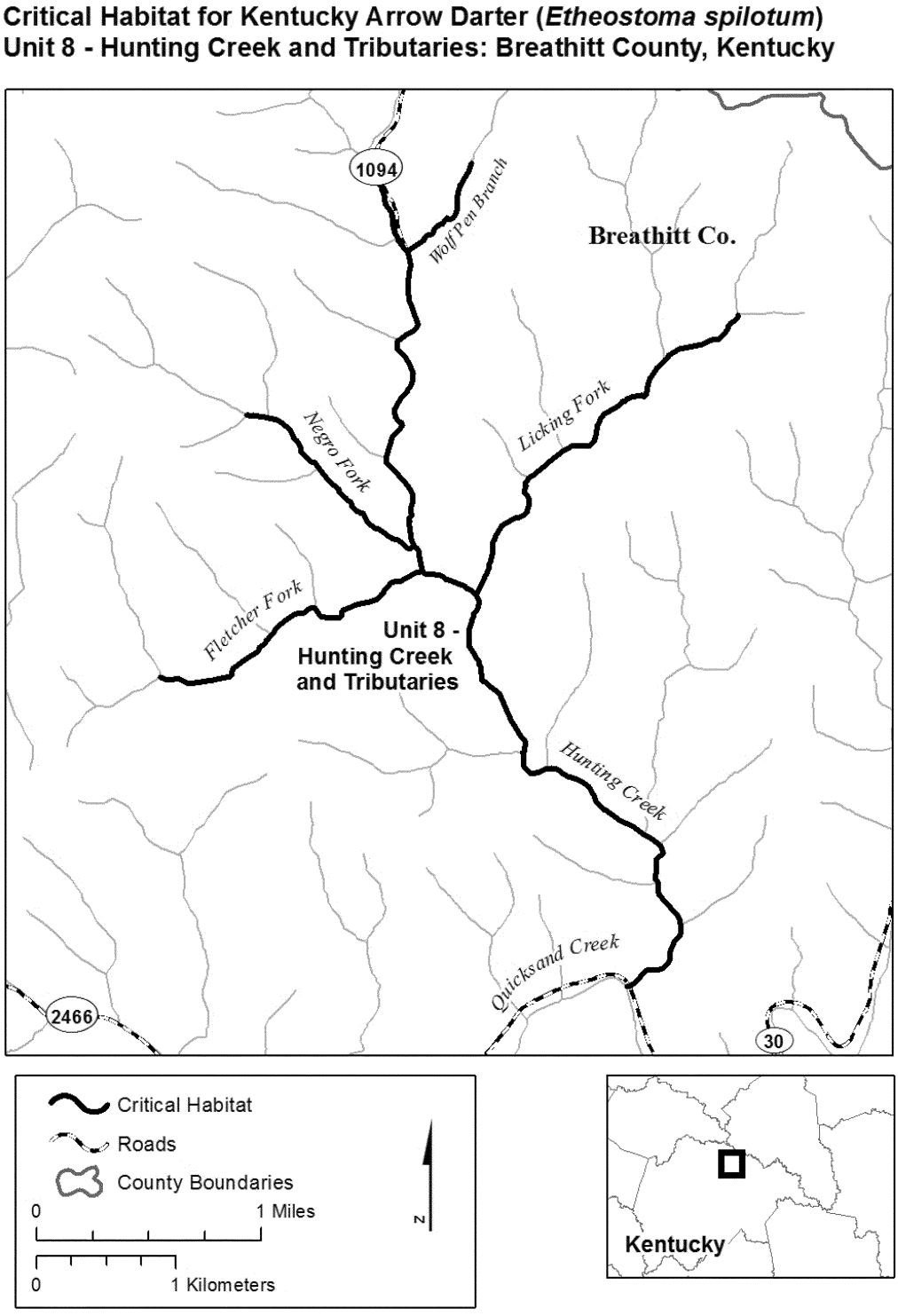


(12) Unit 9: Frozen Creek and Tributaries, Breathitt County, Kentucky.

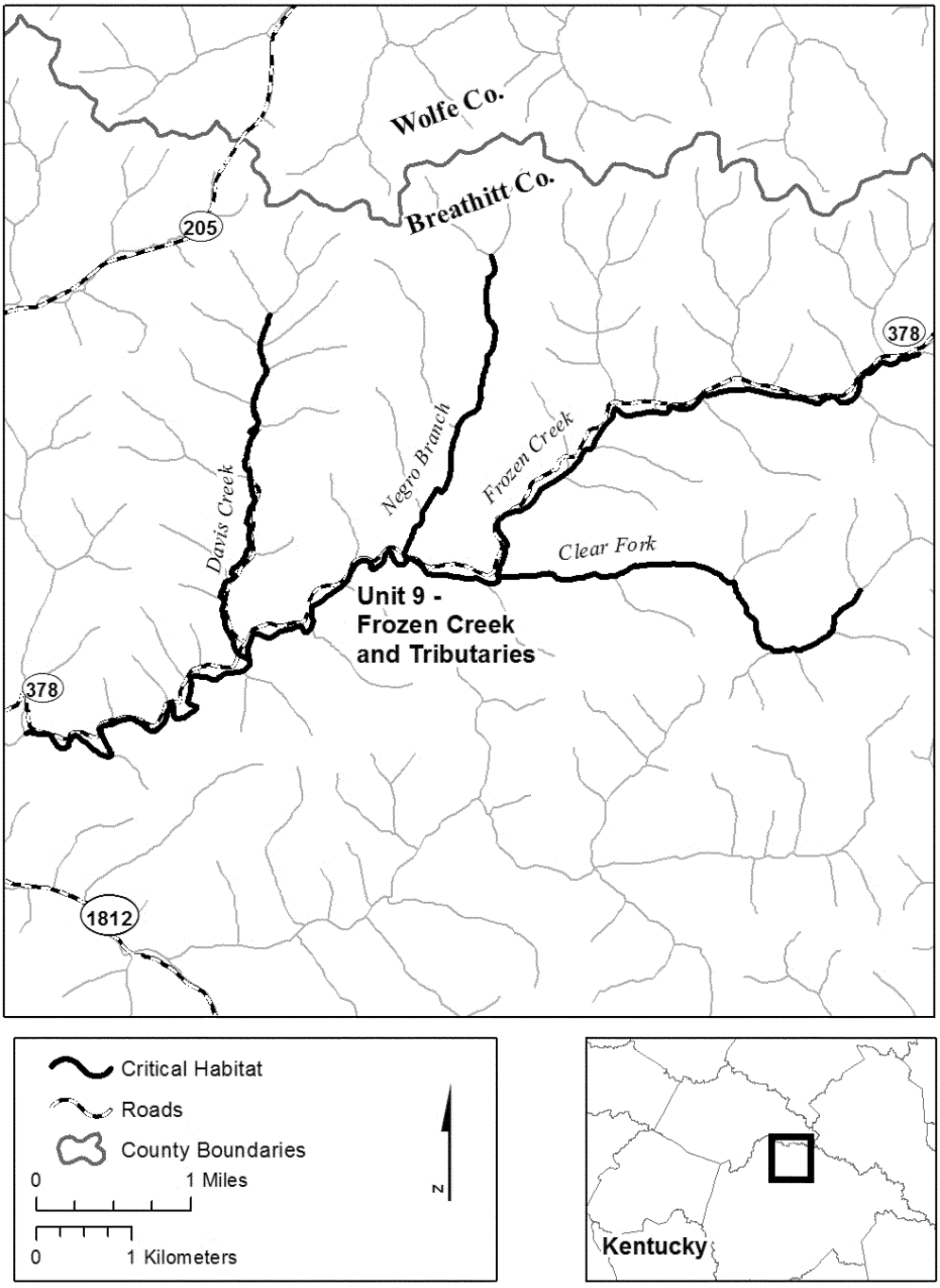
(i) Unit 9 includes 4.7 skm (2.9 smi) of Clear Fork from its headwaters at (37.63899, −83.27706), downstream to its confluence with Frozen Creek (37.64109, −83.31969); 3.6 skm (2.3 smi) of Negro Branch from its headwaters at (37.67146, −83.31971), downstream to its confluence with Frozen Creek (37.64319, −83.33068); 4.2 skm (2.6 smi) of Davis Creek from its headwaters at (37.66644, −83.34599), downstream to its confluence with Frozen Creek (37.63402, −83.34953); and 13.9 skm (8.6 smi) of Frozen Creek from its headwaters at (37.66115, −83.26945),

downstream to its confluence with Morgue Fork (37.62761, −83.37622) in Breathitt County, Kentucky.

(ii) Map of Unit 9 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 9 - Frozen Creek and Tributaries: Breathitt County, Kentucky



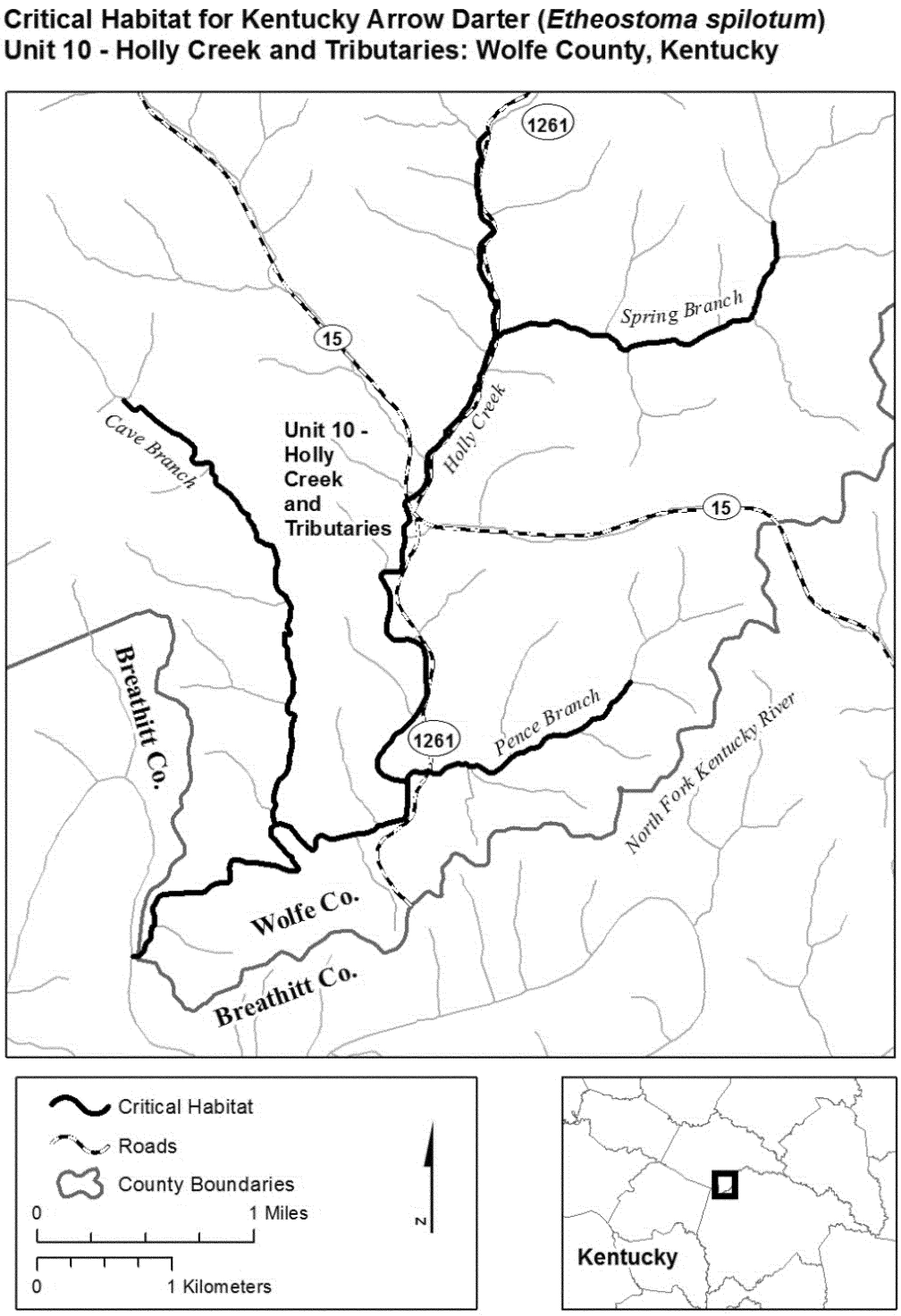
(13) Unit 10: Holly Creek and Tributaries, Wolfe County, Kentucky.

