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## SECURITIES AND EXCHANGE COMMISSION

### 17 CFR Part 230

[Release No. 33–10428; File No. S7–06–17]

RIN 3235–AM07

### Covered Securities Pursuant to Section 18 of the Securities Act of 1933

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission (“SEC” or “Commission”) is adopting an amendment to Rule 146 under Section 18 of the Securities Act of 1933, as amended (“Securities Act”), to designate certain securities listed, or authorized for listing, on Investors Exchange LLC (“IEX” or “Exchange”) as covered securities for purposes of Section 18(b) of the Securities Act. Covered securities under Section 18(b) of the Securities Act are exempt from state law registration requirements. The Commission also is amending Rule 146 to reflect name changes of certain exchanges referenced in the Rule.

**DATES:** *Effective Date:* November 29, 2017.

**FOR FURTHER INFORMATION CONTACT:** Richard Holley III, Assistant Director; Edward Cho, Special Counsel; or Michael Ogershok, Attorney-Adviser, Office of Market Supervision, at (202) 551–5777, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–7010.

#### SUPPLEMENTARY INFORMATION:

#### I. Introduction

In 1996, Congress amended Section 18 of the Securities Act to exempt from state registration requirements securities listed, or authorized for listing, on the New York Stock Exchange LLC (“NYSE”), the American Stock Exchange LLC (“Amex”) (now known as

NYSE American LLC),<sup>1</sup> or the National Market System of The NASDAQ Stock Market LLC (“Nasdaq/NGM”)<sup>2</sup> (collectively, the “Named Markets”), or any national securities exchange designated by the Commission to have substantially similar listing standards to those of the Named Markets (“Designated Markets”).<sup>3</sup> More specifically, Section 18(a) of the Securities Act provides that “no law, rule, regulation, or order, or other administrative action of any State . . . requiring, or with respect to, registration or qualification of securities . . . shall directly or indirectly apply to a security that—(A) is a covered security.”<sup>4</sup> Covered securities are defined in Section 18(b)(1) of the Securities Act to include those securities listed, or authorized for listing, on the Named Markets, or securities listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule are “substantially similar” to those of the Named Markets (“Covered Securities”).<sup>5</sup>

<sup>1</sup> On October 1, 2008, NYSE Euronext acquired The Amex Membership Corporation (“AMC”) pursuant to an Agreement and Plan of Merger, dated January 17, 2008 (“Merger”). In connection with the Merger, NYSE Amex’s predecessor, Amex, a subsidiary of AMC, became a subsidiary of NYSE Euronext called NYSE Alternext US LLC (“NYSE Alternext”). See Securities Exchange Act Release No. 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR–NYSE–2008–60 and SR–Amex 2008–62) (approving the Merger). In 2009, NYSE Alternext changed its name to NYSE Amex LLC (“NYSE Amex”). See Securities Exchange Act Release No. 59575 (March 13, 2009), 74 FR 11803 (March 19, 2009) (SR–NYSEALTR–2009–24) (approving the name change). In 2012, NYSE Amex changed its name from NYSE Amex LLC to NYSE MKT LLC (“NYSE MKT”). See Securities Exchange Act Release No. 67037 (May 21, 2012), 77 FR 31415 (May 25, 2012) (SR–NYSEAmex–2012–32) (publishing notice of the name change to NYSE MKT LLC). As of July 24, 2017, NYSE MKT changed its name from NYSE MKT LLC to NYSE American LLC (“NYSE American”). See Securities Exchange Act Release No. 80283 (March 21, 2017), 82 FR 15244 (March 27, 2017) (SR–NYSEMKT–2017–14).

<sup>2</sup> As of July 1, 2006, the National Market System of The NASDAQ Stock Market LLC is known as the Nasdaq Global Market (“NGM”). See Securities Exchange Act Release Nos. 53799 (May 12, 2006), 71 FR 29195 (May 19, 2006) and 54071 (June 29, 2006), 71 FR 38922 (July 10, 2006).

<sup>3</sup> See National Securities Markets Improvement Act of 1996, Public Law 104–290, 110 Stat. 3416 (October 11, 1996).

<sup>4</sup> 15 U.S.C. 77r(a).

<sup>5</sup> 15 U.S.C. 77r(b)(1)(A) and (B). In addition, securities of the same issuer that are equal in seniority or senior to a security listed on a Named Market or national securities exchange designated

Pursuant to Section 18(b)(1)(B) of the Securities Act, the Commission adopted Rule 146.<sup>6</sup> Rule 146(b) lists those national securities exchanges, or segments or tiers thereof, that the Commission has determined to have listing standards substantially similar to those of the Named Markets and thus securities listed on such exchanges are deemed Covered Securities.<sup>7</sup> IEX has petitioned the Commission to amend Rule 146(b) to designate certain securities listed, or authorized for listing, on IEX as Covered Securities for

by the Commission as having substantially similar listing standards to a Named Market are Covered Securities for purposes of Section 18(b) of the Securities Act. See 15 U.S.C. 77r(b)(1)(C).

<sup>6</sup> See Securities Exchange Act Release No. 39542 (January 13, 1998), 63 FR 3032 (January 21, 1998) (determining that the listing standards of the Chicago Board Options Exchange, Incorporated (“CBOE”), the Pacific Exchange, Inc. (now known as NYSE Arca, Inc.), and the Philadelphia Stock Exchange, Inc. (“Phlx”) (now known as NASDAQ PHLX LLC) were substantially similar to those of the Named Markets). The Commission notes that, on July 24, 2008, The NASDAQ OMX Group, Inc. acquired Phlx and renamed it “NASDAQ OMX PHLX LLC,” and NASDAQ OMX PHLX LLC subsequently changed its name to “NASDAQ PHLX LLC.” See Securities Exchange Act Release Nos. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR–Phlx–2008–31); 58183 (July 17, 2008), 73 FR 42850 (July 23, 2008) (SR–NASDAQ–2008–035); 62783 (August 27, 2010), 75 FR 54204 (September 3, 2010) (SR–Phlx–2010–104); and 76654 (December 15, 2015), 80 FR 79396 (December 21, 2015) (SR–Phlx–2015–105). In 2004, the Commission amended Rule 146(b) to designate options listed on the International Securities Exchange, Inc. (“ISE”) as Covered Securities for purposes of Section 18(b) of the Securities Act. See Securities Act Release No. 8442 (July 14, 2004), 69 FR 43295 (July 20, 2004). The Commission notes that, in March 2017, ISE changed its name from International Securities Exchange, LLC to “Nasdaq ISE, LLC.” See Securities Exchange Act Release No. 80325 (March 29, 2017), 82 FR 16445 (April 4, 2017) (SR–ISE–2017–25) (publishing notice of the name change to Nasdaq ISE, LLC). In 2007, the Commission amended Rule 146(b) to designate securities listed on the Nasdaq Capital Market (“NCM”) as Covered Securities for purposes of Section 18(b) of the Securities Act. See Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 (April 24, 2007) (File No. S7–18–06). In 2012, the Commission amended Rule 146(b) to designate securities listed on Tiers I and II of BATS Exchange, Inc. (“BATS”) as Covered Securities for purposes of Section 18(b) of the Securities Act. See Securities Act Release No. 9295 (January 20, 2012), 77 FR 3590 (January 25, 2012). The Commission notes that, in March 2016, BATS changed its name from BATS Exchange, Inc. to “Bats BZX Exchange, Inc.” See Securities Exchange Act Release No. 77307 (March 7, 2016), 81 FR 12996 (March 11, 2016) (SR–BATS–2016–25) (publishing notice of the name change to Bats BZX Exchange, Inc.).

<sup>7</sup> 17 CFR 230.146(b).



purposes of Section 18(b) of the Securities Act.<sup>8</sup>

In July 2017, the Commission proposed to amend Rule 146(b) to designate certain securities listed, or authorized for listing, on IEX as Covered Securities for purposes of Section 18(b) of the Securities Act.<sup>9</sup> The Commission also proposed to amend Rule 146 to reflect name changes of certain exchanges referenced in the Rule. The Commission received one comment letter,<sup>10</sup> which supported amending Rule 146(b) to designate certain securities listed, or authorized for listing, on IEX as Covered Securities.

The Commission has determined that IEX's listing standards are substantially similar to the listing standards of the Named Markets. Accordingly, the Commission today is amending Rule 146(b) to designate securities listed, or authorized for listing, on IEX as Covered Securities under Section 18(b)(1) of the Securities Act.<sup>11</sup> Amending Rule 146(b) to include these securities as Covered Securities will exempt those securities from state registration requirements as set forth under Section 18(a) of the Securities Act.<sup>12</sup> The Commission also is adopting, as proposed, updated references in the Rule.

## II. Amendment to Rule 146(b) To Include IEX Securities

Under Section 18(b)(1)(B) of the Securities Act,<sup>13</sup> the Commission has the authority to determine that the listing standards of an exchange, or tier or segment thereof, are substantially similar with those of the NYSE, NYSE American, or Nasdaq/NGM. The Commission initially compared IEX's listing standards with those of Nasdaq/NGM.<sup>14</sup> Where the listing standards in a particular category were not substantially similar to the standards of Nasdaq/NGM, the Commission compared IEX's standards to NYSE and NYSE American.<sup>15</sup> In addition, as it has done previously, the Commission interpreted the "substantially similar"

standard to require listing standards at least as comprehensive as those of the Named Markets.<sup>16</sup> If IEX's listing standards were higher than those of the Named Markets, then the Commission would still determine that IEX's listing standards are substantially similar to those of the Named Markets.<sup>17</sup> Finally, the Commission notes that differences in language or approach would not necessarily lead to a determination that IEX's listing standards are not substantially similar to those of any Named Market.<sup>18</sup>

The Commission included in the Proposing Release its preliminary view that IEX's quantitative and qualitative listing standards were substantially similar to the listing standards for a Named Market. The Commission received no comments on its views.<sup>19</sup> The Commission has reviewed IEX's listing standards for securities to be listed and traded on IEX and, for the reasons discussed below, has determined that IEX's listing standards are substantially similar to those of a Named Market as required by Section 18(b)(1)(B).<sup>20</sup> Accordingly, the Commission is amending Rule 146(b) to include securities listed, or authorized for listing, on IEX.

### A. IEX Quantitative Listing Standards

The Commission continues to believe that IEX's initial and continued quantitative listing standards for its securities are substantively identical to, and thus substantially similar to, the initial and continued quantitative listing standards for securities listed on

Nasdaq/NGM.<sup>21</sup> Accordingly, because IEX's initial and continued quantitative listing standards are substantively identical to those of Nasdaq/NGM, the Commission has determined that IEX's initial and continued quantitative listing standards are substantially similar to those of a Named Market.<sup>22</sup>

### B. IEX Qualitative Listing Standards

The Commission continues to believe that IEX's initial and continued qualitative listing standards for its securities are substantively identical to, and thus substantially similar to, the qualitative listing standards for securities listed on Nasdaq/NGM,<sup>23</sup> with the exception of IEX Rule 14.201 (Confidential Pre-Application Review of Eligibility) (which the Commission preliminarily believed was substantially similar to rules of NYSE and NYSE American) and IEX Rule 14.414 (Internal Audit Function) (which the Commission preliminarily believed was substantially similar to a rule of NYSE).<sup>24</sup>

Accordingly, because IEX's initial and continued qualitative listing standards are substantively identical to those of Nasdaq/NGM, the Commission has determined that IEX's initial and continued qualitative listing standards are substantially similar to the qualitative listing standards for securities listed on Nasdaq/NGM, which is a Named Market,<sup>25</sup> with the exception of (a) IEX Rule 14.201 (Confidential Pre-Application Review of Eligibility), discussed below, which is substantially similar to rules of other Named Markets, namely NYSE and NYSE American, and (b) IEX Rule 14.414 (Internal Audit

<sup>16</sup> See *id.*

<sup>17</sup> See Securities Act Release No. 8791, *supra* note 6.

<sup>18</sup> See *id.*

<sup>19</sup> See Proposing Release, *supra* note 9, at 33841–42. See also *id.* at 33842 (discussing various other types of securities and exchange-traded derivative securities products).

<sup>20</sup> See *infra* notes 21–29 and accompanying text (discussing the quantitative and qualitative listing standards); and *infra* notes 30–31 and accompanying text (discussing various other types of securities and exchange-traded derivative securities products). See also generally IEX Rules Chapters 14 (IEX Listing Rules) and 16 (Other Securities). See also Securities Exchange Act Release No. 75925 (September 15, 2015), 80 FR 57261 (September 22, 2015) (File No. 10–222) (Notice of Filing of Application of IEX). In making its determination of substantial similarity, as discussed below, the Commission compared IEX's quantitative listing standards with Nasdaq/NGM's quantitative listing standards; IEX's qualitative listing standards with Nasdaq/NGM's qualitative listing standards and, with respect to the rules relating to the listing application process and internal audit function, with NYSE's and NYSE American's applicable qualitative listing standards; and IEX's listing standards for other securities, including portfolio depository receipts, index fund shares, and managed fund shares, with Nasdaq/NGM's corresponding listing standards.

<sup>21</sup> See Proposing Release, *supra* note 9, at 33841. Quantitative listing standards relate to, among other things, the requirements for bid price, number of publicly held shares, number of shareholders, market value of publicly held shares, and market capitalization.

<sup>22</sup> Compare IEX Rules 14.300 series with Nasdaq/NGM Rule 5300 and 5400 series (providing for identical rules concerning initial listing and maintenance standards for units, primary equity securities, preferred stock and secondary classes of common stock, rights, warrants, and convertible debt on IEX and Nasdaq/NGM).

<sup>23</sup> Qualitative listing standards relate to, among other things, the number of independent directors required, conflicts of interest, composition of the audit committee, executive compensation, shareholder meeting requirements, voting rights, quorum, code of conduct, proxies, shareholder approval of certain corporate actions, and the annual and interim reports requirements.

<sup>24</sup> See Proposing Release, *supra* note 9, at 33841–42.

<sup>25</sup> Compare IEX Rules 14.200 and 14.400 series with Nasdaq/NGM Rules 5200 and 5600 series (providing for virtually identical rules concerning procedures and prerequisites for initial and continued listing, obligations of security issuers, the application and qualification process, and corporate governance standards on IEX and Nasdaq/NGM).

<sup>8</sup> See Letter from Sophia Lee, General Counsel, IEX, to Brent J. Fields, Secretary, Commission, dated September 22, 2016 ("IEX Petition").

<sup>9</sup> See Securities Act Release No. 10390 (July 14, 2017), 82 FR 33839 (July 21, 2017) ("Proposing Release").

<sup>10</sup> See Letter from Karl T. Muth, Lecturer in Economics and Public Policy, Northwestern University, and Lecturer in Law, Pritzker School of Law, Northwestern University, to Commission, dated July 21, 2017 ("Muth Letter").

<sup>11</sup> 15 U.S.C. 77r(b)(1).

<sup>12</sup> 15 U.S.C. 77r(a).

<sup>13</sup> 15 U.S.C. 77r(b)(1)(B).

<sup>14</sup> See *infra* note 20.

<sup>15</sup> This approach is consistent with the approach that the Commission has previously taken. See, e.g., Securities Act Release No. 7494 (January 13, 1998), 63 FR 3032 (January 21, 1998) (File No. S7–17–97).

Function), also discussed below, which is substantially similar to a rule of NYSE.

With respect to the standards relating to the listing and delisting of companies, including prerequisites for initial and continued listing on IEX, obligations of security issuers listed on IEX, as well as rules describing the application and qualification process, IEX's listing rules for securities are virtually identical to, and thus substantially similar to, those of Nasdaq/NGM.<sup>26</sup> IEX Rule 14.201, which specifically relates to confidential pre-application review for listing eligibility, is substantially similar to the corresponding rules of NYSE and NYSE American.<sup>27</sup>

The Commission also notes that IEX's corporate governance standards in connection with securities to be listed and traded on IEX are virtually identical to, and thus substantially similar to, the current rules of Nasdaq/NGM and NYSE.<sup>28</sup> IEX Rule 14.414, specifically concerning the internal audit function for a listed issuer, is substantially similar to the corresponding rule of NYSE.<sup>29</sup> Therefore, the Commission has

<sup>26</sup> Compare IEX Rule 14.200 series with Nasdaq/NGM Rule 5200 series (providing for virtually identical rules concerning procedures and prerequisites for initial and continued listing, obligations of security issuers, and the application and qualification process).

<sup>27</sup> See IEX Rule 14.201; NYSE Listed Company Manual Sections 101 and 104; and NYSE American Company Guide Section 201. IEX Rule 14.201 requires a company seeking the initial listing of one or more classes of securities to participate in a free, confidential pre-application eligibility review to determine whether the company meets the applicable listing criteria and, if, upon completion of this review, IEX determines that a company is eligible for listing, IEX will notify that company in writing that it has been cleared to submit an original listing application. The Commission notes that, while IEX Rule 14.201 is substantially similar to the equivalent NYSE and NYSE American rules (all of which relate to the confidential pre-application review for eligibility for companies seeking to list on the Exchange), IEX's rule contains an additional, heightened provision stating that a company deemed eligible for listing will be provided with written notification valid for nine months that it has been cleared to submit an original listing application. See IEX Rule 14.201. See also NYSE Listed Company Manual Sections 101 and 104; NYSE American Company Guide Section 201. IEX represents that an issuer that does not clear the pre-application eligibility review process or receive a timely response as part of that process on IEX after the confidential pre-application eligibility review would be permitted to appeal such determination under the procedures set forth in IEX Rule series 9.500. See IEX Petition, *supra* note 8, at 5.

<sup>28</sup> Compare IEX Rule 14.400 series (Corporate Governance Requirements) with Nasdaq/NGM Rule 5600 series (Corporate Governance Requirements).

<sup>29</sup> Compare IEX Listed Company Manual Section 303A.07(c) (requiring listed companies to maintain an internal audit function to provide management and the audit committee with ongoing assessments of the listed company's risk

determined that IEX's qualitative listing standards are substantially similar to those of a Named Market.

#### C. Other Securities, Including Securities of Exchange-Traded Funds and Other Exchange-Traded Derivative Securities Products

The Commission compared IEX's listing standards for other types of securities, including, for example, portfolio depository receipts; index fund shares; securities linked to the performance of indexes, commodities, and currencies; index-linked exchangeable notes; partnership units; trust units; and managed fund shares,<sup>30</sup> to Nasdaq/NGM's standards. The Commission continues to believe that IEX's standards for these other types of securities are virtually identical to the corresponding Nasdaq/NGM standards.<sup>31</sup> Accordingly, because IEX's initial and continued listing standards for these other securities are substantively identical to those of Nasdaq/NGM, the Commission has determined that IEX's standards for these other securities are substantially similar to those of a Named Market.

#### D. Other Amendments

Finally, the Commission is amending Rule 146(b) as proposed to reflect the following name changes, on which the Commission did not receive any comments:

- Paragraphs (b)(1) and (b)(2) of Rule 146 use the term "NYSE Amex" to refer to the national securities exchange formerly known as the American Stock Exchange LLC. As noted above, in 2012, NYSE Amex changed its name from NYSE Amex LLC to NYSE MKT LLC, and, in July 2017, NYSE MKT LLC changed its name to NYSE American LLC.<sup>32</sup> Accordingly, the Commission is

management processes and system of internal control) with IEX Rule 14.414.

<sup>30</sup> Compare IEX Rules Chapter 16 (Other Securities) with Nasdaq/NGM Rule 5700 series (Other Securities). See also IEX Rule 16.105(a) (Portfolio Depository Receipts); Rule 16.105(b) (Index Fund Shares); Rule 16.110 (Securities Linked to the Performance of Indexes and Commodities (Including Currencies)); Rule 16.111(a) (Index-Linked Exchangeable Notes); Rule 16.111(b) (Equity Gold Shares); Rule 16.111(c) (Trust Certificates); Rule 16.111(d) (Commodity-Based Trust Shares); Rule 16.111(e) (Currency Trust Shares); Rule 16.111(f) (Commodity Index Trust Shares); Rule 16.111(g) (Commodity Futures Trust Shares); Rule 16.111(h) (Partnership Units); Rule 16.111(i) (Trust Units); Rule 16.111(j) (Managed Trust Securities); Rule 16.113 (Paired Class Shares); Rule 16.115 (Selected Equity-linked Debt Securities ("SEEDS")); Rule 16.120 (Trust Issued Receipts); Rule 16.125 (Index Warrants); Rule 16.130 (Listing Requirements for Securities Not Otherwise Specified (Other Securities)); and Rule 16.135 (Managed Funds Shares).

<sup>31</sup> See Proposing Release, *supra* note 9, at 33842.

<sup>32</sup> See *supra* note 1.

making a conforming change to Rule 146(b).

- Paragraph (b)(1) of Rule 146 refers to "Tier I of the NASDAQ OMX PHLX LLC." As noted above, in December 2015, NASDAQ OMX PHLX LLC changed its name to NASDAQ PHLX LLC.<sup>33</sup> Accordingly, the Commission is making a conforming change to Rule 146(b).

- Paragraph (b)(1) of Rule 146 refers to "Tier I and Tier II of BATS Exchange, Inc." As noted above, in March 2016, BATS Exchange, Inc. changed its name to Bats BZX Exchange, Inc.<sup>34</sup> Accordingly, the Commission is making a conforming change to Rule 146(b).

- Paragraph (b)(1) of Rule 146 refers to "Options listed on the International Securities Exchange, LLC." As noted above, in March 2017, the International Securities Exchange, LLC changed its name to Nasdaq ISE, LLC.<sup>35</sup> Accordingly, the Commission is making a conforming change to Rule 146(b).

### III. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 does not apply because the amendment to Rule 146(b) does not impose recordkeeping or information collection requirements or other collection of information, which require the approval of the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

### IV. Economic Analysis

The Commission is sensitive to the economic consequences of its rules, including the benefits, costs, and effects on efficiency, competition, and capital formation. As noted above, the Commission has determined that the overall listing standards for securities to be listed and traded on IEX are substantially similar to those of a Named Market. As such, the Commission is adopting amendments to Rule 146 under Section 18 of the Securities Act, to designate securities listed, or authorized for listing, on IEX as Covered Securities. The following analysis considers the economic effects that may result from the amendment.

Where possible, the Commission has quantified the economic effects of the amendment; however, as explained further below, the Commission is unable to quantify all of the economic effects because it lacks the information necessary to provide reasonable estimates. In some cases, quantification depends heavily on factors outside of the control of the Commission, particularly due to the flexibility that an

<sup>33</sup> See *supra* note 6.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

issuer has when choosing if and where to list its securities and the flexibility of a registered national securities exchange to tailor its policies and rules to the nature of its business and technology. These factors make it difficult to quantify the changes in market share of Named and Designated Markets that may result from the amendment. In addition, the incumbent Named and Designated Markets and IEX each may react to the amendments with respect to listing fees and services. These reactions are also difficult to quantify or predict, which further complicates quantification of changes to market share, and also makes quantification of the economic effects of the amendment difficult. Therefore, some of the discussions below are qualitative in nature. In the Proposing Release the Commission solicited comment on its economic analysis, including costs and benefits and potential impacts on efficiency, competition, and capital formation, and encouraged commenters to provide specific estimates or data. The Commission did not receive any comment on, or data regarding, its estimates. The Commission received one comment letter that was generally supportive of the proposed rule amendment.<sup>36</sup>

*A. Baseline*

The Commission compared the economic effects of the amendment, including benefits, costs, and effects on efficiency, competition, and capital formation, to a baseline that consists of the existing regulatory framework and market structure.

1. Regulatory Framework and Affected Parties

The listing standards of Named and Designated Markets are quantitative and qualitative requirements that issuers must satisfy before they may list on these markets. Securities listed on a Named or Designated Market are Covered Securities, which are exempt from complying with state securities law registration and qualification requirements. As mentioned above,<sup>37</sup> subsequent to its exchange registration, IEX petitioned the Commission to amend Rule 146(b) to provide that the listing standards for securities listed, or authorized for listing, on IEX are substantially similar to those of the Named Markets.

Pursuant to unlisted trading privileges, a national securities exchange such as IEX currently can trade securities that are listed on other exchanges.<sup>38</sup> While IEX may offer to list securities for trading, currently, those securities would not be Covered Securities if they chose to list on IEX in

the absence of this amendment to Rule 146. Issuers of securities that are not Covered Securities must comply with state securities law registration and qualification requirements, which generally require the issuer to register such securities in each state or jurisdiction in which the issuer will offer or sell its securities. State registration and qualification requirements generally vary across the 54 U.S. jurisdictions, comprising the 50 states, the District of Columbia, and the three U.S. territories of Puerto Rico, the Virgin Islands, and Guam.<sup>39</sup> These requirements typically include: (i) Filing state administrative forms and other paperwork necessary for compliance with state registration requirements; (ii) adherence to disclosure standards; and (iii) in some states, requirements based upon the merits of the offering or issuer.<sup>40</sup>

The Commission lacks comprehensive, independent data to precisely estimate the total time, registration, and compliance costs associated with state registration and qualification. Moreover, those total costs may vary widely for issuers depending upon the number of states in which an issuer elects to register. To provide some information about potential costs for state registration, Table 1 below lists examples of Blue Sky registration filing fees for several states.

TABLE 1—EXAMPLES OF BLUE SKY REGISTRATION FILING FEES<sup>41</sup>

State	Filing fee
California .....	\$200 plus 1/5 of 1 percent of the aggregate value of the securities proposed to be sold, with a maximum fee of \$2,500.
Florida .....	\$1,000.
Illinois .....	1/20 of 1 percent of the aggregate offering in Illinois, with a minimum fee of \$500 and a maximum fee of \$2,500.
New York .....	Based on total offerings: \$500,000 or less: \$300. More than \$500,000: \$1,200.
Texas .....	\$100 filing fee, plus examination fee of 1/10 of 1 percent of the aggregate amount of securities sold in Texas.

The issuer of a non-Covered Security in multiple jurisdictions would have

<sup>36</sup> See Muth Letter, *supra* note 10 (“The removal of state-by-state heterogeneity, including through 18(b) inclusion, is one way to decrease friction both at the offering stage and on the secondary market. That IEX securities would enjoy this freedom from the encumbrances of state-level registration requirements is unobjectionable in the short-term and likely beneficial to both securities issuers and consumers in the long-term (and, indirectly, beneficial to brokers in securities of this kind).”).

<sup>37</sup> See *supra* note 8 and accompanying text.

<sup>38</sup> See 15 U.S.C. 781(f) and Rule 12f-2.

<sup>39</sup> See Office of Investor Education and Advocacy, “Blue Sky Laws” (2014), available at <https://www.sec.gov/fast-answers/answers-blueskyhtm.html>.

<sup>40</sup> See, e.g., Stuart R. Cohn, *Securities Counseling for Small and Emerging Companies* § 12:8 (2016) (describing merit review as “the authority of state administrators to deny, suspend or revoke an offering because the administrator believes that the offering has substantive weaknesses in structure, financial strength or fairness to investors”). Typical elements of merit review include: Offering expenses, including underwriter’s compensation, issuer capitalization requirements, dilution, financial condition of the issuer, cheap stock held by insiders, types of offering (e.g., blind pool offerings), the quantity of securities subject to options and warrants, loans to insiders, and the price at which the securities will be offered. See *id.* The North American Securities Administrators

Association (NASAA), an association of state and provincial securities regulators composed of the securities administrators from each state, Mexico, and 13 Canadian provinces, has issued guidelines intended to provide uniformity among state merit review standards. See NASAA Statements of Policy, available at <http://www.nasaa.org/regulatory-activity/statements-of-policy/>. Some exchange listing standards impose merit regulation on issuers.

<sup>41</sup> See CA Corp Code § 25608(e) for California filing fees; [http://www.leg.state.fl.us/Statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=0500-0599/0517/Sections/0517.081.html](http://www.leg.state.fl.us/Statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=0500-0599/0517/Sections/0517.081.html) for Florida filing fees; <http://www.cyberdriveillinois.com/departments/>

more compliance obligations than the issuer of a Covered Security, including the potential for considerable additional costs and legal fees associated with reviews of offering-related materials at the state level.<sup>42</sup> Additionally, as discussed above, many state securities regulators also review securities offerings based upon the merits of the offering and/or the issuer of the securities, which can further increase an issuer's compliance obligations and associated costs.<sup>43</sup> In addition, the Commission notes that on a separate matter, the Commission received an estimate that an issuer seeking state registration in 50 states would incur \$50,000 to \$70,000 in filing fees and \$80,000 to \$100,000 in legal fees.<sup>44</sup>

In addition, the Commission believes that the state registration and qualification requirements applicable to non-Covered Securities also impose costs on broker-dealers. Specifically, broker-dealers may incur costs to ensure that they are complying with applicable state laws governing non-Covered Securities in each state in which they are transacting in those securities on behalf of their customers or providing advice or other information to customers related to those securities. For example, broker-dealers can incur costs associated with maintaining a compliance program to verify an issuer's state registration status and comply with any state requirements applicable to broker-dealers that transact in non-Covered Securities, which could vary depending on where the customer resides and where the transaction occurs. In addition, the types and content of communications broker-dealers may have with their customers regarding non-Covered securities may

*securities/sellingsec.html* for Illinois filing fees; <https://ag.ny.gov/investor-protection/broker-dealer-and-securities-registration-information-sheet> for New York filing fees; and <https://www.ssb.texas.gov/texas-securities-act-board-rules/fee-schedule#one> for Texas filing fees.

<sup>42</sup> See Proposing Release, *supra* note 9, at 33843 (citing Securities Act Release No. 9741 (March 25, 2015), 80 FR 21806 (April 20, 2015) (Amendments for Small and Additional Issues Exemptions under the Securities Act (Regulation A)), at Section II.H.3 ("Regulation A Release")).

<sup>43</sup> See *id.*

<sup>44</sup> See *id.* at 33843 & n.43 (citing Regulation A Release, *supra* note 42; Letter from Michael L. Zuppone, Paul Hastings LLP, to Commission, dated November 26, 2013, at 2 (further noting the "significant costs and uncertainties associated with 'Blue Sky' law compliance"); and Regulation A Release, *supra* note 42, at n.1024 and accompanying text). As noted in the Proposing Release, the commenter did not address whether these estimated costs vary by the size of the offering. Also, the Commission notes that the estimate concerns the initial costs associated with registration. The Commission believes that the ongoing costs of compliance that the issuer bears will be lower than these initial costs. See *id.*

be subject to regulation under Blue Sky laws, thus broker-dealers may incur costs to ensure they are compliant with such requirements in each state in which they advise customers.<sup>45</sup> While some portion of these costs may be passed on to a broker-dealer's customers—*i.e.*, the investors that transact through the broker-dealer in non-Covered Securities—through commissions or transaction fees, the Commission believes that the compliance costs associated with Blue Sky requirements may lead some broker-dealers to only offer their services for Covered Securities.<sup>46</sup> However, the Commission lacks the data necessary to quantify the costs that broker-dealers and their customers face.