(i) Unit 10 includes 2.8 skm (1.8 smi) of Spring Branch from its headwaters at (37.67110, −83.44406), downstream to its confluence with Holly Creek (37.66384, −83.46780) in Wolfe County; 2.0 skm (1.3 smi) of Pence Branch from its headwaters at (37.64048, −83.45703), downstream to its confluence with Holly Creek (37.63413, −83.47608) in Wolfe County; 4.0 skm (2.5 mi) of Cave Branch from its headwaters at (37.66023, −83.49916), downstream to its confluence with Holly Creek (37.63149, −83.48725) in Wolfe County; 9.5 skm (5.9 smi) of Holly Creek from KY 1261 (37.67758, −83.46792) in Wolfe County, downstream to its confluence with the

North Fork Kentucky River (37.62289, −83.49948) in Wolfe County, Kentucky.

(ii) Map of Unit 10 follows:

BILLING CODE 4333–15–P



(14) Unit 11: Little Fork, Lee and Wolfe Counties; Unit 12: Walker Creek and Tributaries, Lee and Wolfe Counties; and Unit 13: Hell Creek and Tributaries, Lee County, Kentucky.

(i) Unit 11 includes 3.8 skm (2.3 smi) of Little Fork from its headwaters at (37.68456, −83.62465) in Wolfe County, downstream to its confluence with Lower Devil Creek (37.66148, −83.59961) in Lee County, Kentucky.

(ii) Unit 12 includes 3.9 skm (2.4 smi) of an unnamed tributary of Walker Creek from its headwaters at (37.71373, −83.64553) in Wolfe County, downstream to its confluence with Walker Creek (37.68567, −83.65045) in Lee County; 2.4 skm (1.5 smi) of Cowan Fork from its headwaters at (37.69624, −83.66366) in Wolfe County, downstream to its confluence with Hell

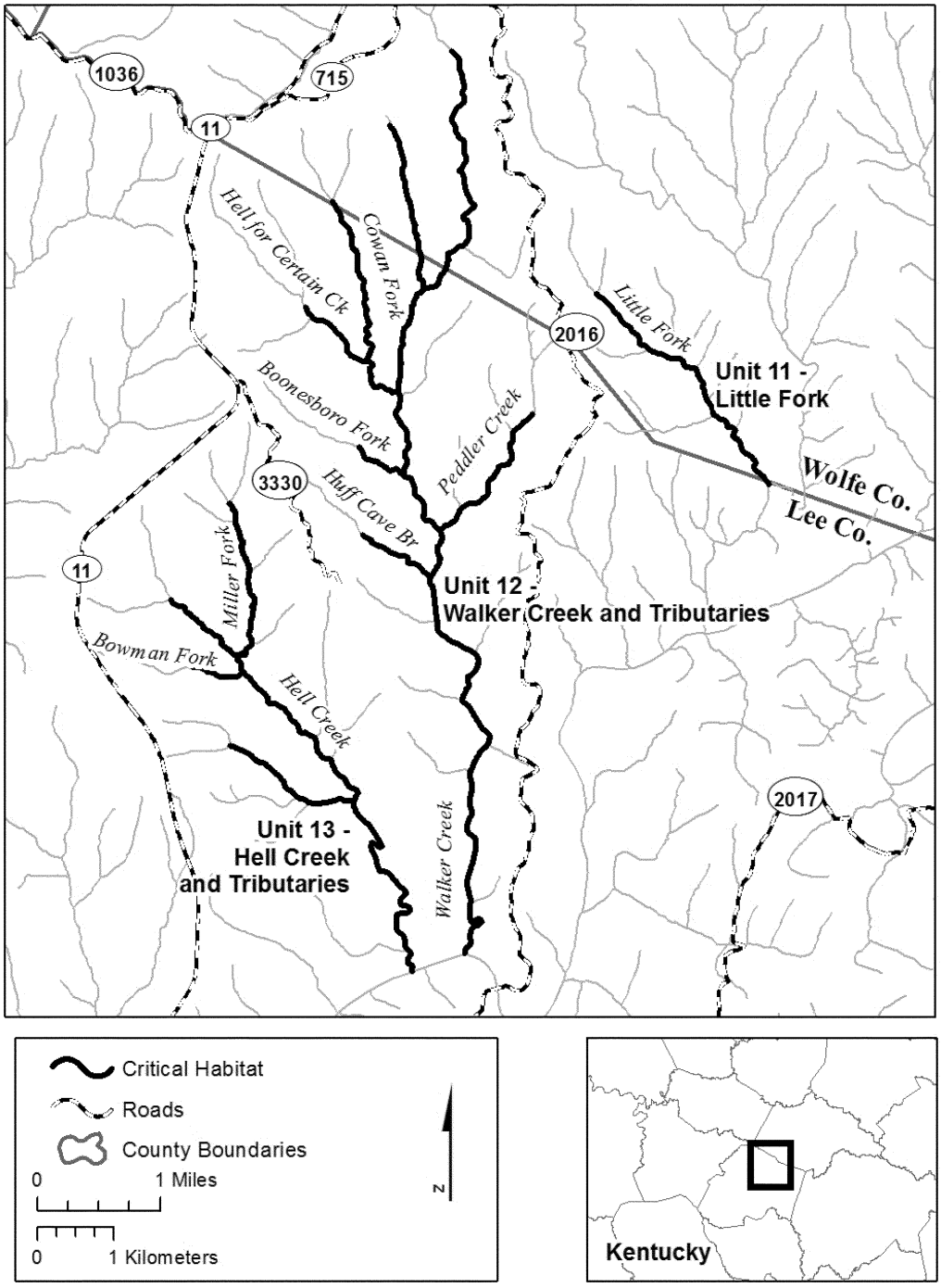
for Certain Creek (37.67718, −83.65931) in Lee County; 2.0 skm (1.2 smi) of Hell for Certain Creek from an unnamed reservoir at (37.68377, −83.66804), downstream to its confluence with Walker Creek (37.67340, −83.65449) in Lee County; 0.8 skm (0.5 smi) of Boonesboro Fork from its headwaters at (37.66706, −83.66053), downstream to its confluence with Walker Creek (37.66377, −83.65408) in Lee County; 2.2 skm (1.4 smi) of Peddler Creek from its headwaters at (37.67054, −83.63456), downstream to its confluence with Walker Creek (37.65696, −83.64879) in Lee County; 1.1 skm (0.7 smi) of Huff Cave Branch from its headwaters at (37.65664, −83.66033), downstream to its confluence with Walker Creek (37.65138, −83.65034) in Lee County; and 12.6 skm (7.8 smi) of Walker Creek from an unnamed reservoir (37.70502, −83.65490) in Wolfe County, downstream to its confluence with North Fork Kentucky River (37.60678, −83.64652) in Lee County, Kentucky.

(iii) Unit 13 includes 2.3 skm (1.4 smi) of Miller Fork from its headwaters at (37.66074, −83.68005), downstream to its confluence with Hell Creek (37.64261, −83.67912); 0.7 skm (0.4 smi) of Bowman Fork from its headwaters at (37.64142, −83.68594), downstream to its confluence with Hell Creek (37.64070, −83.67848); 1.9 skm (1.2 smi) of an unnamed tributary of Hell Creek from its headwaters at (37.63199, −83.83.68064), downstream to its confluence with Hell Creek (37.62516, −83.66246); and 7.1 skm (4.4 smi) of Hell Creek from an unnamed reservoir (37.64941, −83.68907), downstream to its confluence with North Fork Kentucky River (37.60480. −83.65440) in Lee County, Kentucky.

(iv) Map of Units 11, 12, and 13 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 11 - Little Fork: Lee and Wolfe Counties, Kentucky
Unit 12 - Walker Creek and Tributaries: Wolfe and Lee Counties, Kentucky
Unit 13 - Hell Creek and Tributaries: Lee County, Kentucky



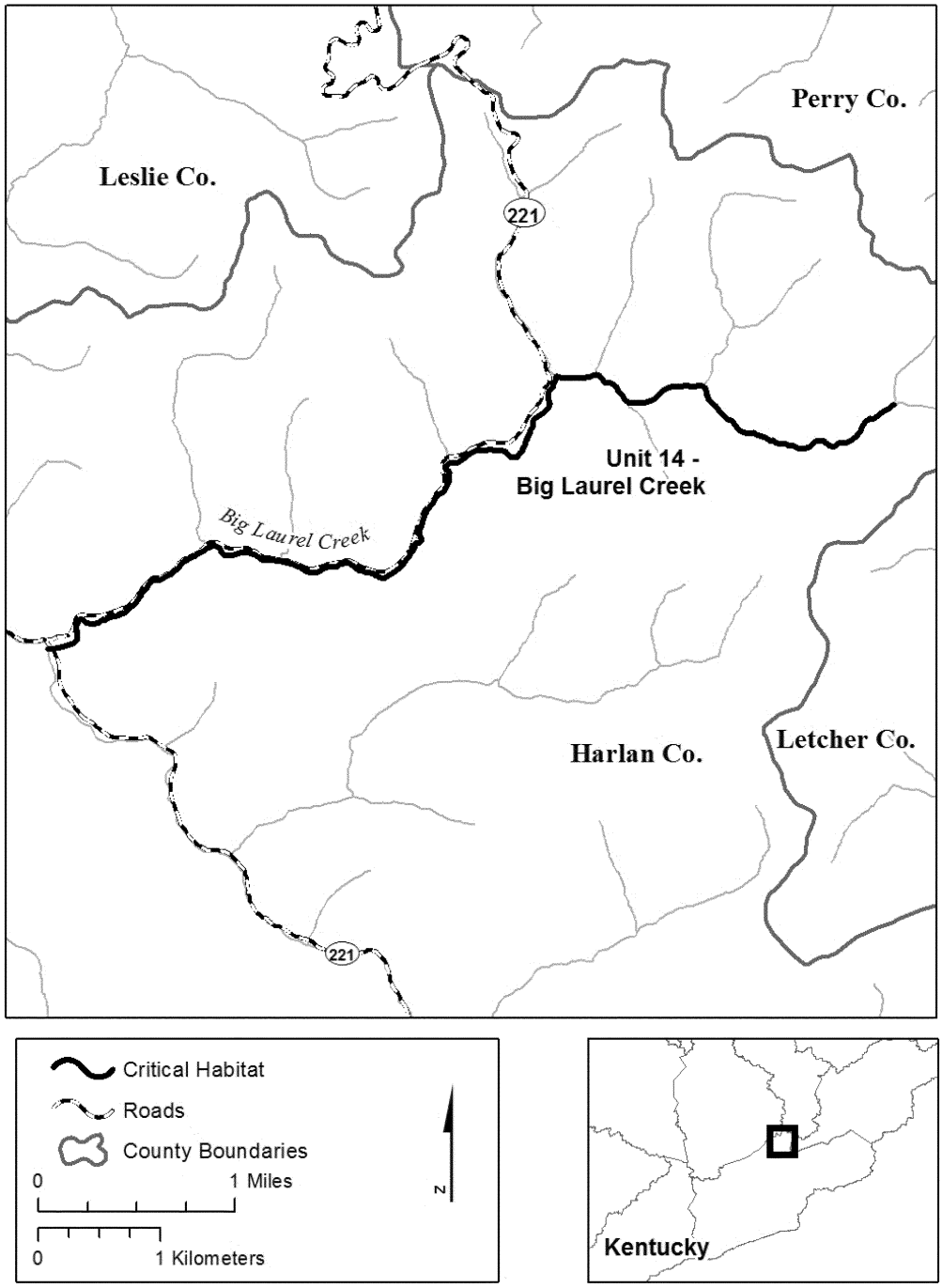
(15) Unit 14: Big Laurel Creek, Harlan County, Kentucky.

(i) Unit 14 includes 9.1 skm (5.7 smi) of Big Laurel Creek from its confluence with Combs Fork (36.99520, −83.14086), downstream to its confluence with Greasy Creek (36.97893, −83.21907) in Harlan County, Kentucky.

(ii) Map of Unit 14 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 14 - Big Laurel Creek: Harlan County, Kentucky



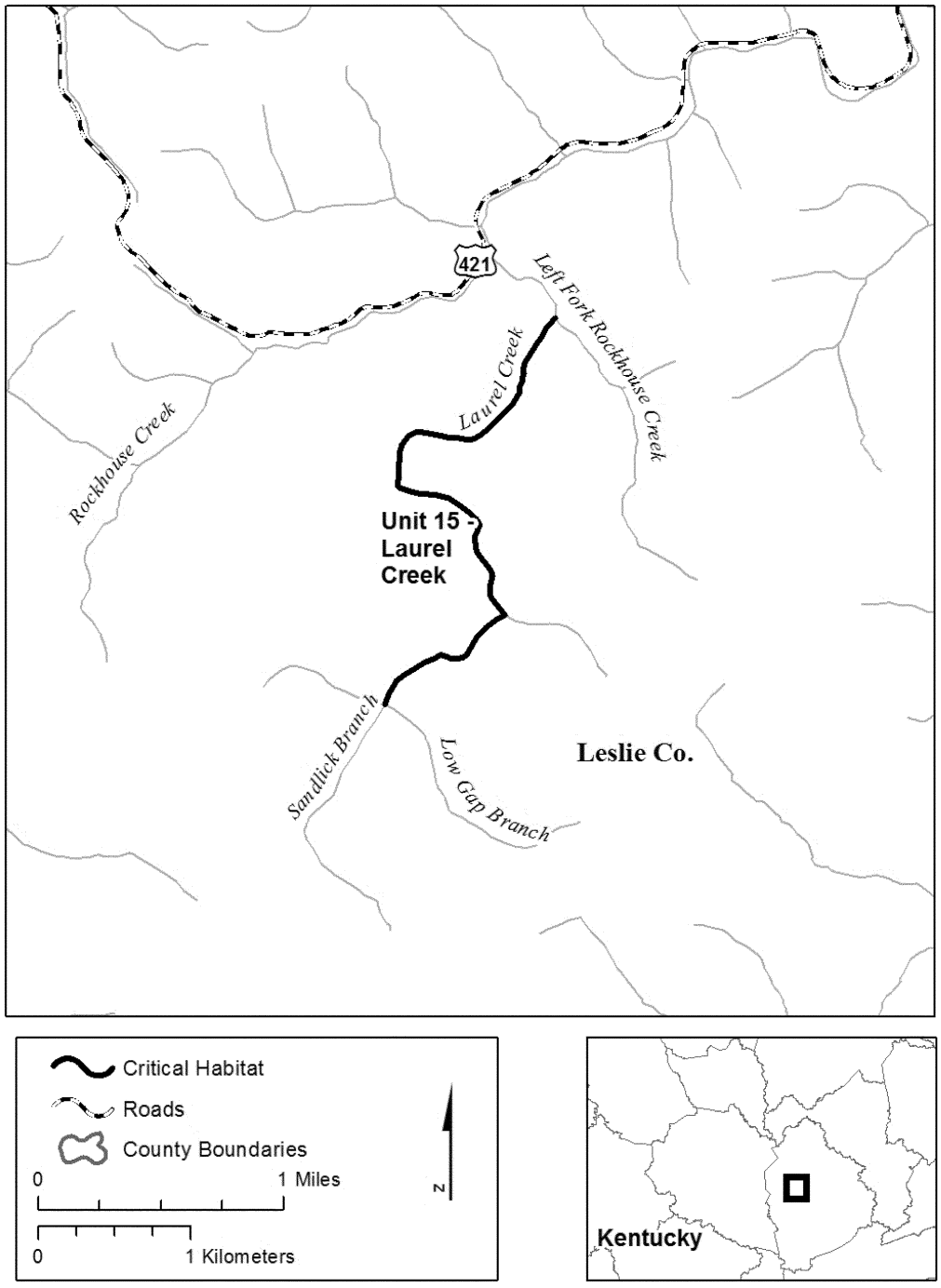
(16) Unit 15: Laurel Creek, Leslie County, Kentucky.

(i) Unit 15 includes 4.1 skm (2.6 smi) of Laurel Creek from its confluence with Sandlick Branch (37.10825, −83.45036), downstream to its confluence with Left Fork Rockhouse Creek (37.13085, −83.43699) in Leslie County, Kentucky.

(ii) Map of Unit 15 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 15 - Laurel Creek: Leslie County, Kentucky



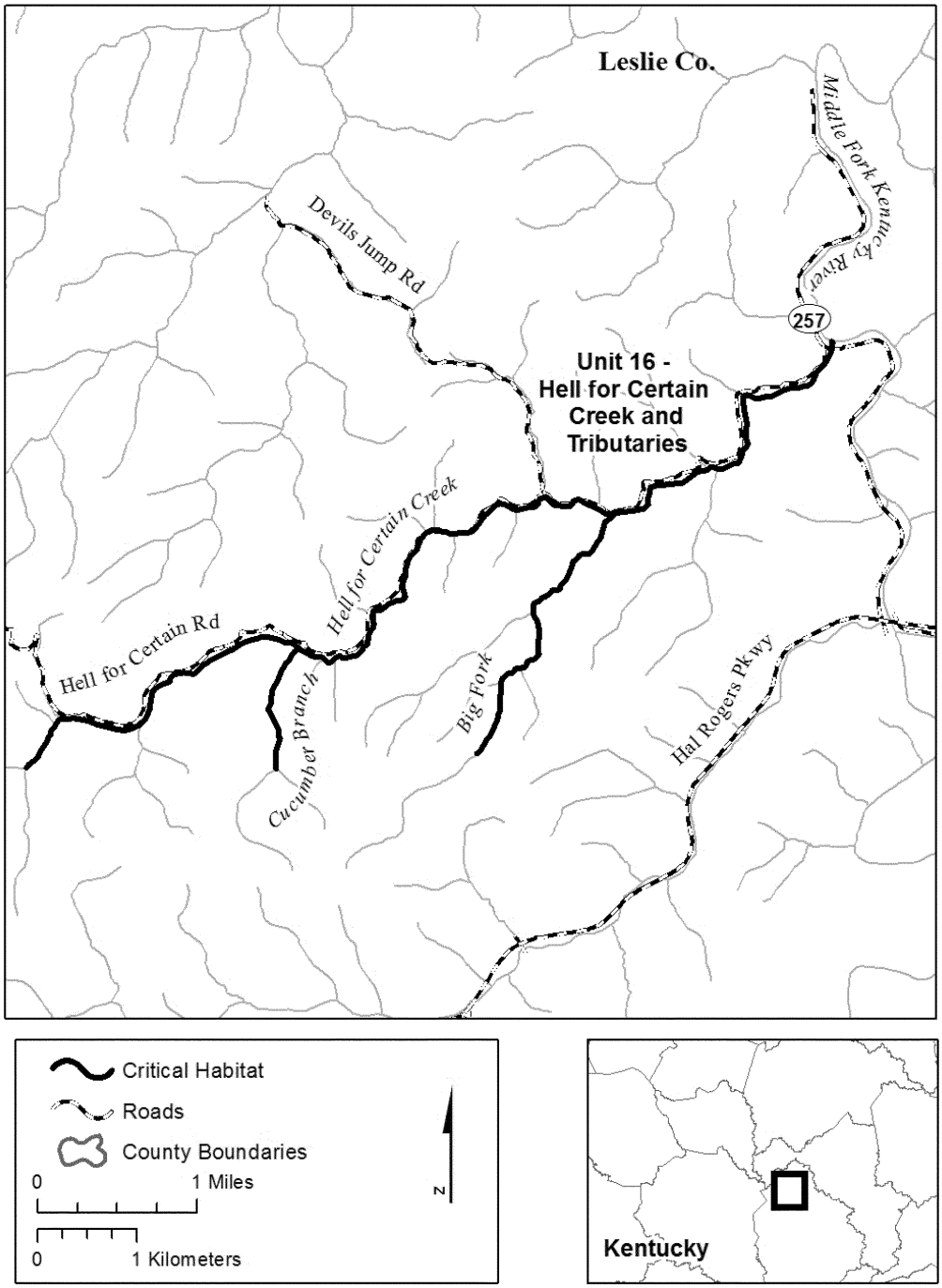
(17) Unit 16: Hell For Certain Creek and Tributaries, Leslie County, Kentucky.

(i) Unit 16 includes 1.3 skm (0.8 smi) of Cucumber Branch from its headwaters at (37.20839, −83.44644), downstream to its confluence with Hell For Certain Creek (37.21929, −83.44355); 3.1 skm (1.9 smi) of Big Fork from its headwaters at (37.20930, −83.42356), downstream to its confluence with Hell For Certain Creek (37.23082, −83.40720); and 11.4 skm (7.1 smi) of Hell For Certain Creek from its headwaters at (37.20904, −83.47489), downstream to its confluence with the Middle Fork Kentucky River (37.24611, −83.38192) in Leslie County, Kentucky.