The amendment to Rule 146 that the Commission is adopting to make IEX a Designated Market will impact several parties, including (i) issuers that currently list their securities on a Named or Designated Market; (ii) issuers with securities not currently listed on any incumbent Named or Designated Market but who might list on IEX, or on an incumbent Named or Designated Market, as a result of the competition from IEX if IEX enters the listing market; and (iii) issuers with securities not currently listed on any incumbent Named or Designated Market and that would eventually list on a Named or Designated Market, regardless of IEX's entry into the market. Given that issuers that meet the listing standards of IEX are likely to meet the listing standards of other Named or Designated Markets, the number of issuers that will list on a Named or Designated Market solely as a result of the amendment (*i.e.*, those in category (ii) above) may be small. In addition, the amendment will affect IEX, as it will now be able to list Covered Securities, as can the Named and Designated Markets with which IEX now will be able to compete for listings.<sup>47</sup> The impacts on each of these

<sup>45</sup> See *id.* at 33844 & n.45 (citing Letter from Daniel Zinn, General Counsel, OTC Markets Group Inc., to Elizabeth M. Murphy, Secretary, Commission, dated March 24, 2014, at 4 (describing the commenter's views of the impact of Blue Sky laws on broker-dealers)).

<sup>46</sup> As noted in the Proposing Release, a commenter also stated that broker-dealers may have increased "rescission risk" for failing to comply with each jurisdiction's Blue Sky requirements, which OTC Markets argues "may chill some broker-dealers' willingness to allow their customers to transact in those securities at all, including securities of SEC reporting companies." See *id.* at 33844 & n.46.

<sup>47</sup> The Commission believes that the amendment also may indirectly impact exchanges that are not Named or Designated Markets as well as other trading venues for both covered and non-covered securities as explained below.

affected parties are discussed in more detail below.

## 2. Current Practices in the Market for Listings

Issuers of public securities make several considerations when deciding on which exchange to list their securities. These considerations include, among other things, the visibility and publicity provided by the exchange, the exchange's listing services and fees, and the exchange's listing standards. The Named and Designated Markets may provide issuers of Covered Securities with additional visibility over that of securities traded over the counter, which may, in turn, increase the pool of potential investors for an issuer and thereby improve an issuer's access to capital. In addition, the Named and Designated Markets provide listing services for their listed issuers, which can include monitoring, communication, and regulatory compliance services. These services may help issuers by reducing the cost of raising capital and the costs associated with going or remaining public. However, many issuers that list for the first time do so as part of an initial public offering, which can include considerations not related to listing on an exchange, such as SEC reporting obligations, as well as legal, accounting, and other expenses (both for the initial offering and the ongoing requirements of remaining public). In addition, issuers also consider the benefits of going public, such as increased access to capital and providing investors with a signal of an issuer's ability to meet obligations that apply to public companies (*e.g.*, reporting requirements). Commonly, the decision of which exchange to list on is made concurrently with the decision about whether or not to go public.

Issuers must pay listing fees and meet listing standards to list on a Named or Designated Market. Listing fees may include an initial application fee, as well as an ongoing annual fee, and may vary by the number of shares in the initial offering or be fixed. However, listing fees typically represent a small portion of the overall cost of an initial public offering or the ongoing costs of remaining public,<sup>48</sup> and thus may not be

<sup>48</sup> Listing fees for equity securities can range from \$55,000 (NYSE American) to \$295,000 (NYSE). See NYSE MKT Company Guide at Sec. 140, available at [http://wallstreet.cch.com/MKTtools/PlatformViewer.asp?SelectedNode=chp\\_1\\_1\\_1&manual=/MKT/CompanyGuide/mkt-company-guide/](http://wallstreet.cch.com/MKTtools/PlatformViewer.asp?SelectedNode=chp_1_1_1&manual=/MKT/CompanyGuide/mkt-company-guide/); and NYSE Listed Company Manual at 902.02, available at [http://nysemanual.nyse.com/LCMTTools/bookmark.asp?id=sx-ruling-nyse-policymanual\\_902.02&manual=/lcm/sections/lcm-sections/](http://nysemanual.nyse.com/LCMTTools/bookmark.asp?id=sx-ruling-nyse-policymanual_902.02&manual=/lcm/sections/lcm-sections/). See

Continued

a significant factor that issuers consider when deciding (i) whether to list on a Named or Designated Market, and (ii) if so, on which Named or Designated market to list. Listing exchanges also impose listing standards on issuers, which can include corporate governance standards as well as quantitative requirements, such as minimum income, market capitalization, and operating history requirements.<sup>49</sup> While an exchange’s listing standards may prevent potential issuers who do not meet those standards from listing on the exchange, the stringency of an exchange’s listing standards may provide a valuable signal to investors about the quality of issuers that are able to list, which may improve the issuers’ access to capital.<sup>50</sup>

3. Competitive Landscape

The amendment to Rule 146 will affect the market for listing services, in which the Named and Designated Markets compete to provide listing services to issuers, or potential issuers, of Covered Securities because, as explained in detail below, the amendment will permit IEX to compete in this market. In addition, the Commission believes that the amendment can also affect the market

for trading services because the listing status and listing designation of securities (*i.e.*, whether a security is a Covered Security and where it is listed) are related to where and how the securities trade. In this section, the Commission discusses competition among Named and Designated Markets for listings, as well as competition among the various trading platforms (including Named and Designated Markets) for trading services.

(a) Competition for Listings

Listing exchanges compete with each other for listings in many ways, including, but not limited to, listing fees, listing standards, and listing services. When issuers select a listing exchange, they consider the listing fees and the costs of compliance with listing standards on any given exchange, as well as the quality of listing services and any relevant reputational benefits, among other things, each exchange may offer. Although issuers may incur costs to meet an exchange’s listing standards, high listing standards may also yield benefits as they may serve as a positive signal to investors of an issuer’s ability to satisfy high qualitative and quantitative listing requirements. Investors may interpret the reputation of

a listing exchange and high listing standards as a credible signal of the quality of the listed securities on that exchange.<sup>51</sup>

Currently, there are three Named Markets under Section 18(b)(1)(A) of the Securities Act: NYSE, NYSE American, and Nasdaq/NGM. In addition, there are currently six Designated Markets: (i) Tier I of the NYSE Arca, Inc.; (ii) Tier I of the NASDAQ OMX PHLX LLC; (iii) CBOE; (iv) options listed on ISE; (v) The Nasdaq Capital Market; and (vi) Tier I and Tier II of BATS. As of June 2, 2017, the Commission estimates that NYSE listed 3,172 equity securities, Nasdaq listed 3,183 equity securities, NYSE Arca listed 1,529 equity securities, NYSE American listed 359 equity securities, and BATS listed 176 equity securities.<sup>52</sup>

While the number of equities listed on each exchange relative to the total number of equities listed on all exchanges is informative about overall competition for listings among the exchanges, the market shares for recent equity issue listings may provide a better picture of the nature of competition between exchanges and the size of the new listings market. Table 2 identifies the number of new equity issue listings from 2008 to 2016.<sup>53</sup>

TABLE 2—NEW EQUITY LISTINGS IN NAMED AND DESIGNATED MARKETS, 2008–2016

	NYSE	Nasdaq	NYSE American	NYSE ARCA	BATS
2008 .....	68	142	53	68	0
2009 .....	76	115	33	20	0
2010 .....	141	156	31	12	0
2011 .....	130	132	34	14	0
2012 .....	148	135	19	9	17
2013 .....	178	201	26	13	6
2014 .....	178	278	23	12	5
2015 .....	101	220	15	13	31
2016 .....	81	163	5	12	85

As shown in Table 2, two listing exchanges—NYSE and Nasdaq—captured 71% of all new equity listings on Named and Designated Markets in 2016, which is evidence of a highly

concentrated listing market.<sup>54</sup> In addition, when BATS entered the market in 2012, it gained only 17 new listings, which was 5.2% of all new equity listings in 2012. This small

number of new listings suggests that the number of currently unlisted issuers that would list with a new Designated Market is likely to be small.<sup>55</sup>

*also supra* notes 41–46 and accompanying text (discussing the overall costs of state securities registration). See also Proskauer Rose LLP, 2016 IPO Study, at 52, available at <http://www.proskauer.com/files/uploads/Proskauer-2016-IPO-Study.pdf> (examining 258 IPOs from 2013 to 2015 and finding that the average total IPO expense, excluding underwriting fees, was \$4.15 million).

<sup>49</sup> The Commission views the term “listing exchange” as equivalent to the term “Named or Designated Market” for purposes of this release.

<sup>50</sup> See *infra* Section IV.A.3, for further discussion of listing standards and signaling to investors.

<sup>51</sup> See, e.g., Thomas J. Chemmanur & Paolo Fulghieri, *Competition and Cooperation Among Exchanges: A Theory of Cross-listing and*

*Endogenous Listing Standards*, 82 J. Fin. Econ. 455–89 (2006), available at <http://www.sciencedirect.com/science/article/pii/S0304405X06001139>.

<sup>52</sup> These figures of listed equities include equity securities reported to a securities information processor. The estimates also include multiple securities from the same issuer, which means the total number of securities may differ from the total number of issuers potentially affected by this rulemaking. Listing information is from the master files of the daily trade and quotation data (“TAQ Data”).

<sup>53</sup> The listings data for NYSE, Nasdaq, NYSE American, and NYSE Arca were taken from Compustat Merged © 2016 Center for Research in Securities Prices (“CRSP”), The University of

Chicago Booth School of Business. As CRSP does not have BATS listings data, BATS listings are from TAQ Data. See *supra* note 52.

<sup>54</sup> The Herfindahl-Hirschman Index (HHI) measure for listing exchanges is 0.321, calculated as the sum of squared market shares, or  $(2,552/7,217)^2 + (2,863/7,217)^2 + (1,377/7,217)^2 + (339/7,217)^2 + (86/7,217)^2 = 0.321$ . See Campbell McConnell, Stanley Brue & Sean Flynn, *Microeconomics: Principles, Problems, & Policies* 218, 219, 225, 226 (2014). An HHI close to 0 indicates low concentration while an HHI of 1 indicates total concentration or monopoly.

<sup>55</sup> See *infra* Section IV.B.2, for further discussion about how this may affect currently unlisted issuers.

A highly concentrated market may be the result of barriers to entry, which limit competition, and can include economies of scale, reputation, legal barriers to entry, and network externalities. These barriers to entry may adversely affect a new listing exchange's ability to compete with incumbent exchanges for listings. New listing exchanges do not enjoy the economies of scale of large listing exchanges. Listing exchanges may exhibit economies of scale because an exchange with a large number of listings can spread the fixed costs of listing equities over a greater number of issuers. The larger these fixed costs are, the greater will be the scale economies of larger listing exchanges. New listing exchanges face reputational barriers to entry because they may not be able to quickly establish a strong reputation for high quality listings. This lack of reputation may discourage issuers from listing on an entrant exchange, as well as discourage investors from investing in an issuer that lists on an entrant exchange, which may further reinforce the reputational barriers to entry.

Legal barriers to entry also can apply because exchanges are self-regulatory organizations overseen by the Commission. The governing statute and regulations establish legal barriers to entry for an entity that seeks to register

as an exchange, as well as additional legal barriers for an exchange to become a Designated Market. Specifically, the process by which the Commission designates an exchange as a Designated Market imposes a legal barrier to entry on the ability of an exchange to effectively compete for the listing business of Covered Securities.

In addition, the market for listings exhibits positive network externalities: Issuers may prefer to be listed on exchanges where other similar issuers are listed because of increased visibility. This indicates that, all else being equal, issuers may tend to favor listing their securities on large exchanges (in terms of listings) over smaller ones.

Issuers also may face costs associated with moving their listing from one exchange to another. These switching costs will not only include the fixed costs associated with listing on a new exchange (such as the exchange's application fee, and the legal and accounting expenses associated with ensuring that the issuer satisfies the listing standards of the new exchange) but also will include the costs associated with communicating with investors about the move to the new exchange. Thus, an issuer that is considering moving from one exchange to another would compare the relatively lower annual listing fee of its current

exchange with the relatively high costs of moving its listing to a new exchange, which places the new exchange at a disadvantage and creates a barrier to entry for a potential entrant. Even if an entrant exchange prices its listing fees and services for new issuers competitively compared to the incumbent exchanges, the costs for an issuer to switch its listing to a new exchange may dissuade an issuer from switching and thereby prevent the entrant from gaining market share.

Table 3 shows estimates of the probability that an issuer would change its listing exchange in a given year, based on issuer switching behavior for equities over the period 2008 to 2016. As an example, if an equity security was listed on NYSE in a given year, there was a 99.33% chance that it would still be listed on NYSE the following year, but a 0.04% chance it would be listed on Amex the following year, a 0.34% chance it would be listed on Nasdaq the following year, and a 0.08% chance it would be listed on NYSE Arca the following year. More generally, equities listed on NYSE and Nasdaq in a given year had a greater than 99% chance of remaining listed on that exchange the following year. This result suggests that issuers are unlikely to switch their listings away from the two exchanges with the highest market shares.

TABLE 3—CONDITIONAL PROBABILITY OF TRANSITION FOR LISTINGS, 2008–2016<sup>56</sup>

Original exchange	NYSE (%)	NYSE American (%)	Nasdaq (%)	NYSE Arca (%)	BATS (%)	Not trading <sup>57</sup>
<b>Status in the Following Year</b>						
NYSE .....	99.33	0.04	0.34	0.08	0.00	0.20
NYSE Amer .....	1.80	93.47	2.80	1.39	0.00	0.54
Nasdaq .....	0.38	0.07	99.11	0.01	0.00	0.42
NYSE Arca .....	1.50	0.47	1.13	90.81	0.00	6.10
BATS .....	0.00	0.00	0.00	0.00	94.40	5.60

#### (b) Competition for Trading Services

Trading in Covered Securities is segmented from trading in those securities that are not listed on a Named or Designated Market (*i.e.*, non-Covered Securities). Non-Covered Securities trade only on over-the-counter (“OTC”) markets, which consist of alternative trading systems (“ATs”) that trade unlisted securities and broker-dealers who internalize orders. Covered Securities, on the other hand, may trade

on the registered national securities exchanges or off-exchange either on the 35 ATs or through broker-dealers that internalize orders. The market to trade Covered Securities on either the Named and Designated Markets or the other trading platforms is more liquid than the OTC trading of non-Covered Securities because, among other things, OTC markets have higher search costs associated with finding buyers and sellers.<sup>58</sup> Further, because Covered

Securities are exempt from state securities registration laws, the costs associated with complying with state securities registration laws are lower for broker-dealers that trade Covered Securities on behalf of their customers, as compared to trading non-covered securities.

Exchanges, ATs, and broker-dealers compete to attract order flow in Covered Securities by offering better trading services or innovative trading

<sup>56</sup> The listings data for NYSE, Nasdaq, NYSE American, and NYSE Arca were taken from CRSP. BATS listings are from TAQ Data. See *supra* note 52.

<sup>57</sup> For the exchanges in the CRSP data (NYSE, NYSE American, Nasdaq, and NYSE Arca), this

category (Not Trading) includes listings that were halted, suspended, not trading, or whose listing status was not known in the following year. For the exchange from the TAQ data (BATS), this column includes listings that were not in the TAQ master file in the following year.