(ii) Map of Unit 16 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 16 - Hell for Certain Creek and Tributaries: Leslie County, Kentucky



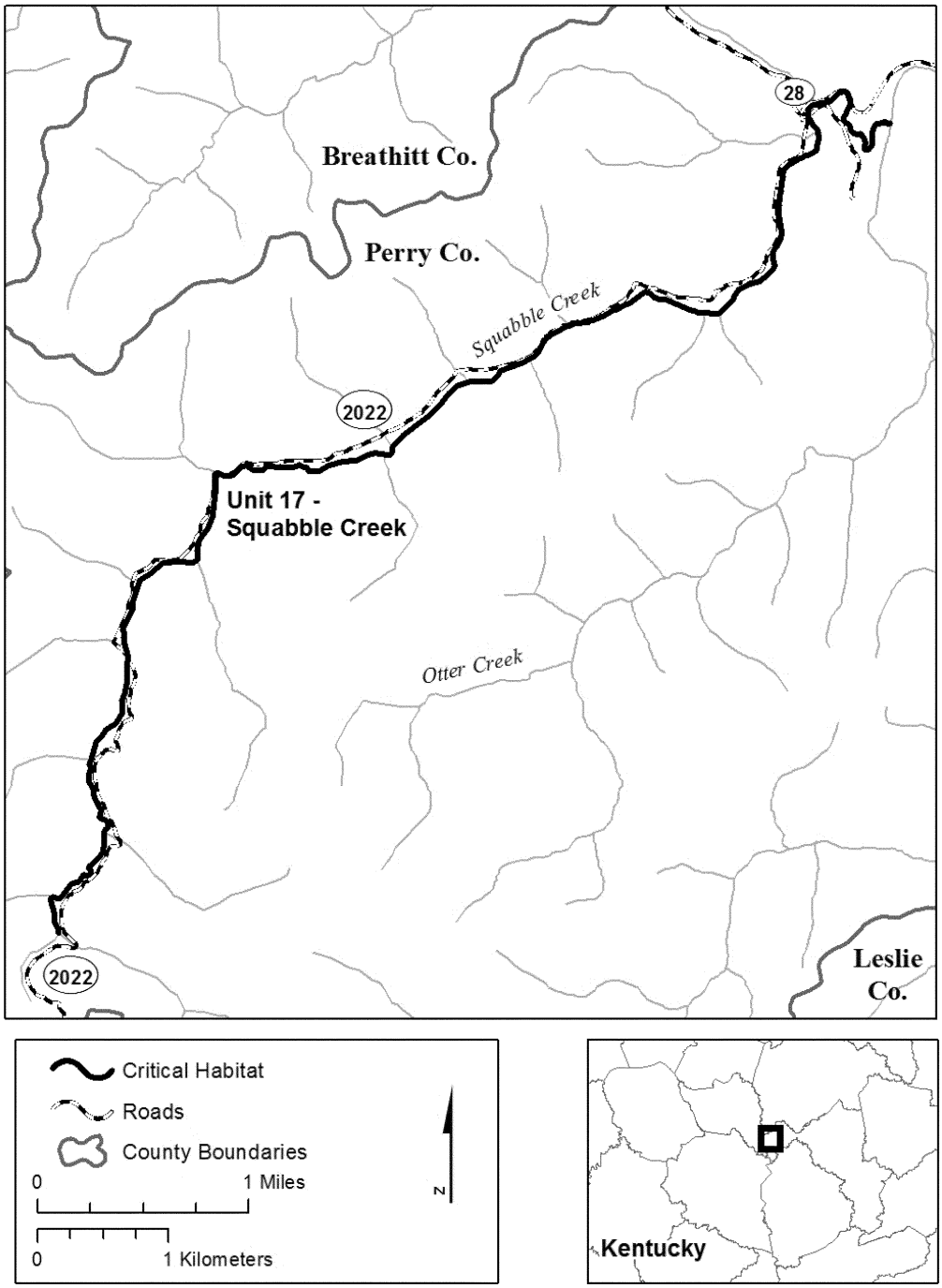
(18) Unit 17: Squabble Creek, Perry County, Kentucky.

(i) Unit 17 includes 12.0 skm (7.5 smi) of Squabble Creek from its confluence with Long Fork (37.29162, −83.54202), downstream to its confluence with the Middle Fork Kentucky River (37.34597, −83.46883) in Perry County, Kentucky.

(ii) Map of Unit 17 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 17 - Squabble Creek: Perry County, Kentucky



(19) Unit 18: Blue Hole Creek and Left Fork Blue Hole Creek, Unit 19: Upper Bear Creek and Tributaries, Unit 20: Katies Creek, and Unit 21: Spring Creek and Little Spring Creek, Clay County; and Unit 22: Bowen Creek and Tributaries, Leslie County, Kentucky.

(i) Unit 18 includes 1.8 skm (1.1 smi) of Left Fork from its headwaters at (36.97278, −83.56898), downstream to its confluence with Blue Hole Creek (36.98297, −83.55687); and 3.9 skm (2.4 smi) of Blue Hole Creek from its headwaters at (36.98254, −83.57376), downstream to its confluence with the Red Bird River (36.99288, −83.53672) in Clay County, Kentucky.

(ii) Unit 19 includes 1.5 skm (1.0 smi) of Left Fork Upper Bear Creek from its headwaters at (36.99519, −83.58446), downstream to its confluence with Upper Bear Creek (37.00448, −83.57354); 0.8 skm (0.5 smi) of Right Fork Upper Bear Creek from its headwaters at (37.00858, −83.58013), downstream to its confluence with Upper Bear Creek (37.00448, −83.57354); and 4.5 skm (2.8 smi) of Upper Bear Creek from its confluence with Left Fork and Right Fork Upper Bear Creek (37.02109, −83.53423), downstream to its confluence with the

Red Bird River (37.00448, −83.57354) in Clay County, Kentucky.

(iii) Unit 20 includes 5.7 skm (3.5 smi) of Katies Creek from its confluence with Cave Branch (37.01837, −83.58848), downstream to its confluence with the Red Bird River (37.03527, −83.53999) in Clay County, Kentucky.

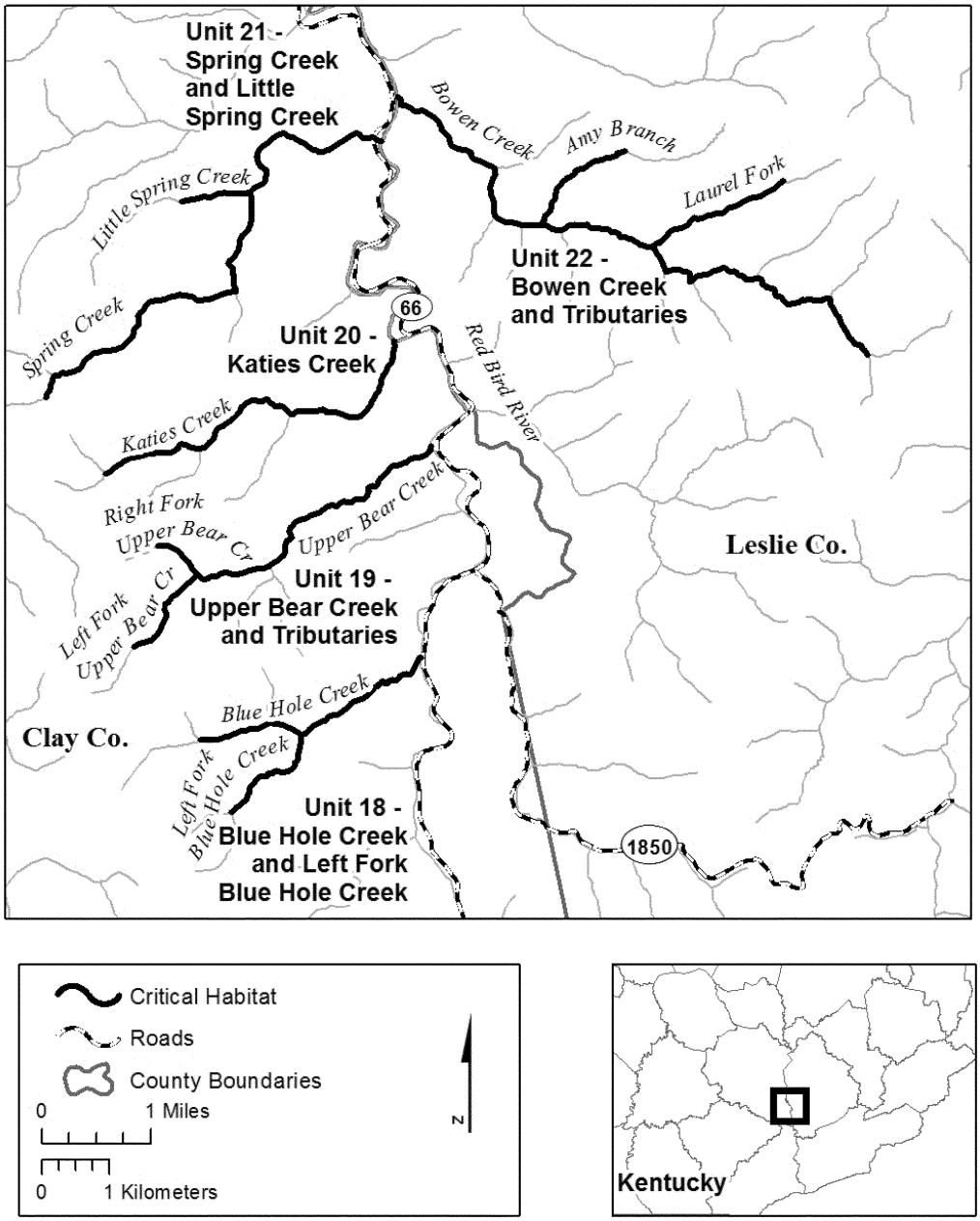
(iv) Unit 21 includes 1.0 skm (0.6 smi) of Little Spring Creek from its headwaters at (37.05452, −83.57483), downstream to its confluence with Spring Creek (37.05555, −83.56339); and 8.2 skm (5.1 smi) of Spring Creek from its headwaters at (37.02874, −83.59815), downstream to its confluence with the Red Bird River (37.06189, −83.54134) in Clay County, Kentucky.

(v) Unit 22 includes 2.2 skm (1.4 smi) of Laurel Fork from its headwaters at (37.05536, −83.47452), downstream to its confluence with Bowen Creek (37.04702, −83.49641); 1.8 skm (1.1 smi) of Amy Branch from its headwaters at (37.05979, −83.50083), downstream to its confluence with Bowen Creek (37.05031, −83.51498); and 9.6 skm (6.0 smi) of Bowen Creek from its headwaters at (37.03183, −83.46124), downstream to its confluence with the Red Bird River (37.06777, −83.53840) in Leslie County, Kentucky.

(vi) Map of Units 18, 19, 20, 21, and 22 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 18 - Blue Hole Creek and Left Fork Blue Hole Creek: Clay County, Kentucky
Unit 19 - Upper Bear Creek and Tributaries: Clay County, Kentucky
Unit 20 - Katies Creek: Clay County, Kentucky
Unit 21 - Spring Creek and Little Spring Creek: Clay County, Kentucky
Unit 22 - Bowen Creek and Tributaries: Leslie County, Kentucky



(20) Unit 23: Elisha Creek and Tributaries, Leslie County; and Unit 24: Gilberts Big Creek, and Unit 25: Sugar Creek, Clay and Leslie Counties, Kentucky.

(i) Unit 23 includes 4.4 skm (2.7 smi) of Right Fork Elisha Creek from its headwaters at (37.07255, −83.47839), downstream to its confluence with Elisha Creek (37.08165, −83.51802); 2.3 skm (1.4 smi) of Left Fork Elisha Creek from its headwaters at (37.09632, −83.51108), downstream to its confluence with Elisha Creek (37.08528, −83.52645); and 2.9 skm (1.8 smi) of Elisha Creek from its confluence with Right Fork Elisha Creek (37.08165, −83.51802), downstream to its confluence with the Red Bird River (37.08794, −83.54676) in Leslie County, Kentucky.

(ii) Unit 24 includes 7.2 skm (4.5 smi) of Gilberts Big Creek from its headwaters at (37.10825, −83.49164) in

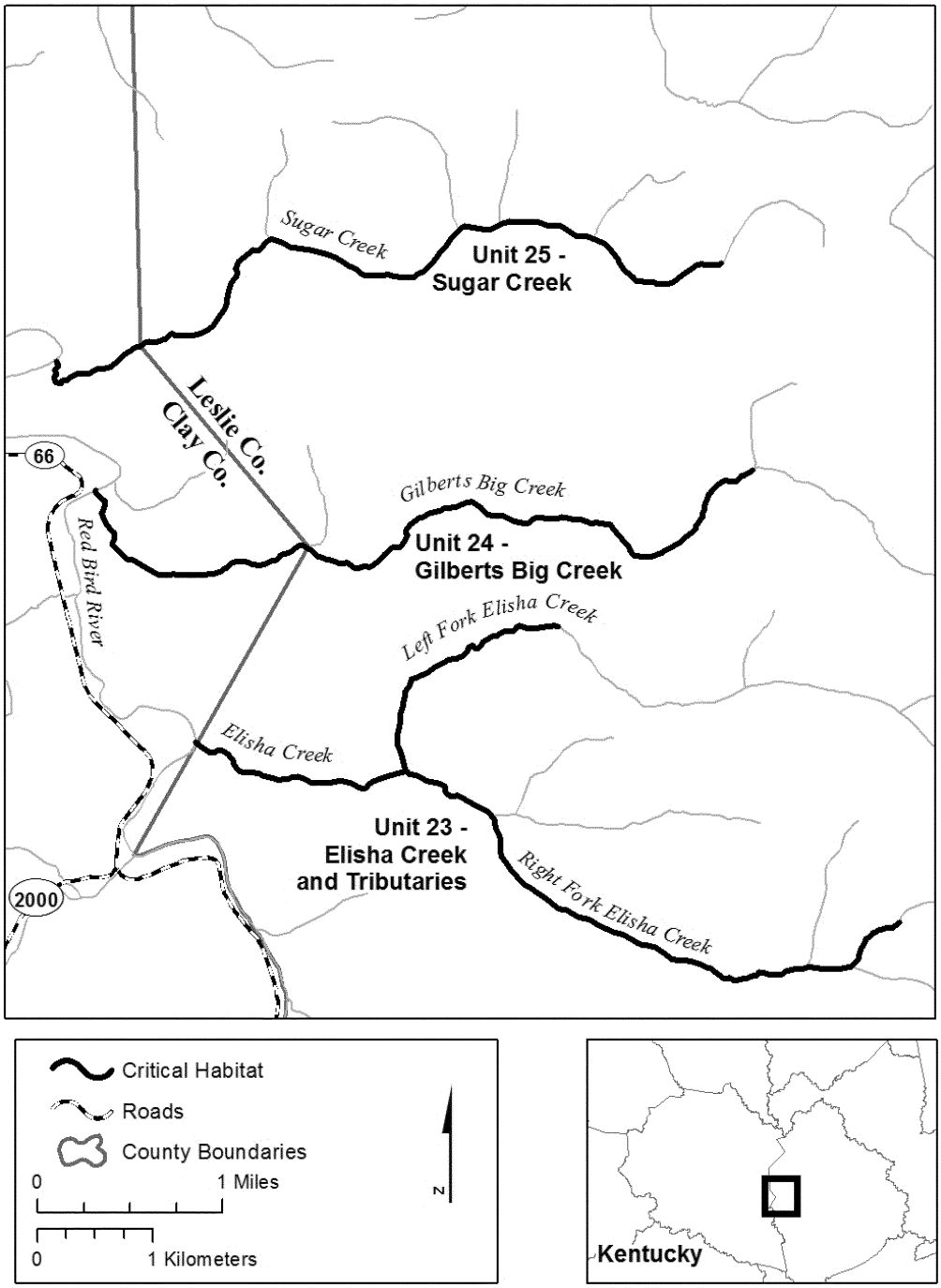
Leslie County, downstream to its confluence with the Red Bird River (37.10784, −83.55590) in Clay County, Kentucky.

(iii) Unit 25 includes 7.2 skm (4.5 smi) of Sugar Creek from its headwaters at (37.12446, −83.49420) in Leslie County, downstream to its confluence with the Red Bird River (37.11804, −83.55952) in Clay County, Kentucky.

(iv) Map of Units 23, 24, and 25 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 23 - Elisha Creek and Tributaries: Leslie County, Kentucky
Unit 24 - Gilberts Big Creek: Clay and Leslie Counties, Kentucky
Unit 25 - Sugar Creek: Clay and Leslie Counties, Kentucky



(21) Unit 26: Big Double Creek and Tributaries, and Unit 27: Little Double Creek, Clay County, Kentucky.

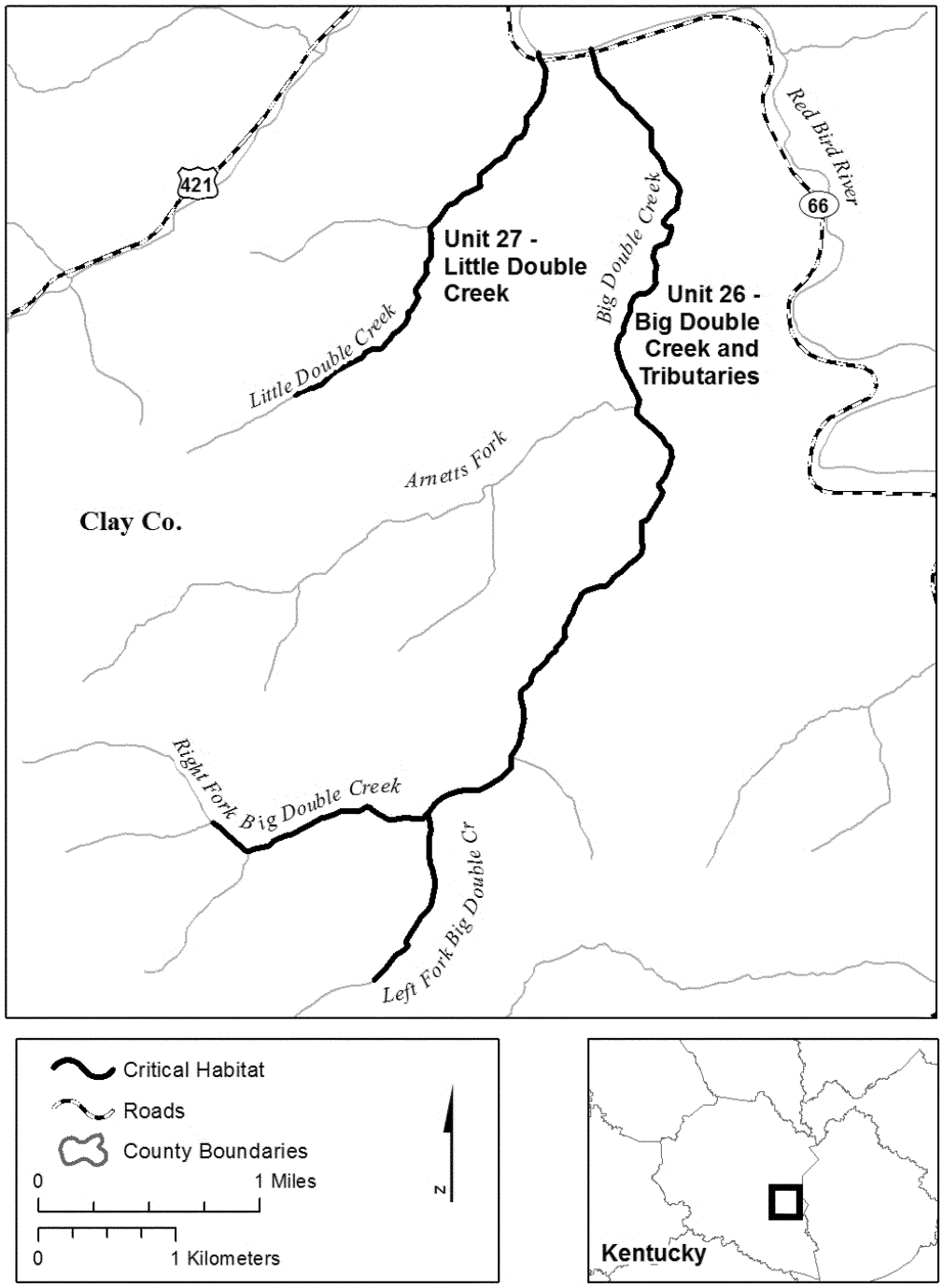
(i) Unit 26 includes 1.4 skm (0.9 smi) of Left Fork Big Double Creek from its headwaters at (37.07967, −83.60719), downstream to its confluence with Big Double Creek (37.09053, −83.60245); 1.8 skm (1.1 smi) of Right Fork Big Double Creek from its headwaters at (37.09021, −83.62010), downstream to its confluence with Big Double Creek (37.09053, −83.60245); and 7.1 skm (4.4 smi) of Big Double Creek from its confluence with the Left and Right Forks (37.09053, −83.60245), downstream to its confluence with the Red Bird River (37.14045, −83.58768) in Clay County, Kentucky.

(ii) Unit 27 includes 3.4 skm (2.1 smi) of Little Double Creek from its headwaters at (37.11816, −83.61251), downstream to its confluence with the Red Bird River (37.14025, −83.59197) in Clay County, Kentucky.

(iii) Map of Units 26 and 27 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 26 - Big Double Creek and Tributaries: Clay County, Kentucky
Unit 27 - Little Double Creek: Clay County, Kentucky



(22) Unit 28: Jacks Creek, and Unit 29: Long Fork, Clay County, Kentucky.

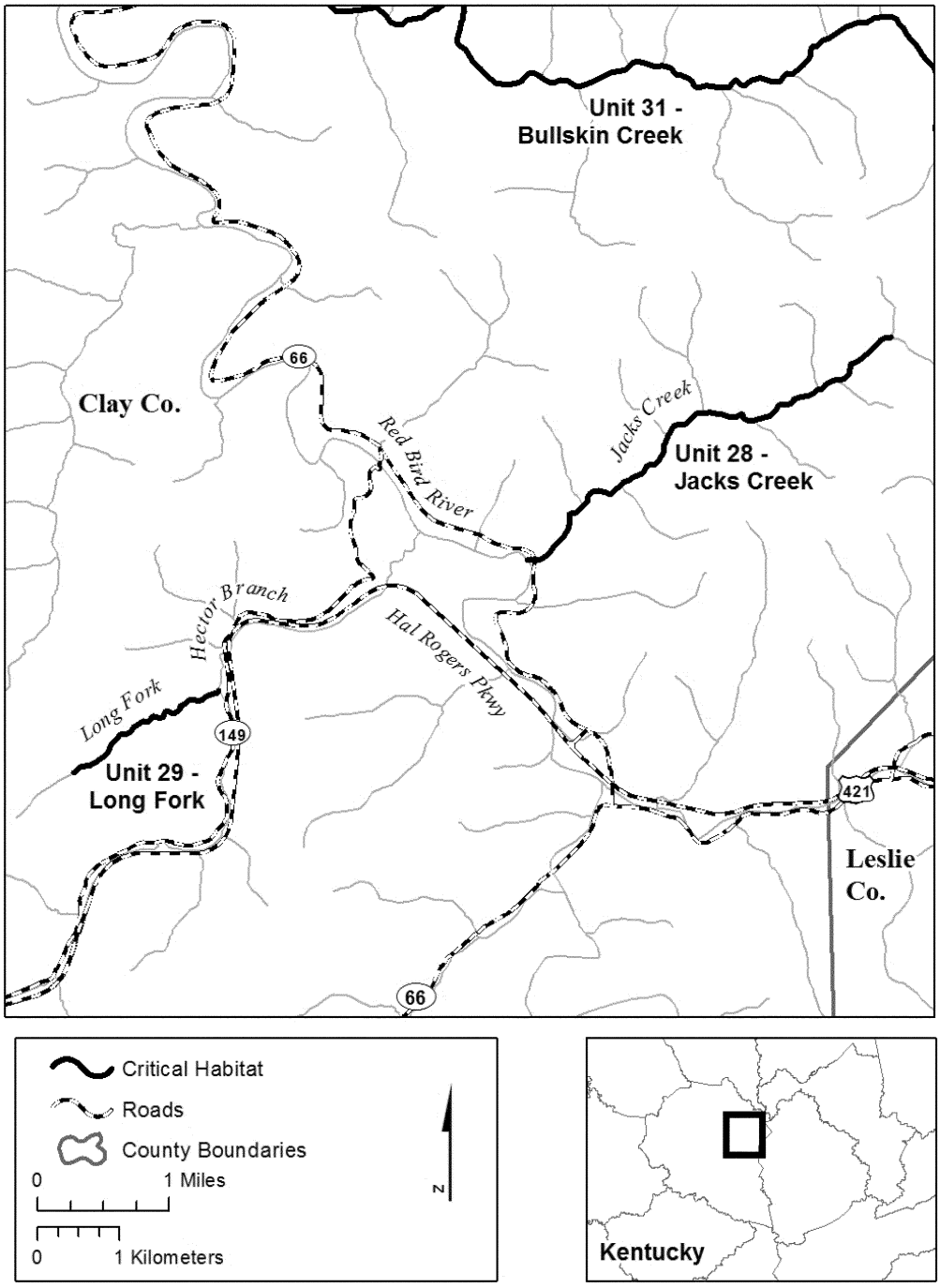
(i) Unit 28 includes 5.9 skm (3.7 smi) of Jacks Creek from its headwaters at (37.21472, −83.54108), downstream to its confluence with the Red Bird River (37.19113, −83.59185) in Clay County, Kentucky.