<sup>58</sup> See, e.g., Ulf Brüggemann, Aditya Kaul, Christian Leuz & Ingrid M. Werner, *The Twilight Zone: OTC Regulatory Regimes and Market Quality*, (Nat'l Bureau of Econ. Research, Working Paper No. 19358, 2013), available at <https://ideas.repec.org/p/nbr/nberwo/19358.html>.

mechanisms. Attracting order flow can generate revenue in the form of transaction fees or data revenue.<sup>59</sup>

The ability of listing exchanges, however, to successfully use innovative trading services to attract listings has declined over the past decade.<sup>60</sup> During this time, the number of competitors in the market for trading services has increased, resulting in fragmentation in the market and a decline in the market share of trading at listing exchanges. For example, since the third quarter of 2009, the number of ATSS that reported transactions in NMS stocks has increased from 32 to 34,<sup>61</sup> while the share volume of Covered Securities executed on ATSS has increased from 7.9% to 13.0%.<sup>62</sup> In contrast, the two listing exchanges with the greatest number of issues listed, NYSE and Nasdaq, each experienced a sharp decline in the market share of trading volume in the securities they list. The market share of the NYSE in NYSE-listed stocks fell from approximately 80% in 2005 to 20% in 2013; Nasdaq's market share of Nasdaq-listed stocks fell by approximately half, from 50% in 2005 to 25% in 2013.<sup>63</sup> Despite these changes, listing exchanges still currently

enjoy a larger trading market share in their listed securities.<sup>64</sup>

### B. Impact on Efficiency, Competition, and Capital Formation

Securities Act Section 2(b)<sup>65</sup> requires the Commission, when engaging in rulemaking that requires it 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.

#### 1. Efficiency

By listing on IEX, security issuers that otherwise would have not listed their securities on a Named or Designated Market will be able to avoid the duplicative costs of securities registration in multiple jurisdictions. In this way, the amendment will reduce the impediments to listing on exchanges, which in turn can improve market efficiency. To the extent that the amendment results in increased listing activity, then it may improve the allocative efficiency of securities markets by allowing investors to better diversify financial risks by investing in newly-listed securities.

However, these two impacts may be mitigated by the extent to which issuers are unable to list on a Named or Designated Market because, for example, they do not satisfy listing standards or cannot afford the attendant costs of doing so. An issuer must be an SEC reporting company to list on a national securities exchange.<sup>66</sup> Therefore, to the extent that an issuer is not already an SEC reporting company, it may face increased disclosure costs in order to be eligible to be listed on a national securities exchange. Moreover, issuers that are able to meet the listing standards of IEX are likely to be able to meet the listing standards of other Named or Designated Markets; accordingly, the entry of IEX will not necessarily increase the pool of securities eligible for listing. As a result, the Commission believes that the number of issuers that would not have listed at all in the absence of an

amendment, but will now list on IEX, is likely to be small.<sup>67</sup>

#### 2. Capital Formation

Whether IEX entering the listing market promotes capital formation depends on the extent to which issuers previously unable or unwilling to list on a Named or Designated Market subsequently do so. Some issuers may, as a result of improved services and/or decreased fees stemming from the increased competition between listing exchanges, be induced to list on an exchange where, in the absence of the amendment, they would not have done so. If so, then the entrance of IEX can provide issuers with lower cost access to capital.

As noted in Section IV.A, one reason issuers list on a Named or Designated Market is improved access to capital. Listing on a Named or Designated Market may improve access to capital in several ways, which can promote capital formation. First, listing on a Named or Designated Market may credibly signal to investors that a firm is of higher quality because firms that list on these exchanges must meet the exchange's minimum standards for governance and disclosure. Like listed issuers on the Named and Designated Markets, IEX's listed issuers might benefit from the signal of quality that comes from listing on a Named or Designated Market. The reputational benefits that come from listing on a Named or Designated Market may make investors more willing to invest in such issuers, which may improve the issuers' access to capital, and promote capital formation.

Second, an issuer listing on a Named or Designated Market may experience enhanced liquidity that facilitates capital formation. Investors may demand a liquidity premium (greater returns) when investing in illiquid securities to compensate for the risks associated with the lack of liquidity. Any liquidity risk premium raises the costs issuers incur when issuing new securities. Listing on a Named or Designated Market may result in more liquid trading relative to OTC trading because of potential frictions to liquidity imposed by OTC search costs.<sup>68</sup> Therefore, if the amendment induces additional issuers to list, the enhanced liquidity can facilitate capital formation by reducing the cost that the issuers of those securities would otherwise incur (e.g., through their

<sup>59</sup> For example, market data fees collected by the three industry networks are allocated proportionally among the exchanges based, in part, on each exchange's share of the overall transaction volume. See Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3600-01 (January 21, 2010) (Concept Release on Equity Market Structure) (Commission concept release discussing the revenues and expenses from data fees at that point in time).

<sup>60</sup> See James Angel, Lawrence Harris & Chester Spatt, *Equity Trading in the 21st Century: An Update* (2013), available at <http://www.q-group.org/wp-content/uploads/2014/01/Equity-Trading-in-the-21st-Century-An-Update-FINAL1.pdf>.

<sup>61</sup> Data compiled from Forms ATS and Form ATS-R submitted to the Commission as of June 2017 show that 35 ATSS have noted that they expect to trade NMS stocks. However, only 34 ATSS had observable transactions in NMS stocks since the third quarter of 2009.

<sup>62</sup> See 17 CFR 242.600(b)(47) (definition of NMS Stock) ("NMS stock means any NMS security other than an option.") and 17 CFR 242.600(46) (definition of NMS security) ("NMS security means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options."). The estimates of ATSS that trade NMS stocks and ATS trade volume share was developed using weekly summaries of trade volume collected from ATSS pursuant to FINRA Rule 4552. See also Securities Exchange Act Release No. 76474 (November 18, 2015), 80 FR 80998, 81109 (December 28, 2015) (Regulation of NMS Stock Alternative Trading Systems). The estimates in this release were developed in the same manner as in the cited release. See also *OTC (ATS & Non-ATS) Transparency*, FINRA, <http://www.finra.org/Industry/Compliance/MarketTransparency/ATS/>.

<sup>63</sup> See Angel, Harris & Spatt, *supra* note 60, at 20-21.

<sup>64</sup> For the purposes of this rulemaking, staff examined TAQ Data for the time period of November through December 2014. Staff observed that exchanges tend to enjoy more than 15% higher market share in the securities they list compared to the securities they do not list, on average, and they tend to enjoy about 20% higher market share in the securities they list compared to the market share of others' trading in those securities, on average.

<sup>65</sup> See 15 U.S.C. 77b(b).

<sup>66</sup> See 15 U.S.C. 78l(b).

<sup>67</sup> See *supra* Section IV.A.3.a (for further discussion).

<sup>68</sup> See *supra* Section IV.A.3.b. See also Darrell Duffie, Nicolae Garleanu & Lasse Heje Pedersen, *Over-the-Counter Markets*, 73 *Econometrica* 1815 (2005).

ability to issue securities at a higher offering price compared to a non-listed issuer) when issuing new securities. Additionally, listing on a Named or Designated Market may enhance liquidity and promote access to capital (and thereby promote capital formation) by reducing the costs of trading incurred by broker-dealers, which potentially are shared with investors. Broker-dealers incur costs to trade non-Covered Securities when ensuring their compliance with state securities laws in multiple jurisdictions,<sup>69</sup> which are potentially shared with investors. Thus, the amendment may reduce investors' transaction costs to trade securities that list on a Named or Designated Market as a result of the amendment.<sup>70</sup> Consequently, investors in securities that list on IEX as a result of the amendment will have easier access to invest in those securities and to further diversify their investment portfolios, which may promote capital formation by improving allocative efficiency.<sup>71</sup>

### 3. Competition

The amendment to Rule 146(b) will likely increase competition among the Named and Designated Markets that compete to list securities. By determining that IEX has "substantially similar" listing standards to the Named and other Designated Markets, the amendment permits IEX to compete with other Named and Designated Markets to list securities that are exempt from state registration requirements. As discussed above, the Named and Designated Markets compete with each other in many ways, including listing standards, listing fees, and listing services. In addition to permitting IEX to compete to list securities as a Designated Market, the additional competition from IEX's entry into the listing market will also provide incumbent listing markets with incentives to change how they compete with each other.<sup>72</sup>

Generally, there are two ways that increased competition can affect how listing markets compete with each other. First, it can affect how Named or Designated Markets compete to provide better services and value for listing

issuers. If an additional entrant competes by providing better listing and monitoring services or lower costs for issuers, incumbent listing exchanges may decide to follow suit. For example, listing markets could reduce fees, improve services, or reduce compliance burdens associated with their listing standards.<sup>73</sup>

The Named and Designated Markets also may compete to provide better services by increasing their level of specialization with respect to securities listings. As noted below, as in the case of BATS, some Named and Designated Markets may develop reputations for specializing in specific types of issues by catering to specific types of issuers. An increase in competitive pressures may cause the Named and Designated Markets to increase the degree to which they cater to specific types of issuers. Specialization may reduce the cost of providing listing services or may promote innovation in the provision of listing services. To the extent that specialization improves the services provided to issuers or reduces the costs of these services, this competitive response may improve the efficiency of the market for listing services.

Second, the reputation of a Named or Designated Market for strict listing standards may be informative to an investor and serve as a signal of the quality of an issuer.<sup>74</sup> Issuers that are able to meet the listing standards of a Named or Designated Market can signal their ability to do so by listing on those exchanges. However, because complying with these listing standards may be costly for issuers, issuers weigh the benefits of signaling their higher quality (through their ability to meet the stronger listing standards of the Named or Designated Market) against the costs of compliance with these standards.

The impact of increased competition on listing standards is uncertain. The Named and Designated Markets may respond to increased competition by

strengthening listing standards to provide additional signaling and attract investors to the issuers the exchanges list. Alternatively, the Named and Designated Markets can instead respond to increased competition by proposing to weaken their listing standards to attract additional listings. The exchanges' opposing incentives to cater to these two groups of market participants make predicting the impact of increased competition on listing standards difficult.

The Named and Designated Markets' ability to lower listing standards is constrained by two factors (1) any proposed listing standards or proposed changes to existing listing standards must be filed with the Commission pursuant to Section 19(b) of the Exchange Act and must meet statutory and rule requirements to become effective;<sup>75</sup> and (2) an exchange with listing standards that are not substantially similar to those of a Named Market may lose its status as a Designated Market.<sup>76</sup> The requirement that the listing standards of a Designated Market be substantially similar to those of a Named Market means that the listing standards of the Named Markets serve as a lower bound for the extent to which competition may pressure listing exchanges to attempt to weaken their listing standards.

Some of the features of the market for listings that currently inhibit competition may mitigate the effects of the amendment on competition. Specifically, some of the barriers to entry discussed in the baseline—economies of scale and network externalities—may make it difficult for IEX to effectively compete with incumbent exchanges for listings.<sup>77</sup> For example, if a new entrant does not attract enough initial listings, the fixed cost of operations may make it difficult to keep its listing fees competitive. In addition, a new entrant may not have established a sufficient reputation as a listing exchange to credibly certify the quality of its new issues. Thus, the structure of the market for listings may mitigate some of the potential effects of increased competition between Named and Designated Markets.

The most recent example of an entrant into the market for listings is BATS, which became a Designated Market in

<sup>73</sup> See *infra* note 75 (discussing the filing requirements under the Securities Exchange Act of 1934 ("Exchange Act") necessary for any revision to exchange listing standards and noting that such listing standards and changes to such listing standards are subject to the requirements of the Exchange Act and the rules and regulations thereunder).

<sup>74</sup> See Stewart C. Myers & Nicholas S. Majluf, *Corporate Financing and Investment Decisions When Firms Have Information That Investors Do Not Have*, 13 J. Fin. Econ. 187 (1984), available at <http://www.sciencedirect.com/science/article/pii/0304405X84900230>, for a discussion of the role of asymmetric information in corporate finance. See also Nathalie Dierkens, *Information Asymmetry and Equity Issues*, 26 J. Fin. & Quantitative Analysis 181 (1991), available at [www.jstor.org/stable/2331264](http://www.jstor.org/stable/2331264), for empirical evidence of asymmetric information in the equity issue process.

<sup>75</sup> Any revision to exchange listing standards must be filed in accordance with Section 19(b) of the Exchange Act and Rule 19b-4 thereunder and is subject to the requirements of the Exchange Act and the rules and regulations thereunder. See 15 U.S.C. 78s(b) and 17 CFR 240.19b-4.

<sup>76</sup> See 17 CFR 230.146(b)(2).

<sup>77</sup> See *supra* Section IV.A.

<sup>69</sup> See *supra* Section IV.A.3.b.

<sup>70</sup> See *supra* Section IV.A.1.

<sup>71</sup> See, e.g., John Heaton & Deborah J. Lucas, *Evaluating the Effects of Incomplete Markets on Risk Sharing and Asset Pricing*, 104 J. Pol. Econ. 443 (1996).

<sup>72</sup> See, e.g., Thierry Foucault & Christine A. Parlour, *Competition for Listing*, 35 Rand J. Econ. 329 (2004) (describing how, in equilibrium, competing exchanges obtain positive expected profits by offering different execution costs and different listing fees). See also *supra* note 60 and accompanying text.



2012.<sup>78</sup> Table 2 in Section IV.A.3.a shows that the number of new listings on BATS decreased each year until 2015 but has increased recently. While the growth in new listings by BATS may be indicative of the barriers to entry that entrants such as IEX will face, circumstances specific to BATS may have impacted its ability during that period to attract listings.<sup>79</sup>

Table 3 in Section IV.A.3.a shows that almost none of the new listings on BATS arrived as transfers from another exchange; rather most of those listings were the initial listing for each issuer. This evidence could indicate that switching costs may also have had an impact on BATS' ability to gain market share, and may be a factor for IEX, as well. Moreover, the vast majority of BATS-listed securities are exchange-traded products, which is consistent with the idea that, despite barriers to entry, BATS was able to enter the market by competing for one segment of the market and specializing in listing exchange-traded products.

### C. Analysis of Benefits and Costs

The amendment to Rule 146(b) making IEX a Designated Market allows securities listed, or authorized for listing, on IEX to be designated as Covered Securities under Rule 146(b)(1) under the Securities Act. As described above, Covered Securities are exempt from state law registration requirements.<sup>80</sup> In this section, the Commission discusses the benefits and costs of the amendment, which stem from: (i) The exemption from Blue Sky laws provided to any issuers that would not list in the absence of the amendment; and (ii) the entry of IEX into the market for listings as a Designated Market.

As noted above, the Commission is unable to quantify all of the economic effects of the amendment because it lacks the information necessary to provide reasonable estimates.

<sup>78</sup> See Securities Act Release No. 9295 (January 20, 2012), 77 FR 3590 (January 25, 2012).

<sup>79</sup> As BATS noted in its registration statement filed with the Commission on December 15, 2015, "[O]n March 23, 2012, we experienced a serious technical failure on BZX, forcing us to cancel our planned IPO. . . . These technical failures damaged our reputation and resulted in increased regulatory scrutiny of the event by the SEC and other governmental authorities."

<sup>80</sup> Rule 146 and Section 18 have no effect on Federal registration requirements, which are addressed by Section 5 of the Exchange Act. See 15 U.S.C. 78e. Section 18 of the Securities Act states that no law, rule, regulation, or order, or other administrative action of any State or any political subdivision thereof requiring, or with respect to, registration or qualification of securities, or registration or qualification of securities transactions, shall directly or indirectly apply to a covered security. See 15 U.S.C. 77r(a)(1)(A).