(ii) Unit 29 includes 2.2 skm (1.4 smi) of Long Fork from its headwaters at (37.16889, −83.65490), downstream to its confluence with Hector Branch (37.17752, −83.63464) in Clay County, Kentucky.

(iii) Map of Units 28 and 29 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 28 - Jacks Creek: Clay County, Kentucky
Unit 29 - Long Fork: Clay County, Kentucky

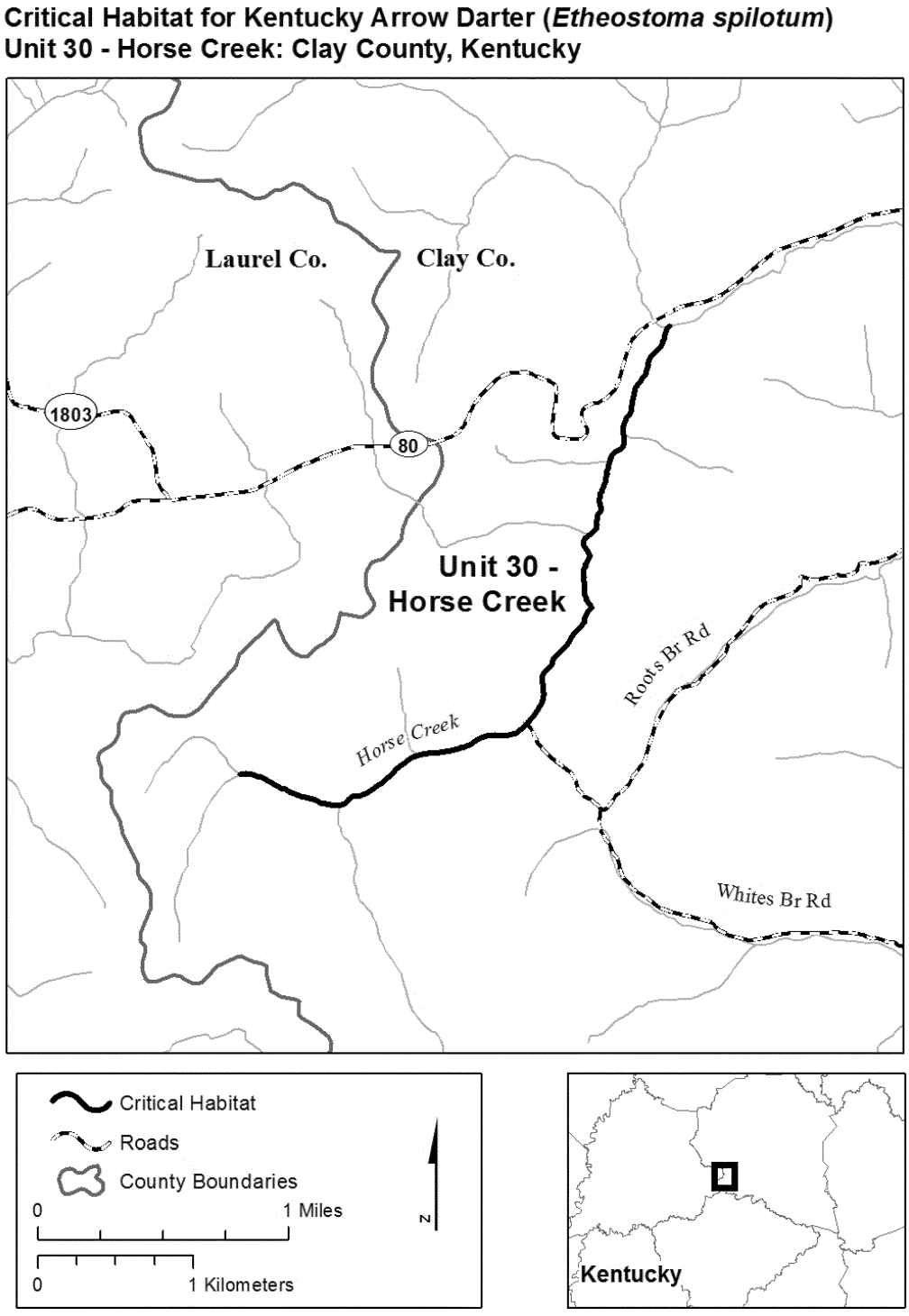


(23) Unit 30: Horse Creek, Clay County, Kentucky.

(i) Unit 30 includes 5.0 skm (3.1 smi) of Horse Creek from its headwaters at (37.07370, −83.87756), downstream to its confluence with Pigeon Roost Branch (37.09926, −83.84582) in Clay County, Kentucky.

(ii) Map of Unit 30 follows:

BILLING CODE 4333–15–P



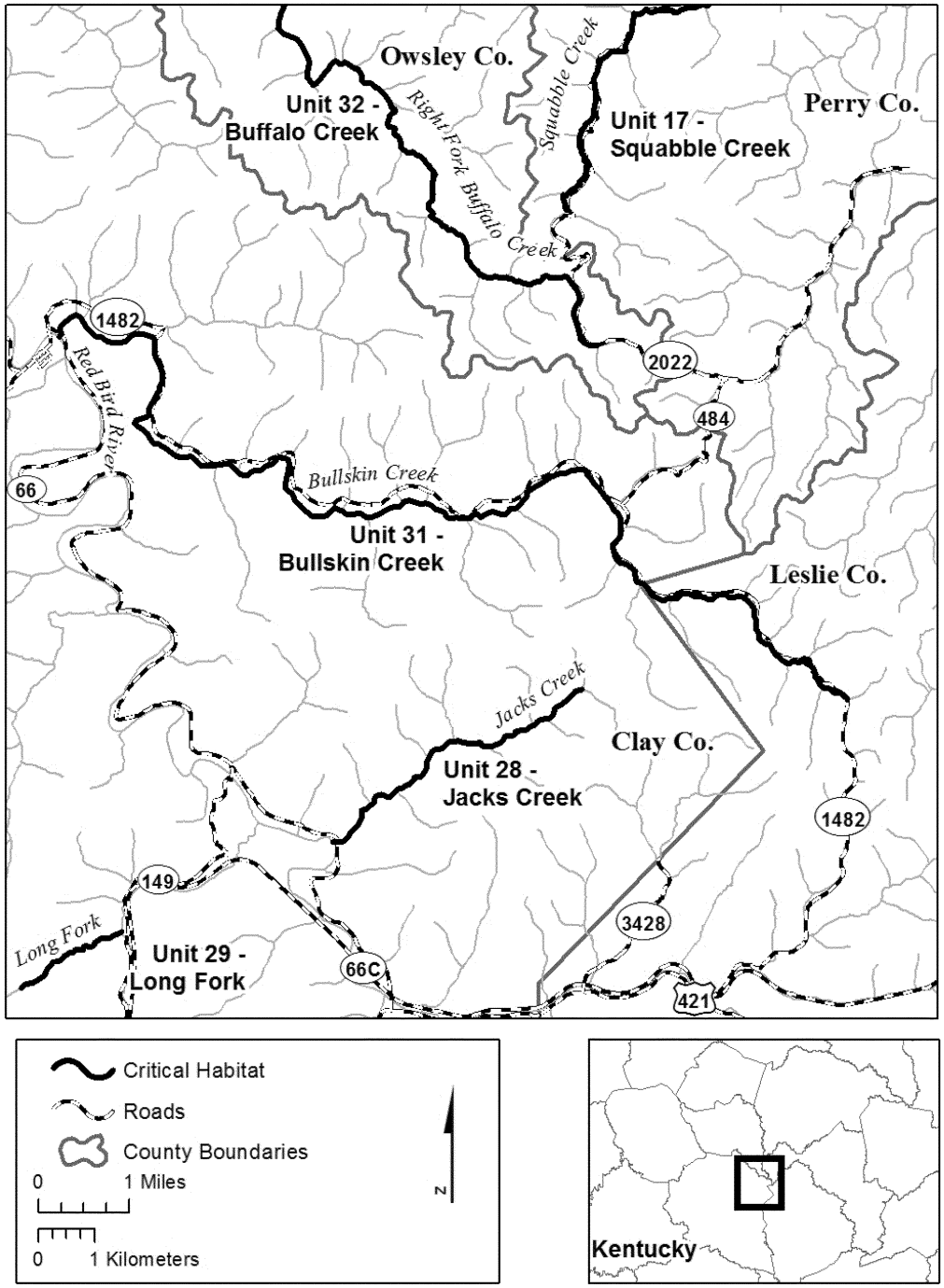
(24) Unit 31: Bullskin Creek, Clay and Leslie Counties, Kentucky.

(i) Unit 31 includes 21.7 skm (13.5 smi) of Bullskin Creek from its confluence with Old House Branch (37.21218, −83.48798) in Leslie County, downstream to its confluence with the South Fork Kentucky River (37.27322, −83.64441) in Clay County, Kentucky.

(ii) Map of Unit 31 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 31 - Bullskin Creek: Clay and Leslie Counties, Kentucky

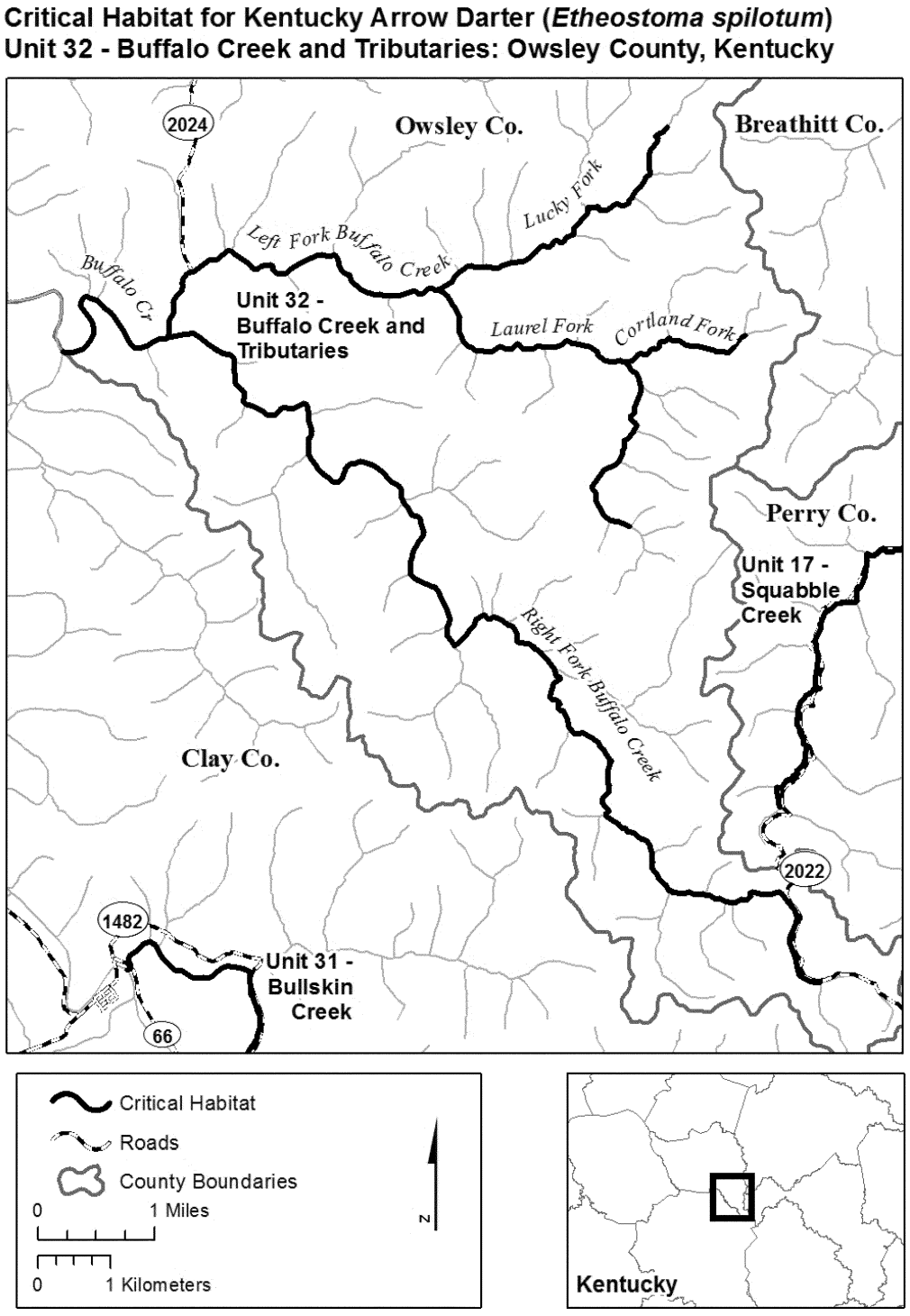


(25) Unit 32: Buffalo Creek and Tributaries, Owsley County, Kentucky.

(i) Unit 32 includes 2.0 skm (1.2 smi) of Cortland Fork from its headwaters at (37.35052, −83.54570), downstream to its confluence with Laurel Fork (37.34758, −83.56466); 6.4 skm (4.0 smi) of Laurel Fork from its headwaters at (37.32708, −83.56450), downstream to its confluence with Left Fork Buffalo Creek (37.347758, −83.56466); 4.6 skm (2.9 smi) of Lucky Fork from its headwaters at (37.37682, −83.55711), downstream to its confluence with Left Fork Buffalo Creek (37.35713, −83.59367); 5.1 skm (3.2 smi) of Left Fork Buffalo Creek from its confluence with Lucky Fork and Left Fork (37.35713, −83.59367), downstream to its confluence with Buffalo Creek (37.35197, −83.63583); 17.3 skm (10.8 smi) of Right Fork Buffalo Creek from its headwaters at (37.26972, −83.53646), downstream to its confluence with Buffalo Creek (37.35197, −83.63583); and 2.7 skm (1.7 smi) of Buffalo Creek from its confluence with the Left and Right Forks (37.35197, −83.63583), downstream to its confluence with the South Fork Kentucky River (37.35051, −83.65233) in Owsley County, Kentucky.

(ii) Map of Unit 32 follows:

BILLING CODE 4333–15–P



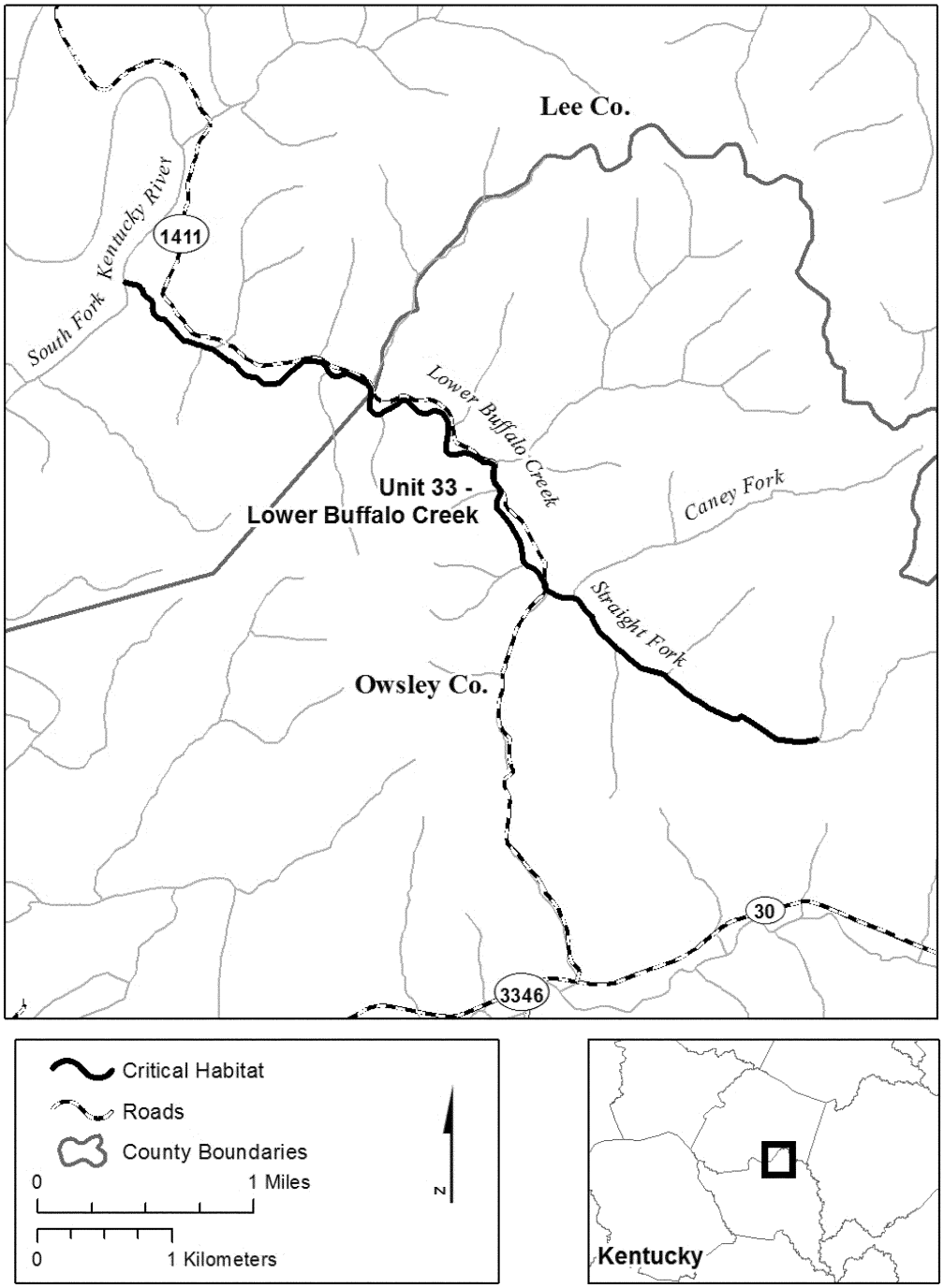
(26) Unit 33: Lower Buffalo Creek, Lee and Owsley Counties, Kentucky.

(i) Unit 33 includes 2.2 skm (1.4 smi) of Straight Fork from its headwaters at (37.49993, −83.62996), downstream to its confluence with Lower Buffalo Creek (37.50980, −83.65015) in Owsley County; and 5.1 skm (3.2 smi) of Lower Buffalo Creek from its confluence with Straight Fork (37.50980, −83.65015) in Owsley County, downstream to its confluence with the South Fork Kentucky River (37.53164, −83.68732) in Lee County, Kentucky.

(ii) Map of Unit 33 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 33 - Lower Buffalo Creek: Owsley and Lee Counties, Kentucky



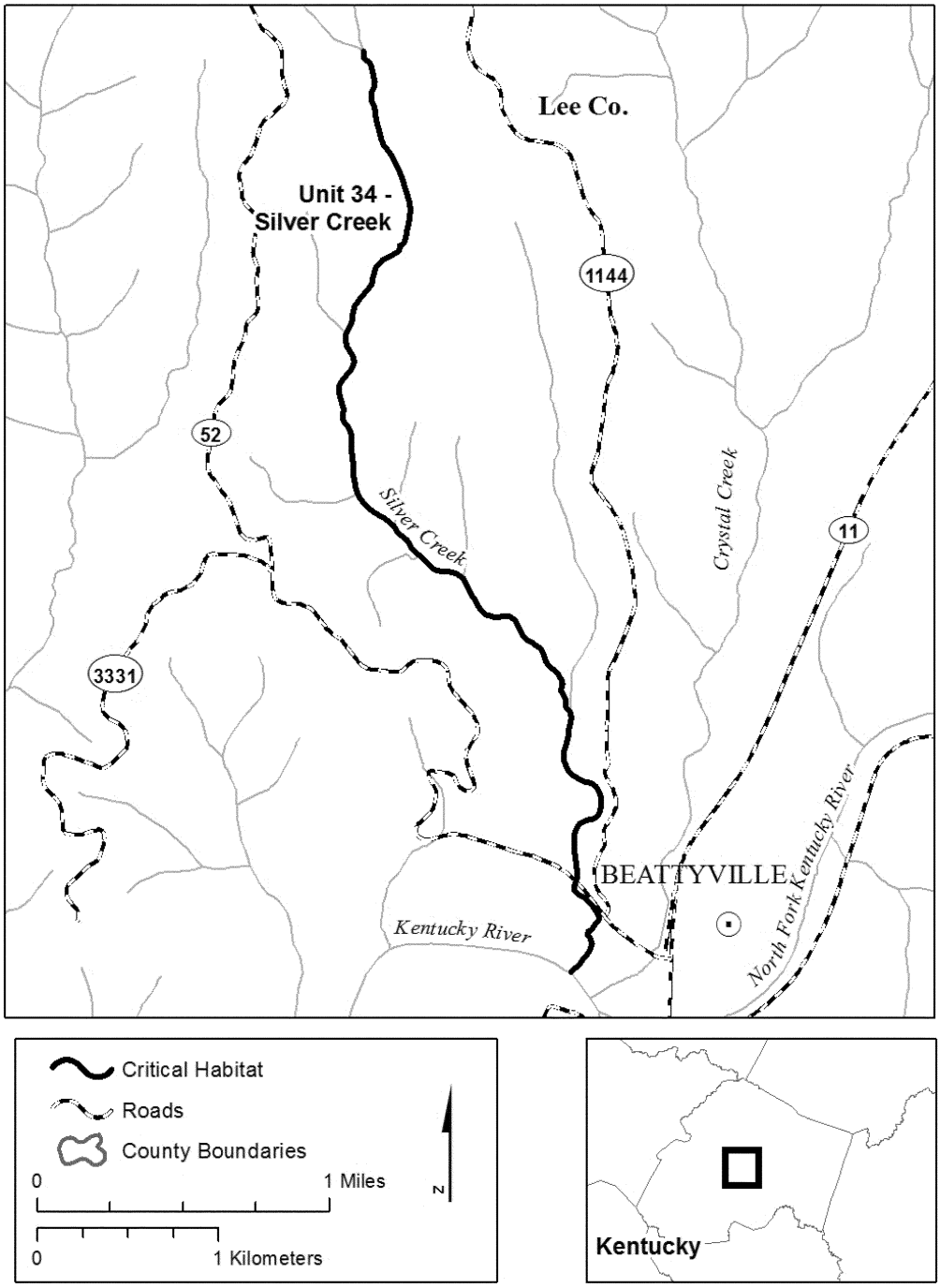
(27) Unit 34: Silver Creek, Lee County, Kentucky.