### 1. Benefits of the Amendment

The amendment will provide benefits, flowing from the exemption from Blue Sky laws, to issuers that do not currently list on an existing Named or Designated Market but choose to list on IEX.<sup>81</sup> Specifically, the amendment will permit these issuers to avoid the potentially duplicative costs of complying with multiple state securities regulations. As noted above, these duplicative costs can include both a fixed cost of registration and ongoing compliance costs. Because an unlisted issuer needs to register in each of the jurisdictions in which its securities will be bought or sold, any issuers that list as a result of the amendment will save these registration costs. To the extent that IEX attracts previously unlisted issuers, IEX will benefit as a result of revenue from listing fees, trading fees, and data fees generated by additional issuers. In addition, absent the amendment, the heterogeneity in state securities regulations generates ongoing costs for broker-dealers and investors transacting in multiple jurisdictions.<sup>82</sup> However, the overall magnitude of these benefits depends on the number of currently unlisted issuers that choose to list on IEX as a result of the amendment, and the Commission believes this number is likely to be small because any unlisted issuer able to meet the listing standards of IEX is likely to be able to meet the listing standards of the other Named and Designated Markets.<sup>83</sup>

More generally, by making IEX a Designated Market, the amendment will benefit IEX by allowing it to compete in the listing market for Covered Securities on a more level playing field with similarly situated national securities exchanges.<sup>84</sup> Specifically, being able to list Covered Securities will allow IEX more effectively to compete with the incumbent Named and Designated Markets that also are able to offer Covered Securities status. This will also benefit issuers that choose to list securities on a Named or Designated Market by providing them with another alternative venue on which to list. Furthermore, adding IEX as an entrant into this market will increase the

<sup>81</sup> Data to estimate the number of such issuers does not exist, but the Commission believes that the numbers of such issuers is likely to be small, as any issuers that can meet the listing standards of IEX are likely to be able to meet the listing standards of the incumbent Named or Designated Markets.

<sup>82</sup> See *supra* Sections IV.A.1 and IV.B.1.

<sup>83</sup> See Table 2, *supra* Section IV.A.3.a, and accompanying text.

<sup>84</sup> The Commission acknowledges that this benefit to IEX may come at the expense of the existing Named and Designated Markets, who may lose a portion of their current share to a new entrant. See *infra* Section IV.D.

number of competitors in the market for listings. To the extent that the existing Named and Designated Markets respond to this increased competition by reducing listing fees or improving listing services, as discussed above, currently listed issuers and their investors may benefit from the improved quality of listing services, reduced listing fees or reduced compliance costs. In addition, to the extent that the entry of IEX increases the specialization of incumbent Named and Designated Markets, issuers may benefit from listing services that are more tailored to their needs.<sup>85</sup>

Last, if issuers list on a Named or Designated Market as a result of the amendment, this listing may impact the trading of those issuers' securities on markets that are not Named or Designated Markets. As noted in the baseline, securities that list on a Named or Designated Market may also trade on exchanges that are not Named or Designated Markets, which may bring those exchanges additional revenue from trades.<sup>86</sup> To the extent IEX's entry into the market increases the number of issuers listing on a Named or Designated Market, exchanges that are not Named or Designated Markets may benefit from trading revenue from trading more Covered Securities, even though these exchanges do not directly compete with IEX or the Named or Designated Markets for listings business.

### 2. Costs of the Amendment

For unlisted issuers that choose to list on IEX as a result of the amendment, listing on IEX may entail compliance costs arising from new reporting obligations from IEX's listing standards. In addition, if unlisted issuers choose to list on IEX as a result of the amendment, investors may also face costs from the loss of state oversight for the securities listed by these issuers. The Commission notes that the overall magnitude of costs associated with the loss of state oversight depends on the number of unlisted issuers that choose to list as a result of the amendment. The Commission believes this number is likely to be small, or non-existent, for the reasons noted above.<sup>87</sup> Furthermore, the Commission notes that these issuers would only choose to list on IEX and bear these costs if they decided that the benefits of listing on IEX justified the costs.

The Commission believes that any costs to investors from a loss of state

<sup>85</sup> See *supra* Section IV.B.3.

<sup>86</sup> See *supra* Section IV.A.1.

<sup>87</sup> See Table 2, *supra* Section IV.A.3.a, and accompanying text.

oversight for such issuers will be mitigated by (i) federal regulations and oversight of IEX and the other Named and Designated Markets, and (ii) the requirement for issuers to meet the exchanges' listing standards. Indeed, Congress, in Section 18 of the Securities Act, has already determined that federal regulation is sufficient for those issuers that meet the high listing standards of a Named or Designated Market. Furthermore, the Commission believes that regulatory protections offered by exchanges for trading in Covered Securities conducted on their facilities (e.g., market surveillance, investigation and enforcement) will mitigate the potential costs of a loss of state oversight for unlisted issuers that list on IEX.

Issuers that currently list on an existing Named or Designated Market that would switch to IEX would not experience potential costs from a loss of state oversight or compliance costs arising from new reporting obligations, because they currently are not subject to state oversight and are subject to the reporting requirements by virtue of being an SEC reporting company (a condition to their listing on a current Named or Designated Market). However, any previously listed issuers that decide to change their listing from another Named or Designated Market to IEX will incur costs to switch their listing.<sup>88</sup> Still, the Commission notes that issuers can choose whether or not to incur this cost and likely would do so only if the benefits of switching their listing exceed their switching costs.

#### D. Other Effects of the Amendment

Some of the effects of the amendment to Rule 146 on IEX, incumbent Named and Designated Markets, and issuers involve transfers from one party to another. For example, the listing fees collected by IEX from previously-listed issuers may come from a reduction in the listing fees collected by other Named or Designated Markets. Issuers that list on Named and Designated Markets may also enjoy savings from listing fee reductions as a result of increased listing exchange competition, which would also come from a reduction in listing fees collected by Named or Designated Markets.

Additionally, as a result of changes to competition in the market for listings, the volume of trading across trading venues may shift, to the advantage of some venues and to the detriment of others. Changes to the Named or Designated Markets' shares of the

market for listings may affect the distribution of trading volumes across Named and Designated Markets, as well as other trading venues. Commission staff estimates that an exchange captures an average share of volume in the securities listed by that exchange that is about 20% higher than the market share of other exchanges trading the same securities.<sup>89</sup> This result suggests that even if the number of listed securities does not change, changes to listings driven by increased competition may alter the market share of trading distributed across each venue by about 20% of the volume in such securities. Any shifts in the market share of trading can result in gains and losses in transaction fees collected and the share of data fees split between exchanges. Although these gains and losses are relevant potential economic effects of the amendment, the Commission does not consider these transfers to be a benefit or cost of the amendment, but rather a consequence of increased competition.<sup>90</sup>

#### V. Regulatory Flexibility Act Certification

The Commission certified, pursuant to Section 605(b) of the Regulatory Flexibility Act,<sup>91</sup> that the amendment to Rule 146 would not have a significant economic impact on a substantial number of small entities. This certification was included in the Proposing Release.<sup>92</sup> The Commission solicited comments on the certification. No comments on the certification were received.

#### VI. Statutory Authority and Text of the Rule

The Commission is adopting an amendment to Rule 146 pursuant to the Securities Act of 1933,<sup>93</sup> particularly Sections 18(b)(1)(B) and 19(a).<sup>94</sup>

#### List of Subjects in 17 CFR Part 230 Securities.

<sup>89</sup> See *supra* note 64. Using TAQ data, Commission staff estimates that listing exchanges have around 28.8% of the dollar volume in the securities they list compared to other exchanges' average of about 3.3% of the dollar volume. Staff observed that each listing exchange enjoys a higher market share of dollar volume in its listed securities than any other exchange trading the listing exchange's listed securities. Staff also observed that these differences were not only economically large, but that they were also statistically significant.

<sup>90</sup> In light of the relevant statutory language and in the context of this particular rulemaking, the Commission does not believe that there are reasonable alternatives to this proposal to designate securities listed on IEX as Covered Securities.

<sup>91</sup> 5 U.S.C. 605(b).

<sup>92</sup> See Proposing Release, *supra* note 9, at 33850-51.

<sup>93</sup> 15 U.S.C. 77a *et seq.*

<sup>94</sup> 15 U.S.C. 77r(b)(1)(B) and 77s(a).

For the reasons set forth in the preamble, Title 17, Chapter II of the Code of Federal Regulations is amended as follows:

#### PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

■ 1. The authority citation for part 230 continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77b, 77b note, 77c, 77d, 77f, 77g, 77h, 77j, 77r, 77s, 77z-3, 77sss, 78c, 78d, 78j, 78l, 78m, 78n, 78o, 78o-7 note, 78t, 78w, 78ll(d), 78mm, 80a-8, 80a-24, 80a-28, 80a-29, 80a-30, and 80a-37, and Pub. L. 112-106, sec. 201(a), sec. 401, 126 Stat. 313 (2012), unless otherwise noted.

\* \* \* \* \*

■ 2. Section 230.146 is amended by revising paragraphs (b)(1) and (b)(2) to read as follows:

#### § 230.146 Rules under section 18 of the Act.

\* \* \* \* \*

(b) \* \* \*

(1) For purposes of Section 18(b) of the Act (15 U.S.C. 77r), the Commission finds that the following national securities exchanges, or segments or tiers thereof, have listing standards that are substantially similar to those of the New York Stock Exchange ("NYSE"), the NYSE American LLC ("NYSE American"), or the National Market System of the Nasdaq Stock Market ("Nasdaq/NGM"), and that securities listed, or authorized for listing, on such exchanges shall be deemed covered securities:

- (i) Tier I of the NYSE Arca, Inc.;
- (ii) Tier I of the NASDAQ PHLX LLC;
- (iii) The Chicago Board Options Exchange, Incorporated;
- (iv) Options listed on Nasdaq ISE, LLC;
- (v) The Nasdaq Capital Market;
- (vi) Tier I and Tier II of Bats BZX Exchange, Inc.; and
- (vii) Investors Exchange LLC.

(2) The designation of securities in paragraphs (b)(1)(i) through (vii) of this section as covered securities is conditioned on such exchanges' listing standards (or segments or tiers thereof) continuing to be substantially similar to those of the NYSE, NYSE American, or Nasdaq/NGM.

By the Commission.

Dated: October 24, 2017.

**Lynn M. Powalski,**  
Deputy Secretary.

[FR Doc. 2017-23507 Filed 10-27-17; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>88</sup> See *supra* Section IV.A.3.a, for a discussion of the sources of switching costs.

**DEPARTMENT OF HOMELAND  
SECURITY**

**U.S. Customs and Border Protection**

**DEPARTMENT OF THE TREASURY**

**19 CFR Part 12**

[CBP Dec. 17–15]

RIN 1515–AE27

**Removing the Prohibition on the  
Importation of Jadeite or Rubies Mined  
or Extracted From Burma, and Articles  
of Jewelry Containing Jadeite or  
Rubies Mined or Extracted From  
Burma**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security; Department of Treasury.

**ACTION:** Final rule.

**SUMMARY:** This document amends the U.S. Customs and Border Protection (CBP) regulations to remove the provision relating to the prohibition on the importation of jadeite or rubies mined or extracted from Burma, and articles of jewelry containing jadeite or rubies mined or extracted from Burma. This reflects the termination of all Burmese sanctions by Executive Order 13742, of October 7, 2016.

**DATES:** This final rule is effective on October 30, 2017.

**FOR FURTHER INFORMATION CONTACT:** Daniel Collier, Partner Government Agency Branch, Trade Policy and Programs, Office of Trade, (202) 863–6225, [Daniel.Collier@cbp.dhs.gov](mailto:Daniel.Collier@cbp.dhs.gov); or William Scopa, Branch Chief, Partner Government Agency Branch, Trade Policy and Programs, Office of Trade, (202) 863–6554, [William.R.Scopa@cbp.dhs.gov](mailto:William.R.Scopa@cbp.dhs.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On July 28, 2003, the President signed into law the Burmese Freedom and Democracy Act of 2003 (Pub. L. 108–61) (the “BFDA”) to sanction the military junta then ruling Burma. Among other provisions, the BFDA required the imposition, subject to annual renewal, of a ban on the importation into the United States of any article that is a product of Burma. To implement the BFDA, the President issued Executive Order (“E.O.”) 13310 (68 FR 44853, July 30, 2003), which prohibited, among other things, the importation into the United States of any article that is a product of Burma.

On July 29, 2008, the President signed into law the Tom Lantos Block Burmese JADE (Junta’s Anti-Democratic Efforts)

Act of 2008 (Pub. L. 110–286) (the “JADE Act”), which, among other things, amended the BFDA to require a prohibition on the importation into the United States of jadeite or rubies mined or extracted from Burma and articles of jewelry containing such jadeite or rubies. Section 12.151 of the CBP regulations (Title 19, Code of Federal Regulations (“CFR”) section 12.151) reflects this prohibition on the importation of jadeite or rubies mined or extracted from Burma and articles of jewelry containing such jadeite or rubies.

The BFDA, as amended by the JADE Act, required annual renewal, which did not occur in 2013. As a result, the prohibition on the importation of jadeite or rubies mined or extracted from Burma and articles of jewelry containing jadeite or rubies mined or extracted from Burma expired on July 28, 2013. On August 6, 2013, the President signed E.O. 13651, titled “Prohibiting Certain Imports of Burmese Jadeite and Rubies” (78 FR 48793), which revoked the sections of E.O. 13310 imposing a prohibition on the importation into the United States of any article that is a product of Burma. As a result, there was no longer a general ban on importing into the United States any article that is a product of Burma; however, the specific ban of jadeite and rubies mined or extracted from Burma as well as articles of jewelry containing jadeite or rubies mined or extracted from Burma was reinstated by E.O. 13651. Consequently, on August 23, 2016, CBP published a final rule in the **Federal Register** (81 FR 57456) amending the CBP regulations to update the relevant provisions to reflect the import prohibitions set forth in E.O. 13651.

**II. Termination of the Burmese Sanctions**

On October 7, 2016, the President signed E.O. 13742, titled “Termination of Emergency With Respect to the Actions and Policies of the Government of Burma” (81 FR 70593), which revoked, among others, E.O. 13310 and 13651. The President found that the situation that gave rise to the declaration of a national emergency with respect to the actions and policies of the Government of Burma has been significantly altered by Burma’s substantial advances in promoting democracy, including historic elections that resulted in the formation of a democratically elected, civilian-led government; the release of many political prisoners; and greater enjoyment of human rights and fundamental freedoms, including freedom of expression and freedom of

association and peaceful assembly. As a result, President Obama revoked all the Burmese sanctions. This was accomplished by revoking, among others, E.O. 13651, which prohibited the importation of any jadeite or rubies mined or extracted from Burma as well as any articles of jewelry containing jadeite or rubies mined or extracted from Burma. As of October 7, 2016, CBP is no longer enforcing this import prohibition. To reflect this, CBP is removing the relevant provision, 19 CFR 12.151, from the CBP regulations.

**III. Statutory and Regulatory Requirements**

*A. Inapplicability of Public Notice and Delayed Effective Date Requirements*

Under section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), rulemaking generally requires prior notice and comment, and a 30-day delayed effective date, subject to specified exceptions. This document amends the regulations to remove 19 CFR 12.151 to reflect Executive Order 13742 of October 7, 2016, which terminated the import prohibitions on Burmese articles. Since this document removes a regulation that is no longer applicable or enforced by CBP in light of the Executive Order, CBP has determined it is a nondiscretionary action and that, pursuant to the provisions of 5 U.S.C. 553(b)(B), prior public notice and comment procedures on this regulation are impracticable, unnecessary, and contrary to the public interest and that there is good cause for this rule to become effective immediately upon publication. For these reasons, pursuant to the provision of 5 U.S.C. 553(d)(3), CBP finds that there is good cause for dispensing with a delayed effective date.

*B. Executive Orders 13563 and 12866: Regulatory Planning and Review*

Executive Orders 13563 and 12866 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is not a “significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget has not reviewed this regulation.

### C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. As a notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

### D. Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of his delegate) to approve regulations related to certain customs revenue functions.

### List of Subjects in 19 CFR Part 12

Customs duties and inspection, Reporting and recordkeeping requirements.

### Amendments to the Regulations

For the reasons set forth in the preamble, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12) is amended as set forth below.

### PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 continues to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

\* \* \* \* \*

■ 2. The specific authority citation for § 12.151 is removed.

#### § 12.151 [Removed and Reserved]

■ 3. Remove and reserve § 12.151.

Dated: October 25, 2017.