(i) Unit 34 includes 6.2 skm (3.9 smi) of Silver Creek from its headwaters at (37.61857, −83.72442), downstream to its confluence with the Kentucky River (37.57251, −83.71264) in Lee County, Kentucky.

(ii) Map of Unit 34 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 34 - Silver Creek: Lee County, Kentucky



(28) Unit 35: Travis Creek, Jackson County; Unit 36: Wild Dog Creek, Jackson and Owsley Counties; and Unit 37: Granny Dismal Creek, Owsley and Lee Counties, Kentucky.

(i) Unit 35 includes 4.1 skm (2.5 smi) of Travis Creek from its headwaters at (37.43039, −83.88516), downstream to its confluence with Sturgeon Creek (37.43600, −83.84609) in Jackson County, Kentucky.

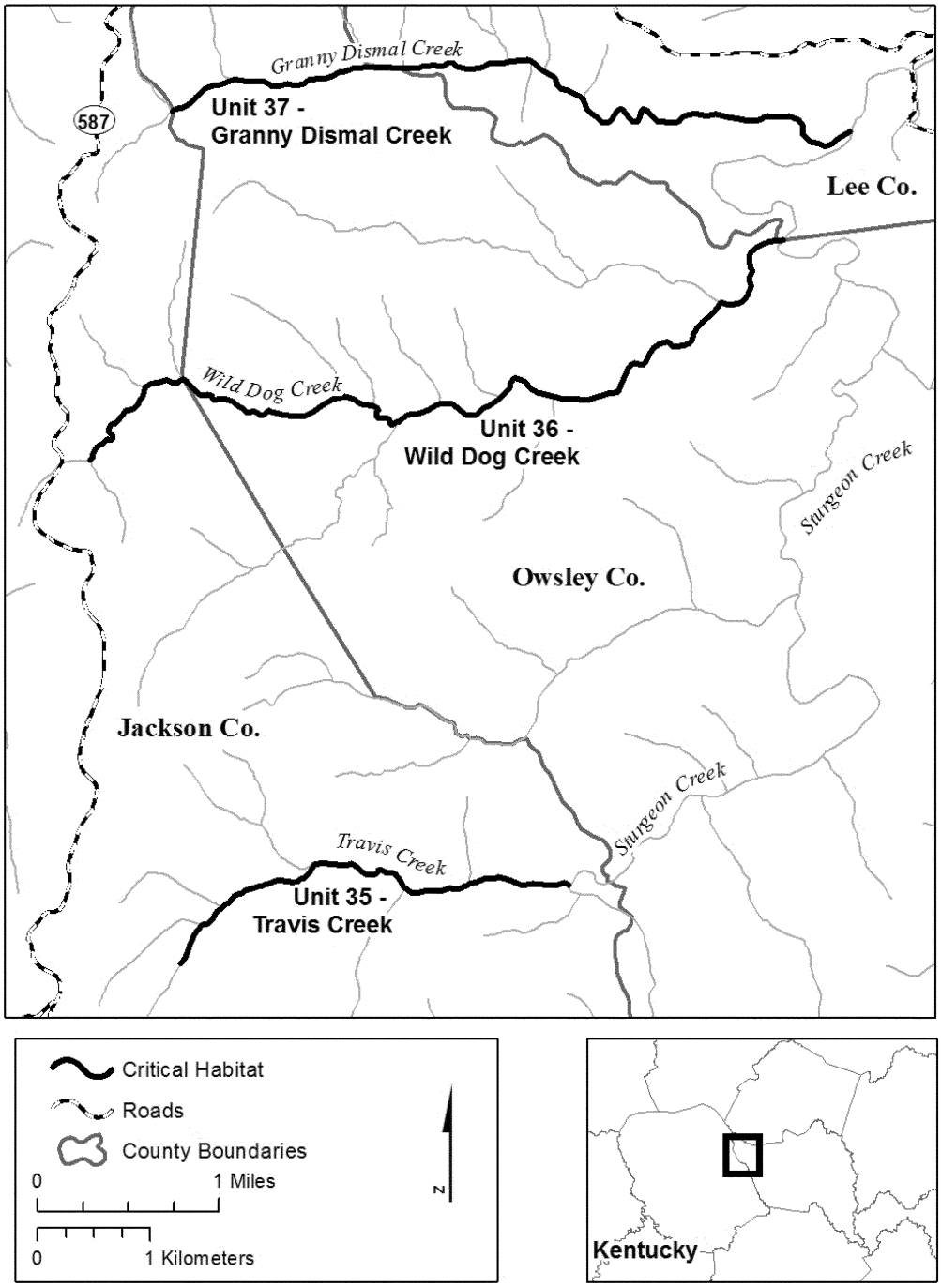
(ii) Unit 36 includes 8.1 skm (5.1 smi) of Wild Dog Creek from its headwaters at (37.47081, −83.89329) in Jackson County, downstream to its confluence with Sturgeon Creek (37.48730, −83.82319) in Owsley County, Kentucky.

(iii) Unit 37 includes 6.9 skm (4.3 smi) of Granny Dismal Creek from its headwaters at (37.49862, −83.88435) in Owsley County, downstream to its confluence with Sturgeon Creek (37.49586, −83.81629) in Lee County, Kentucky.

(iv) Map of Units 35, 36, and 37 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 35 - Travis Creek: Jackson County, Kentucky
Unit 36 - Wild Dog Creek: Jackson and Owsley Counties, Kentucky
Unit 37 - Granny Dismal Creek: Owsley and Lee Counties, Kentucky



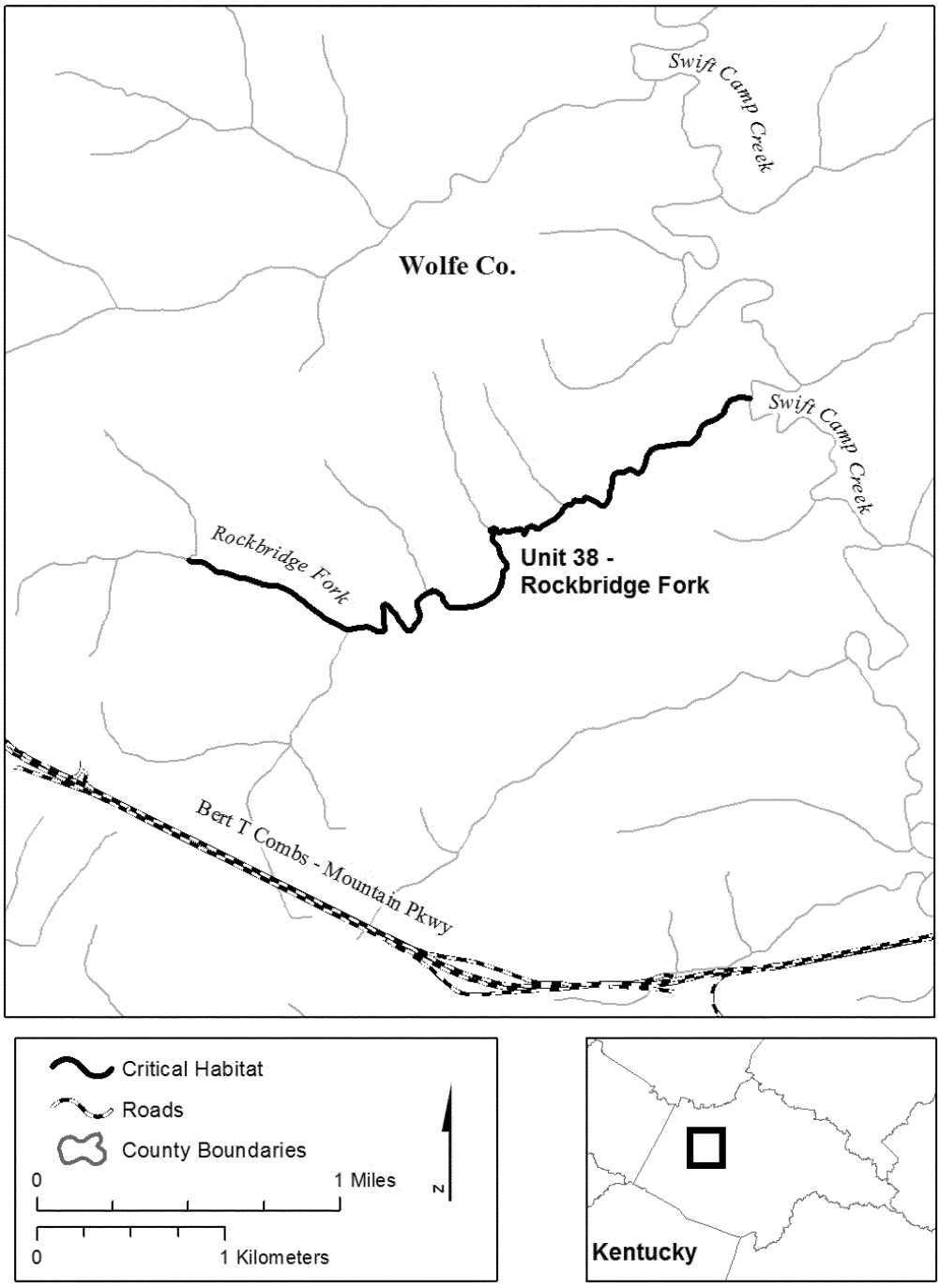
(29) Unit 38: Rockbridge Fork, Wolfe County, Kentucky.

(i) Unit 38 includes 4.5 skm (2.8 smi) of Rockbridge Fork from its headwaters at (37.76228, −83.59553), downstream to its confluence with Swift Camp Creek (37.76941, −83.56134) in Wolfe County, Kentucky.

(ii) Map of Unit 38 follows:

BILLING CODE 4333–15–P

Critical Habitat for Kentucky Arrow Darter (*Etheostoma spilotum*)
Unit 38 - Rockbridge Fork: Wolfe County, Kentucky



* * * * *

Dated: September 20, 2016.

Karen Hyun,

Acting Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2016–23539 Filed 10–4–16; 8:45 am]

BILLING CODE 4333–15–P

FEDERAL REGISTER

Vol. 81 Wednesday,
No. 193 October 5, 2016

Part VI

The President

Memorandum of September 30, 2016—Transfer of Unified Command Plan Responsibilities

Federal Register
Vol. 81, No. 193
Wednesday, October 5, 2016

Presidential Documents

Title 3—

The President

Memorandum of September 30, 2016

Transfer of Unified Command Plan Responsibilities

Memorandum for the Secretary of Defense

Pursuant to my authority as Commander in Chief, I hereby approve your request dated August 29, 2016, and direct the relief of the requested responsibilities in the Unified Command Plan.

Consistent with title 10, United States Code, section 161(b)(2) and title 3, United States Code, section 301, you are directed to notify the Congress on my behalf.

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

THE WHITE HOUSE,
Washington, September 30, 2016

[FR Doc. 2016–24308
Filed 10–4–16; 11:15 am]
Billing code 5001–06–P

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Federal Register

Vol. 81, No. 193

Wednesday, October 5, 2016

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