**Kevin K. McAleenan,**

*Acting Commissioner, U.S. Customs and Border Protection.*

Approved:

**Timothy E. Skud,**

*Deputy Assistant Secretary of the Treasury.*  
[FR Doc. 2017-23560 Filed 10-27-17; 8:45 am]

**BILLING CODE 9111-14-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 862

[Docket No. FDA-2017-N-5685]

#### Medical Devices; Clinical Chemistry and Clinical Toxicology Devices; Classification of the Acute Kidney Injury Test System

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

**ACTION:** Final order.

**SUMMARY:** The Food and Drug Administration (FDA or we) is classifying the acute kidney injury test system into class II (special controls). The special controls that apply to the device type are identified in this order and will be part of the codified language for the acute kidney injury test system's classification. We are taking this action because we have determined that classifying the device into class II (special controls) will provide a reasonable assurance of safety and effectiveness of the device. We believe this action will also enhance patients' access to beneficial innovative devices, in part by reducing regulatory burdens.

**DATES:** This order is effective October 30, 2017. The classification was applicable on September 5, 2014.

**FOR FURTHER INFORMATION CONTACT:** Seth Olson, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4561, Silver Spring, MD 20993-0002, 301-796-4364, *Jeremy.Olson@fda.hhs.gov*.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Upon request, FDA has classified the acute kidney injury test system as class II (special controls), which we have determined will provide a reasonable assurance of safety and effectiveness. In addition, we believe this action will enhance patients' access to beneficial innovation, in part by reducing regulatory burdens by placing the device into a lower device class than the automatic class III assignment.

The automatic assignment of class III occurs by operation of law and without any action by FDA, regardless of the level of risk posed by the new device. Any device that was not in commercial distribution before May 28, 1976, is automatically classified as, and remains within, class III and requires premarket approval unless and until FDA takes an action to classify or reclassify the device

(see 21 U.S.C. 360c(f)(1)). We refer to these devices as "postamendments devices" because they were not in commercial distribution prior to the date of enactment of the Medical Device Amendments of 1976, which amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act).

FDA may take a variety of actions in appropriate circumstances to classify or reclassify a device into class I or II. We may issue an order finding a new device to be substantially equivalent under section 513(i) of the FD&C Act to a predicate device that does not require premarket approval (see 21 U.S.C. 360c(i)). We determine whether a new device is substantially equivalent to a predicate by means of the procedures for premarket notification under section 510(k) of the FD&C Act and part 807 (21 U.S.C. 360(k) and 21 CFR part 807, respectively).

FDA may also classify a device through "De Novo" classification, a common name for the process authorized under section 513(f)(2) of the FD&C Act. Section 207 of the Food and Drug Administration Modernization Act of 1997 established the first procedure for De Novo classification (Pub. L. 105-115). Section 607 of the Food and Drug Administration Safety and Innovation Act modified the De Novo application process by adding a second procedure (Pub. L. 112-144). A device sponsor may utilize either procedure for De Novo classification.

Under the first procedure, the person submits a 510(k) for a device that has not previously been classified. After receiving an order from FDA classifying the device into class III under section 513(f)(1) of the FD&C Act, the person then requests a classification under section 513(f)(2).

Under the second procedure, rather than first submitting a 510(k) and then a request for classification, if the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence, that person requests a classification under section 513(f)(2) of the FD&C Act.

Under either procedure for De Novo classification, FDA is required to classify the device by written order within 120 days. The classification will be according to the criteria under section 513(a)(1) of the FD&C Act. Although the device was automatically placed within class III, the De Novo classification is considered to be the initial classification of the device.

We believe this De Novo classification will enhance patients' access to beneficial innovation, in part by reducing regulatory burdens. When FDA

classifies a device into class I or II via the De Novo process, the device can serve as a predicate for future devices of that type, including for 510(k)s (see 21 U.S.C. 360c(f)(2)(B)(i)). As a result, other device sponsors do not have to submit a De Novo request or premarket approval application in order to market a substantially equivalent device (see 21 U.S.C. 360c(i), defining “substantial equivalence”). Instead, sponsors can use the less-burdensome 510(k) process, when necessary, to market their device.

**II. De Novo Classification**

On June 5, 2013, Astute Medical, Incorporated submitted a request for De Novo classification of the NEPHROCHECK® Test System. FDA reviewed the request in order to classify the device under the criteria for classification set forth in section

513(a)(1) of the FD&C Act. We classify devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls that, in combination with the general controls, provide reasonable assurance of the safety and effectiveness of the device for its intended use (see 21 U.S.C. 360c(a)(1)(B)). After review of the information submitted in the request, we determined that the device can be classified into class II with the establishment of special controls. FDA has determined that these special controls, in addition to general controls, will provide reasonable assurance of the safety and effectiveness of the device.

Therefore, on September 5, 2014, FDA issued an order to the requestor

classifying the device into class II. FDA is codifying the classification of the device by adding 21 CFR 862.1220. We have named the generic type of device acute kidney injury test system, and it is identified as a device intended to measure one or more analytes in human samples as an aid in the assessment of a patient’s risk for developing acute kidney injury. Test results are intended to be used in conjunction with other clinical and diagnostic findings, consistent with professional standards of practice, including confirmation by alternative methods.

FDA has identified the following risks to health associated specifically with this type of device and the measures required to mitigate these risks in table 1.

TABLE 1—ACUTE KIDNEY INJURY TEST SYSTEM RISKS AND MITIGATION MEASURES

Identified risks	Mitigation measures/21 CFR section
Incorrect interpretation of test results .....	Special controls (1), (2), and (3) (21 CFR 862.1220(b)(1), 21 CFR 862.1220(b)(2), and 21 CFR 862.1220(b)(3)).
Incorrect test results .....	Special control (3) (21 CFR 862.1220(b)(3)).

FDA has determined that special controls, in combination with the general controls, address these risks to health and provide reasonable assurance of safety and effectiveness. In order for a device to fall within this classification, and thus avoid automatic classification in class III, it would have to comply with the special controls named in this final order. The necessary special controls appear in the regulation codified by this order. This device is subject to premarket notification requirements under section 510(k) of the FD&C Act.

**III. Analysis of Environmental Impact**

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

**IV. Paperwork Reduction Act of 1995**

This final order establishes special controls that refer to previously approved collections of information found in other FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in part 807, subpart E, regarding premarket

notification submissions have been approved under OMB control number 0910–0120; the collections of information 21 CFR part 801, regarding labeling have been approved under OMB control number 0910–0485; and the collections of information in 21 CFR part 820, regarding the Quality System Regulation have been approved under OMB control number 0910–0073.

**List of Subjects in 21 CFR Part 862**

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 862 is amended as follows:

**PART 862—CLINICAL CHEMISTRY AND CLINICAL TOXICOLOGY DEVICES**

■ 1. The authority citation for part 862 continues to read as follows:

**Authority:** 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Add § 862.1220 to subpart B to read as follows:

**§ 862.1220 Acute kidney injury test system.**

(a) *Identification.* An acute kidney injury test system is a device that is intended to measure one or more analytes in human samples as an aid in the assessment of a patient’s risk for

developing acute kidney injury. Test results are intended to be used in conjunction with other clinical and diagnostic findings, consistent with professional standards of practice, including confirmation by alternative methods.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) Premarket notification submissions must detail an appropriate end user device training program that will be offered while marketing the device as part of your efforts to mitigate the risk of incorrect interpretation of test results.

(2) As part of the risk management activities performed as part of your 21 CFR 820.30 design controls, you must document the appropriate end user device training program provided in your premarket notification submission to satisfy special control 21 CFR 862.1220(b)(1) that will be offered while marketing the device as part of your efforts to mitigate the risk of incorrect interpretation of test results.

(3) Robust clinical data demonstrating the positive predictive value, negative predictive value, sensitivity and specificity of the test in the intended use population must be submitted as part of the premarket notification submission.

Dated: October 24, 2017.

**Anna K. Abram,**

*Deputy Commissioner for Policy, Planning, Legislation, and Analysis.*

[FR Doc. 2017-23491 Filed 10-27-17; 8:45 am]

BILLING CODE 4164-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 866

[Docket No. FDA-2017-N-5719]

#### Medical Devices; Immunology and Microbiology Devices; Classification of the *Streptococcus SPP. Nucleic Acid-Based Assay*

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

**ACTION:** Final order.

**SUMMARY:** The Food and Drug Administration (FDA or we) is classifying the *Streptococcus spp.* nucleic acid-based assay into class II (special controls). The special controls that apply to the device type are identified in this order and will be part of the codified language for the *Streptococcus spp.* nucleic acid-based assay's classification. We are taking this action because we have determined that classifying the device into class II (special controls) will provide a reasonable assurance of safety and effectiveness of the device. We believe this action will also enhance patients' access to beneficial innovative devices, in part by reducing regulatory burdens. **DATES:** This order is effective October 30, 2017. The classification was applicable on April 16, 2014.

**FOR FURTHER INFORMATION CONTACT:** Steven Tjoe, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4550, Silver Spring, MD 20993-0002, 301-796-5866, [steven.tjoe@fda.hhs.gov](mailto:steven.tjoe@fda.hhs.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Upon request, FDA has classified the *Streptococcus spp.* nucleic acid-based assay as class II (special controls), which we have determined will provide a reasonable assurance of safety and effectiveness. In addition, we believe this action will enhance patients' access to beneficial innovation, in part by reducing regulatory burdens by placing the device into a lower device class than the automatic class III assignment.

The automatic assignment of class III occurs by operation of law and without

any action by FDA, regardless of the level of risk posed by the new device. Any device that was not in commercial distribution before May 28, 1976, is automatically classified as, and remains within, class III and requires premarket approval unless and until FDA takes an action to classify or reclassify the device (see 21 U.S.C. 360c(f)(1)). We refer to these devices as "postamendments devices" because they were not in commercial distribution prior to the date of enactment of the Medical Device Amendments of 1976, which amended the Federal Food, Drug, and Cosmetic Act (FD&C Act).

FDA may take a variety of actions in appropriate circumstances to classify or reclassify a device into class I or II. We may issue an order finding a new device to be substantially equivalent under section 513(i) of the FD&C Act to a predicate device that does not require premarket approval (see 21 U.S.C. 360c(i)). We determine whether a new device is substantially equivalent to a predicate by means of the procedures for premarket notification under section 510(k) of the FD&C Act and part 807 (21 U.S.C. 360(k) and 21 CFR part 807, respectively).

FDA may also classify a device through "De Novo" classification, a common name for the process authorized under section 513(f)(2) of the FD&C Act (21 U.S.C. 360c(f)(2)). Section 207 of the Food and Drug Administration Modernization Act of 1997 established the first procedure for De Novo classification (Pub. L. 105-115). Section 607 of the Food and Drug Administration Safety and Innovation Act modified the De Novo application process by adding a second procedure (Pub. L. 112-144). A device sponsor may utilize either procedure for De Novo classification.

Under the first procedure, the person submits a 510(k) for a device that has not previously been classified. After receiving an order from FDA classifying the device into class III under section 513(f)(1) of the FD&C Act, the person then requests a classification under section 513(f)(2).

Under the second procedure, rather than first submitting a 510(k) and then a request for classification, if the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence, that person requests a classification under section 513(f)(2) of the FD&C Act.

Under either procedure for De Novo classification, FDA is required to classify the device by written order within 120 days. The classification will be according to the criteria under

section 513(a)(1) of the FD&C Act (21 U.S.C. 360c(a)(1)). Although the device was automatically within class III, the De Novo classification is considered to be the initial classification of the device.

We believe this De Novo classification will enhance patients' access to beneficial innovation, in part by reducing regulatory burdens. When FDA classifies a device into class I or II via the De Novo process, the device can serve as a predicate for future devices of that type, including for 510(k)s (see 21 U.S.C. 360c(f)(2)(B)(i)). As a result, other device sponsors do not have to submit a De Novo request or PMA in order to market a substantially equivalent device (see 21 U.S.C. 360c(i), defining "substantial equivalence"). Instead, sponsors can use the less-burdensome 510(k) process, when necessary, to market their device.

##### II. De Novo Classification

For this device, FDA issued an order on March 20, 2014, finding the Lyra Direct Strep Assay not substantially equivalent to a predicate not subject to a premarket application approval (PMA). Thus, the device remained in class III in accordance with section 513(f)(1) of the FD&C Act when we issued the order.

On March 28, 2014, Quidel Corp. submitted a request for De Novo classification of the Lyra Direct Strep Assay. FDA reviewed the request in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the FD&C Act. We classify devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls that, in combination with the general controls, provide reasonable assurance of the safety and effectiveness of the device for its intended use (see 21 U.S.C. 360c(a)(1)(B)). After review of the information submitted in the request, we determined that the device can be classified into class II with the establishment of special controls. FDA has determined that these special controls, in addition to general controls, will provide reasonable assurance of the safety and effectiveness of the device.

Therefore, on April 16, 2014, FDA issued an order to the requestor classifying the device into class II. FDA is codifying the classification of the device by adding 21 CFR 866.2680. We have named the generic type of device *Streptococcus spp.* nucleic acid-based assay, and it is identified as a qualitative in vitro diagnostic device that is intended to simultaneously detect and

identify various *Streptococcus spp.* nucleic acids extracted directly from clinical specimens. The device detects specific nucleic acid sequences for organism identification. The identification aids in the diagnosis of diseases caused by bacteria belonging to

the genus *Streptococcus* and provides epidemiological information on these diseases. Pathogenic streptococci are associated with infections, such as sore throat, impetigo (an infection characterized by small pustules on the

skin), urinary tract infections, rheumatic fever, and kidney disease.

FDA has identified the following risks to health associated specifically with this type of device and the measures required to mitigate these risks in table 1.

TABLE 1—STREPTOCOCCUS SPP. NUCLEIC ACID-BASED ASSAY RISKS AND MITIGATION MEASURES

Identified risks	Mitigation measures
Incorrect identification of a pathogenic microorganism by the device can lead to improper patient management.	Special controls (1), (2), (3), (4), (5) and (6) (21 CFR 866.2680(b)(1); 21 CFR 866.2680(b)(2); 21 CFR 866.2680(b)(3); 21 CFR 866.2680(b)(4); 21 CFR 866.2680(b)(5); and 21 CFR 866.2680(b)(6)).
Failure to correctly interpret test results .....	Special control (7) (21 CFR 866.2680(b)(7)).
Failure to correctly operate the instrument .....	Special control (8) (21 CFR 866.2680(b)(8)).

FDA has determined that special controls, in combination with the general controls, address these risks to health and provide reasonable assurance of safety and effectiveness. In order for a device to fall within this classification, and thus avoid automatic classification in class III, it would have to comply with the special controls named in this final order. The necessary special controls appear in the regulation codified by this order. This device is subject to premarket notification requirements under section 510(k).

**III. Analysis of Environmental Impact**

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

**IV. Paperwork Reduction Act of 1995**

This final order establishes special controls that refer to previously approved collections of information found in other FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in part 807, subpart E, regarding premarket notification submissions have been approved under OMB control number 0910–0120, and the collections of information in 21 CFR parts 801 and 809, regarding labeling have been approved under OMB control number 0910–0485.

**List of Subjects in 21 CFR Part 866**

Biologics, Laboratories, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under

authority delegated to the Commissioner of Food and Drugs, 21 CFR part 866 is amended as follows:

**PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES**

■ 1. The authority citation for part 866 continues to read as follows:

**Authority:** 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Add § 866.2680 to subpart C to read as follows:

**§ 866.2680 *Streptococcus spp.* nucleic acid-based assay.**

(a) *Identification.* A *Streptococcus spp.* nucleic acid-based assay is a qualitative in vitro diagnostic device intended to simultaneously detect and identify various *Streptococcus spp.* nucleic acids extracted directly from clinical specimens. The device detects specific nucleic acid sequences for organism identification. The identification aids in the diagnosis of diseases caused by bacteria belonging to the genus *Streptococcus* and provides epidemiological information on these diseases. Pathogenic streptococci are associated with infections, such as sore throat, impetigo (an infection characterized by small pustules on the skin), urinary tract infections, rheumatic fever, and kidney disease.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) Premarket notification submissions must include detailed device description documentation, including the device components, ancillary reagents required but not provided, and a detailed explanation of the methodology including primer/probe sequence, design, and rationale for sequence selection.

(2) Premarket notification submissions must include detailed

documentation from the following analytical and clinical performance studies: Analytical sensitivity (Limit of Detection), reactivity, inclusivity, precision, reproducibility, interference, cross reactivity, carry-over, and cross contamination.

(3) Premarket notification submissions must include detailed documentation from a clinical study. The study, performed on a study population consistent with the intended use population, must compare the device performance to results obtained from well-accepted reference methods.

(4) Premarket notification submissions must include detailed documentation for device software, including, but not limited to, software applications and hardware-based devices that incorporate software.

(5) Premarket notification submissions must include database implementation methodology, construction parameters, and quality assurance protocols, as appropriate.

(6) The device labeling must include limitations regarding the need for culture confirmation of negative specimens, as appropriate.

(7) A detailed explanation of the interpretation of results and acceptance criteria must be included in the device’s 21 CFR 809.10(b)(9) compliant labeling.

(8) Premarket notification submissions must include details on an end user device training program that will be offered while marketing the device, as appropriate.

Dated: October 25, 2017.

**Lauren Silvis,**  
*Chief of Staff.*

[FR Doc. 2017–23513 Filed 10–27–17; 8:45 am]

**BILLING CODE 4164–01–P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Food and Drug Administration****21 CFR Part 866****[Docket No. FDA-2017-N-5870]****Medical Devices; Immunology and Microbiology Devices; Classification of the Aquaporin-4 Autoantibody Immunological Test System****AGENCY:** Food and Drug Administration, HHS.**ACTION:** Final order.

**SUMMARY:** The Food and Drug Administration (FDA or we) is classifying the Aquaporin-4 autoantibody immunological test system into class II (special controls). The special controls that apply to the device type are identified in this order and will be part of the codified language for the Aquaporin-4 autoantibody immunological test system's classification. We are taking this action because we have determined that classifying the device into class II (special controls) will provide a reasonable assurance of safety and effectiveness of the device. We believe this action will also enhance patients' access to beneficial innovative devices, in part by reducing regulatory burdens.

**DATES:** This order is effective October 30, 2017. The classification was applicable on April 25, 2016.

**FOR FURTHER INFORMATION CONTACT:** Steven Tjoe, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 4550, Silver Spring, MD 20993-0002, 301-796-5866, [steven.tjoe@fda.hhs.gov](mailto:steven.tjoe@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:****I. Background**

Upon request, FDA has classified the Aquaporin-4 autoantibody immunological test system as class II (special controls), which we have determined will provide a reasonable assurance of safety and effectiveness. In addition, we believe this action will enhance patients' access to beneficial innovation, in part by reducing regulatory burdens by placing the device into a lower device class than the automatic class III assignment.

The automatic assignment of class III occurs by operation of law and without any action by FDA, regardless of the level of risk posed by the new device. Any device that was not in commercial distribution before May 28, 1976, is automatically classified as, and remains

within, class III and requires premarket approval unless and until FDA takes an action to classify or reclassify the device (see 21 U.S.C. 360c(f)(1)). We refer to these devices as "postamendments devices" because they were not in commercial distribution prior to the date of enactment of the Medical Device Amendments of 1976, which amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act).

FDA may take a variety of actions in appropriate circumstances to classify or reclassify a device into class I or II. We may issue an order finding a new device to be substantially equivalent under section 513(i) of the FD&C Act (21 U.S.C. 360c(i)) to a predicate device that does not require premarket approval. We determine whether a new device is substantially equivalent to a predicate by means of the procedures for premarket notification under section 510(k) of the FD&C Act and part 807 (21 U.S.C. 360(k) and 21 CFR part 807, respectively).

FDA may also classify a device through "De Novo" classification, a common name for the process authorized under section 513(f)(2) of the FD&C Act. Section 207 of the Food and Drug Administration Modernization Act of 1997 established the first procedure for De Novo classification (Pub. L. 105-115). Section 607 of the Food and Drug Administration Safety and Innovation Act modified the De Novo application process by adding a second procedure (Pub. L. 112-144). A device sponsor may utilize either procedure for De Novo classification.

Under the first procedure, the person submits a 510(k) for a device that has not previously been classified. After receiving an order from FDA classifying the device into class III under section 513(f)(1) of the FD&C Act, the person then requests a classification under section 513(f)(2).

Under the second procedure, rather than first submitting a 510(k) and then a request for classification, if the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence, that person requests a classification under section 513(f)(2) of the FD&C Act.

Under either procedure for De Novo classification, FDA is required to classify the device by written order within 120 days. The classification will be according to the criteria under section 513(a)(1) of the FD&C Act. Although the device was automatically placed within class III, the De Novo classification is considered to be the initial classification of the device.

We believe this De Novo classification will enhance patients' access to beneficial innovation, in part by reducing regulatory burdens. When FDA classifies a device into class I or II via the De Novo process, the device can serve as a predicate for future devices of that type, including for 510(k)s (see 21 U.S.C. 360c(f)(2)(B)(i)). As a result, other device sponsors do not have to submit a De Novo request or premarket approval application in order to market a substantially equivalent device (see 21 U.S.C. 360c(i), defining "substantial equivalence"). Instead, sponsors can use the less-burdensome 510(k) process, when necessary, to market their device.

**II. De Novo Classification**

On July 2, 2015, KRONUS, Inc. submitted a request for De Novo classification of the KRONUS Aquaporin-4 Autoantibody (AQP4Ab) ELISA Assay. FDA reviewed the request in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the FD&C Act. We classify devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls that, in combination with the general controls, provide reasonable assurance of the safety and effectiveness of the device for its intended use (see 21 U.S.C. 360c(a)(1)(B)). After review of the information submitted in the request, we determined that the device can be classified into class II with the establishment of special controls. FDA has determined that these special controls, in addition to general controls, will provide reasonable assurance of the safety and effectiveness of the device.

Therefore, on April 25, 2016, FDA issued an order to the requestor classifying the device into class II. FDA is codifying the classification of the device by adding 21 CFR 866.5665. We have named the generic type of device Aquaporin-4 autoantibody immunological test system, and it is identified as a device that consists of reagents used to measure by immunochemical techniques autoantibodies in human serum samples that react with Aquaporin-4 (AQP4Ab). The measurements aid in the diagnosis of neuromyelitis optica and neuromyelitis optica spectrum disorders, in conjunction with other clinical, laboratory, and radiological (e.g., magnetic resonance imaging) findings.

FDA has identified the following risks to health associated specifically with this type of device and the measures



required to mitigate these risks in table 1.

TABLE 1—AQUAPORIN-4 AUTOANTIBODY IMMUNOLOGICAL TEST SYSTEM RISKS AND MITIGATION MEASURES

Identified risks	Mitigation measures/21 CFR section
<p>Inaccurate test results that provide false positive or false negative results can lead to improper patient management.</p> <p>Failure to correctly interpret test results can lead to false positive or false negative results.</p>	<p>Special controls (1), (2), and (3) (21 CFR 866.5665(b)(1); 21 CFR 866.5665(b)(2); and 21 CFR 866.5665(b)(3)).</p> <p>Special controls (1)(iii), (2), and (3) (21 CFR 866.5665(b)(1)(iii); 21 CFR 866.5665(b)(2); and 21 CFR 866.5665(b)(3)).</p>

FDA has determined that special controls, in combination with the general controls, address these risks to health and provide reasonable assurance of safety and effectiveness. In order for a device to fall within this classification, and thus avoid automatic classification in class III, it would have to comply with the special controls named in this final order. The necessary special controls appear in the regulation codified by this order. This device is subject to premarket notification requirements under section 510(k) of the FD&C Act.

**III. Analysis of Environmental Impact**

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

**IV. Paperwork Reduction Act of 1995**

This final order establishes special controls that refer to previously approved collections of information found in other FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in part 807, subpart E, regarding premarket notification submissions have been approved under OMB control number 0910–0120, the collections of information in part 820 have been approved under OMB control number 0910–0073, and the collections of information in 21 CFR parts 801 and 809, regarding labeling have been approved under OMB control number 0910–0485.

**List of Subjects in 21 CFR Part 866**

Biologics, Laboratories, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 866 is amended as follows:

**PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES**

- 1. The authority citation for part 866 continues to read as follows:

**Authority:** 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

- 2. Add § 866.5665 to subpart F to read as follows:

**§ 866.5665 Aquaporin-4 autoantibody immunological test system.**

(a) *Identification.* An Aquaporin-4 autoantibody immunological test system is a device that consists of reagents used to measure by immunochemical techniques autoantibodies in human serum samples that react with Aquaporin-4 (AQP4Ab). The measurements aid in the diagnosis of neuromyelitis optica (NMO) and neuromyelitis optica spectrum disorders (NMOSD) in conjunction with other clinical, laboratory, and radiological (e.g., magnetic resonance imaging) findings.

(b) *Classification.* Class II (special controls). The special controls for this device are:

- (1) Premarket notification submissions must include the following information:

- (i) A detailed device description including:

- (A) A detailed description of all components including all required ancillary reagents in the test;

- (B) If applicable, a detailed description of instrumentation and equipment, including illustrations or photographs of non-standard equipment or manuals;

- (C) If applicable, detailed documentation of the device software, including, but not limited to, standalone software applications and hardware-based devices that incorporate software;

- (D) A detailed description of appropriate internal and external quality controls that are recommended or provided. The description must identify those control elements that are incorporated into the specified testing procedures;

- (E) Detailed specifications for sample collection, processing, and storage;

- (F) A detailed description of methodology and assay procedure;

- (G) A description of how the assay cutoff (the medical decision point between positive and negative) was established and validated as well as supporting data; and

- (H) Detailed specification of the criteria for test results interpretation and reporting.

- (ii) Detailed information demonstrating the performance characteristics of the device, including:

- (A) Device precision/reproducibility data generated from within-run, between-run, between-day, between-lot, between-site, and total precision for multiple nonconsecutive days, as applicable. A well characterized panel of patient samples or pools from the indicated population that covers the device measuring range must be used.

- (B) Device linearity data generated from samples covering the device measuring range, if applicable.

- (C) Information on traceability to a reference material and description of value assignment of calibrators and controls, if applicable.

- (D) Device analytical sensitivity data, including limit of blank, limit of detection, and limit of quantitation, if applicable.

- (E) Device analytical specificity data, including interference by endogenous and exogenous substances, as well as cross-reactivity with samples derived from patients with other autoimmune diseases or conditions.

- (F) Device instrument carryover data, when applicable.

- (G) Device stability data, including real-time stability under various storage times and temperatures.

- (H) Specimen stability data, including stability under various storage times, temperatures, freeze-thaw, and transport conditions, where appropriate.

- (I) Method comparison data generated by comparison of the results obtained with the device to those obtained with a legally marketed predicate device with similar indications of use. A well-characterized panel of patient samples from the indicated population covering the device measuring range must be used.

(J) Specimen matrix comparison data, if more than one specimen type or anticoagulant can be tested with the device. Samples used for comparison must be from well-characterized patient samples covering the device measuring range.

(K) Clinical performance must be established by comparing data generated by testing samples from the indicated population and the differential diagnosis or non-target disease groups with the device to the clinical diagnostic standard.

(1) The diagnosis of NMO and NMOSD must be based on clinical findings, laboratory tests (e.g., serological tests), and radiological tests (e.g., magnetic resonance imaging).

(2) The differential diagnosis or non-target disease group must include the applicable diseases or conditions, including but not be limited to the following: Multiple sclerosis, stroke, Lyme disease, shingles, syphilis, human immunodeficiency virus, hepatitis B, tuberculosis, Srgen's syndrome, systemic lupus erythematosus, systemic vasculitis, sarcoidosis, Graves' disease, Hashimoto's disease, Type I diabetes, rheumatoid arthritis, Addison's disease, and myasthenia gravis.

(3) Diagnosis of diseases or conditions for the differential or non-target disease groups must be based on established diagnostic criteria and clinical evaluation.

(4) For all samples, the diagnostic clinical criteria and the demographic information must be collected and provided.

(5) The clinical validation results must demonstrate clinical sensitivity and clinical specificity for the test values based on the presence or absence of NMO and NMOSD.

(6) The data must be summarized in tabular format comparing the interpretation of results to the disease status.

(L) Expected/reference values generated by testing an adequate number of samples from apparently healthy normal individuals.

(iii) Identification of risk mitigation elements used by the device, including description of all additional procedures, methods, and practices incorporated into the directions for use that mitigate risks associated with testing.

(2) The device's 21 CFR 809.10(b) compliant labeling must include warnings relevant to the device including:

(i) A warning statement that reads "The device is for use by laboratory professionals in a clinical laboratory setting"; and

(ii) A warning statement that reads "The device is not to be used as a stand-alone device but as an adjunct to other clinical information. A diagnosis of Neuromyelitis Optica (NMO) and Neuromyelitis Optica Spectrum Disorders (NMOSD) should not be made on a single test result. The clinical symptoms, results from physical examination, laboratory tests (e.g., serological tests), and radiological tests (e.g. Magnetic Resonance Imaging), when appropriate, should always be taken into account when considering the diagnosis of NMO and NMOSD."

(3) The device's 21 CFR 809.10(b) compliant labeling must include a detailed description of the protocol and performance studies performed in accordance with paragraph (b)(1)(ii) of this section and a summary of the results.

Dated: October 24, 2017.

**Anna K. Abram,**

*Deputy Commissioner for Policy, Planning, Legislation, and Analysis.*

[FR Doc. 2017-23489 Filed 10-27-17; 8:45 am]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 866

[Docket No. FDA-2017-N-5924]

#### Medical Devices; Immunology and Microbiology Devices; Classification of the Newborn Screening Test for Severe Combined Immunodeficiency Disorder

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

**ACTION:** Final order.

**SUMMARY:** The Food and Drug Administration (FDA or we) is classifying the newborn screening test for severe combined immunodeficiency disorder (SCID) into class II (special controls). The special controls that apply to the device type are identified in this order and will be part of the codified language for the newborn screening test for SCID's classification. We are taking this action because we have determined that classifying the device into class II (special controls) will provide a reasonable assurance of safety and effectiveness of the device. We believe this action will also enhance patients' access to beneficial innovative devices, in part by reducing regulatory burdens.

**DATES:** This order is effective October 30, 2017. The classification was applicable on December 15, 2014.

#### FOR FURTHER INFORMATION CONTACT:

Caryl Giuliano, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5664, Silver Spring, MD 20993-0002, 301-796-2478, [caryl.giuliano@fda.hhs.gov](mailto:caryl.giuliano@fda.hhs.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Upon request, FDA has classified the newborn screening test for SCID as class II (special controls), which we have determined will provide a reasonable assurance of safety and effectiveness. In addition, we believe this action will enhance patients' access to beneficial innovation, in part by reducing regulatory burdens by placing the device into a lower device class than the automatic class III assignment.

The automatic assignment of class III occurs by operation of law and without any action by FDA, regardless of the level of risk posed by the new device. Any device that was not in commercial distribution before May 28, 1976, is automatically classified as, and remains within, class III and requires premarket approval unless and until FDA takes an action to classify or reclassify the device (see 21 U.S.C. 360c(f)(1)). We refer to these devices as "postamendments devices" because they were not in commercial distribution prior to the date of enactment of the Medical Device Amendments of 1976, which amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act).

FDA may take a variety of actions in appropriate circumstances to classify or reclassify a device into class I or II. We may issue an order finding a new device to be substantially equivalent under section 513(i) of the FD&C Act (21 U.S.C. 360c(i)) to a predicate device that does not require premarket approval. We determine whether a new device is substantially equivalent to a predicate by means of the procedures for premarket notification under section 510(k) of the FD&C Act and part 807 (21 U.S.C. 360(k) and 21 CFR part 807, respectively).

FDA may also classify a device through "De Novo" classification, a common name for the process authorized under section 513(f)(2) of the FD&C Act. Section 207 of the Food and Drug Administration Modernization Act of 1997 established the first procedure for De Novo classification (Pub. L. 105-115). Section 607 of the Food and Drug Administration Safety and Innovation Act modified the De Novo application process by adding a second procedure (Pub. L. 112-144). A device sponsor may utilize either procedure for De Novo classification.

Under the first procedure, the person submits a 510(k) for a device that has not previously been classified. After receiving an order from FDA classifying the device into class III under section 513(f)(1) of the FD&C Act, the person then requests a classification under section 513(f)(2).

Under the second procedure, rather than first submitting a 510(k) and then a request for classification, if the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence, that person requests a classification under section 513(f)(2) of the FD&C Act.

Under either procedure for De Novo classification, FDA is required to classify the device by written order within 120 days. The classification will be according to the criteria under section 513(a)(1) of the FD&C Act. Although the device was automatically placed within class III, the De Novo classification is considered to be the initial classification of the device.

We believe this De Novo classification will enhance patients' access to beneficial innovation, in part by reducing regulatory burdens. When FDA classifies a device into class I or II via the De Novo process, the device can serve as a predicate for future devices of

that type, including for 510(k)s (see 21 U.S.C. 360c(f)(2)(B)(i)). As a result, other device sponsors do not have to submit a De Novo request or premarket approval application (PMA) in order to market a substantially equivalent device (see 21 U.S.C. 360c(i), defining "substantial equivalence"). Instead, sponsors can use the less-burdensome 510(k) process, when necessary, to market their device.

**II. De Novo Classification**

On October 14, 2014, Wallac Oy, a subsidiary of PerkinElmer, Inc., submitted a request for De Novo classification of the EnLite Neonatal TREC Kit. FDA reviewed the request in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the FD&C Act. We classify devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls that, in combination with the general controls, provide reasonable assurance of the safety and effectiveness of the device for its intended use (see 21 U.S.C. 360c(a)(1)(B)). After review of the information submitted in the request, we determined that the device can be

classified into class II with the establishment of special controls. FDA has determined that these special controls, in addition to general controls, will provide reasonable assurance of the safety and effectiveness of the device.

Therefore, on December 15, 2014, FDA issued an order to the requestor classifying the device into class II. FDA is codifying the classification of the device by adding 21 CFR 866.5930. We have named the generic type of device newborn screening test for SCID, and it is identified as a prescription device intended to measure T-cell receptor excision circle (TREC) DNA obtained from dried blood spot specimens on filter paper using a polymerase chain reaction based test as an aid in screening newborns for SCID. Presumptive positive results must be followed up by diagnostic confirmatory testing. This test is not intended for use as a diagnostic test, or for screening of SCID-like syndromes, such as DiGeorge syndrome or Omenn syndrome. It is also not intended to screen for less acute SCID syndromes, such as leaky SCID or variant SCID.

FDA has identified the following risks to health associated specifically with this type of device and the measures required to mitigate these risks in table 1.

TABLE 1—NEWBORN SCREENING TEST FOR SCID RISKS AND MITIGATION MEASURES

Identified risks	Mitigation measures/21 CFR section
False negative results due to device or user error .....	Special controls (1) and (2) (21 CFR 866.5930(b)(1) and 21 CFR 866.5930(b)(2)).
False positive results due to device or user error .....	Special controls (1) and (2) (21 CFR 866.5930(b)(1) and 21 CFR 866.5930(b)(2)).

FDA has determined that special controls, in combination with the general controls, address these risks to health and provide reasonable assurance of safety and effectiveness. In order for a device to fall within this classification, and thus avoid automatic classification in class III, it would have to comply with the special controls named in this final order. The necessary special controls appear in the regulation codified by this order. This device is subject to premarket notification requirements under section 510(k) of the FD&C Act.

**III. Analysis of Environmental Impact**

The Agency has determined under 21 CFR 25.34(b) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment

nor an environmental impact statement is required.

**IV. Paperwork Reduction Act of 1995**

This final order establishes special controls that refer to previously approved collections of information found in other FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in the guidance document "De Novo Classification Process (Evaluation of Automatic Class III Designation)" have been approved under OMB control number 0910–0844; the collections of information in part 814, subparts A through E, regarding premarket approval, have been approved under OMB control number 0910–0231; the collections of information in part 807, subpart E, regarding premarket

notification submissions, have been approved under OMB control number 0910–0120; and the collections of information in 21 CFR parts 801 and 809, regarding labeling, have been approved under OMB control number 0910–0485.

**List of Subjects in 21 CFR Part 866**

Biologics, Laboratories, Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 866 is amended as follows:

**PART 866—IMMUNOLOGY AND MICROBIOLOGY DEVICES**

■ 1. The authority citation for part 866 continues to read as follows:

**Authority:** 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.

■ 2. Add § 866.5930 to subpart F to read as follows:

**§ 866.5930 Newborn screening test for severe combined immunodeficiency disorder (SCID).**

(a) *Identification.* A newborn screening test for SCID is a prescription device intended to measure T-cell receptor excision circle (TREC) DNA obtained from dried blood spot specimens on filter paper using a polymerase chain reaction based test as an aid in screening newborns for SCID. Presumptive positive results must be followed up by diagnostic confirmatory testing. This test is not intended for use as a diagnostic test, or for screening of SCID-like syndromes, such as DiGeorge syndrome or Omenn syndrome. It is also not intended to screen for less acute SCID syndromes, such as leaky SCID or variant SCID.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) Premarket notification submissions must include the following information:

(i) The intended use must indicate:

(A) The test is not intended for diagnostic use, or for screening of SCID-like syndromes, such as DiGeorge syndrome or Omenn syndrome; and

(B) The test is not intended to screen for less acute SCID syndromes, such as leaky SCID or variant SCID.

(ii) A detailed description of all components in the test that includes:

(A) A detailed description of the test components, all required reagents, instrumentation and equipment, including illustrations or photographs of nonstandard equipment or methods;

(B) Detailed documentation of the device software including, but not limited to, standalone software applications and hardware-based devices that incorporate software;

(C) Specifications for the filter paper, which must be appropriately labeled for in vitro diagnostic use, to be used in specimen collection and how it will be used in specimen collection validation. These specifications must include:

descriptive characteristics of the filter paper, instructions on how a lab should choose the appropriate filter paper, chemical properties of the filter paper, interference concerns associated with the chemicals in the filter paper, absorption properties of the filter paper, punch size, absorption capacity, testing for homogeneity of punches, diameter of the circle for the dried blood spot aliquot, absorption time, physical composition, and number and size of punches to be tested;

(D) Methodology and protocols for detection of T-cell receptor excision

circles and methods for determination of results. The cutoff must be selected before conducting clinical and analytical studies;

(E) A description of the result outputs along with sample reports. Sample reports must include the scale used in reporting of results (*e.g.*, TREC copies/ $\mu$ L) and the range of values that will be reported out; and

(F) A description of appropriate internal and external controls that are recommended or provided. The description must identify those control elements that are incorporated into the testing procedure.

(iii) Information that demonstrates the performance characteristics of the test, including:

(A) Data that demonstrates the clinical validity of the device, using well characterized prospectively or retrospectively obtained clinical specimens representative of the intended use population. A minimum of 10 to 15 confirmed positive specimens must be obtained from more than 1 site, including relevant annotation, and, at 1 year or beyond, a SCID diagnosis by flow cytometry or clinically meaningful information regarding the status of the subject must be obtained. Additional specimens should have been obtained that are characterized by other disorders that can be found by screening specimens that have low or absent TREC (*e.g.*, other T-cell lymphopenic disorders) to supplement the range of results. The clinical validation study must have a pre-specified clinical decision point (*i.e.*, cutoff to distinguish positive and negative results). Results must be summarized in tabular format comparing interpretation of results to the reference method. Point estimates together with two-sided 95 percent confidence intervals must be provided for the positive percent agreement, negative percent agreement, and overall percent agreement. Data must include the retest rate, the false positive rate before retest, the final false positive rate, and the false negative rate;

(B) Device reproducibility data generated, using a minimum of three sites of which at least two must be external sites, with two operators at each site. Each site must conduct a minimum of five runs per operator over five nonconsecutive days evaluating a minimum of six different relevant TREC concentrations that span and are well distributed over the measuring range and include the clinical cutoff. Specimens must include cord blood and cord blood diluted with ABO matched adult blood specimens. Identical specimens from the same sample panel must be tested at each site. Each

specimen must be run in triplicate and include controls run in triplicate. Results must be reported as the standard deviation and percentage coefficient of variation for each level tested. Results must also be displayed as a dichotomous variable around the cutoff. Total variation must be partitioned into the sum of within-lab and between-lab variations with pre-specified acceptance criteria and 95 percent confidence intervals for all data. Pre-specified acceptance criteria must be provided and followed;

(C) Device precision data using clinical samples to evaluate the within-lot, between-lot, within-run, between run, and total variation. A range of TREC levels of the specimen must include samples within the measuring range, samples above and below the measuring range, as well as with samples very near above and below the cutoff value. At least three replicates of each specimen must be tested with controls and calibrator(s) according to the device instructions for use. The precision study must use well characterized samples using different lots, instruments, and operators. Results must be summarized in tabular format. Pre-specified acceptance criteria must be provided and followed;

(D) Linearity of the test must be demonstrated using a dilution panel from clinical samples. The range of dilution samples must include samples within the measuring range, samples above and below the measuring range, as well as with samples very near above and below the cutoff value. Results of the regression analysis must be summarized in tabular format and fitted into a linear regression model with the individual measurement results against the dilution factors. Pre-specified acceptance criteria must be provided and followed;

(E) Device analytic sensitivity data, including limit of blank, limit of detection, and limit of quantification;

(F) Device specificity data, including interference, carryover, cross-contamination, and in silico analysis of potential off-target genomic sequences;

(G) Device stability data, including real-time stability of samples under various storage times, temperatures, and freeze-thaw conditions. A separate shipping stability study must be performed;

(H) Lot-to-lot reproducibility study of each filter paper that will be validated with the test. The lot-to-lot study must include a minimum of three lots of each blood spot card that will be validated with the test and be conducted over five nonconsecutive days. The sample panel must consist of specimens with a range

of TREC levels and include samples within the measuring range, samples above and below the measuring range, and samples very near above and below the cutoff value. Multiple punches must be obtained from each card for demonstration of homogeneity of the analyte across the dried blood spot. Comparability of the test performance for each filter paper must be demonstrated. Stability and storage of TREC DNA on each blood spot card must be demonstrated. Results of the lot-to-lot study must be summarized providing the mean, standard deviation, and percentage coefficient of variation in a tabular format. Data must be calculated for within-run, between-run, within-lot, and between-lot. Data demonstrating the concordance between results across different filter papers must be provided. Study acceptance criteria must be provided and followed; and

(I) If applicable, a thermocycler reproducibility study must be performed using thermocyclers from three independent thermocycler manufacturers. The sample panel must consist of specimens with a range of TREC levels and must include samples within the measuring range, samples above and below the measuring range, and samples very near above and below the cutoff value. The study must be done using three filter paper lots and conducted over five nonconsecutive days. Results of the thermocycler reproducibility study must be summarized providing the mean, standard deviation, and percentage coefficient of variance in a tabular format. Data must be calculated for the within-run, between-run, within-lot, between-lot, and between thermocycler manufacturer study results. Study acceptance criteria must be provided and followed.

(iv) Identification of risk mitigation elements used by your device, including a description of all additional procedures, methods, and practices incorporated into the directions for use that mitigate risks associated with testing.

(2) Your § 809.10 compliant labeling must include:

(i) A warning statement that reads “This test is not intended for diagnostic use, preimplantation or prenatal testing, or for screening of SCID-like syndromes, such as DiGeorge syndrome or Omenn syndrome. It is also not intended to screen for less acute SCID syndromes, such as leaky SCID or variant SCID.”;

(ii) A warning statement that reads “Test results are intended to be used in conjunction with other clinical and diagnostic findings, consistent with

professional standards of practice, including confirmation by alternative methods and clinical evaluation, as appropriate.”;

(iii) A description of the performance studies listed in paragraph (b)(1)(iii) and a summary of the results; and

(iv) A description of the filter paper specifications required for the test.

Dated: October 24, 2017.

**Anna K. Abram,**

*Deputy Commissioner for Policy, Planning, Legislation, and Analysis.*

[FR Doc. 2017–23496 Filed 10–27–17; 8:45 am]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 876

[Docket No. FDA–2017–N–1609]

#### **Medical Devices; Gastroenterology-Urology Devices; Classification of the Oral Removable Palatal Space Occupying Device for Weight Management and/or Weight Loss**

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

**ACTION:** Final order; correction.

**SUMMARY:** The Food and Drug Administration (FDA) is correcting a final order entitled “Medical Devices; Gastroenterology-Urology Devices; Classification of the Oral Removable Palatal Space Occupying Device for Weight Management and/or Weight Loss” that appeared in the **Federal Register** of July 28, 2017. The final order was published with an incorrect statement in the preamble about whether FDA planned to exempt the device from premarket notification requirements. This document corrects that error.

**DATES:** Effective October 30, 2017

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

Mark Antonino, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. G208, Silver Spring, MD 20993–0002, 240–402–9980, [mark.antonino@fda.hhs.gov](mailto:mark.antonino@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** In the **Federal Register** of July 28, 2017 (82 FR 35067), FDA published the final order “Medical Devices; Gastroenterology-Urology Devices; Classification of the Oral Removable Palatal Space Occupying Device for Weight Management and/or Weight Loss.” The final order published with an incorrect statement in the preamble about

whether FDA planned to exempt the device from premarket notification requirements under section 510(k) of the FD&C Act.

In the **Federal Register** of July 28, 2017, (82 FR 35067), the following correction is made: On page 35069, in the first column, the first paragraph is corrected as follows:

“Section 510(m) of the FD&C Act provides that FDA may exempt a class II device from the premarket notification requirements under section 510(k), if FDA determines that premarket notification is not necessary to provide reasonable assurance of the safety and effectiveness of the device. For this type of device, FDA has determined that premarket notification is necessary to provide reasonable assurance of the safety and effectiveness of the device. Therefore, this device type is not exempt from premarket notification requirements. Persons who intend to market this type of device must submit to FDA a premarket notification, prior to marketing the device, which contains information about the oral removable palatal space occupying device for weight management and/or weight loss they intend to market.”

Dated: October 24, 2017.

**Anna K. Abram,**

*Deputy Commissioner for Policy, Planning, Legislation, and Analysis.*

[FR Doc. 2017–23490 Filed 10–27–17; 8:45 am]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 882

[Docket No. FDA–2017–N–5934]

#### **Medical Devices; Neurological Devices; Classification of the Non-Electroencephalogram Physiological Signal Based Seizure Monitoring System**

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

**ACTION:** Final order.

**SUMMARY:** The Food and Drug Administration (FDA or we) is classifying the non-electroencephalogram (non-EEG) physiological signal based seizure monitoring system into class II (special controls). The special controls that apply to the device type are identified in this order and will be part of the codified language for the non-EEG physiological signal based seizure monitoring system’s classification. We

are taking this action because we have determined that classifying the device into class II (special controls) will provide a reasonable assurance of safety and effectiveness of the device. We believe this action will also enhance patients' access to beneficial innovative devices, in part by reducing regulatory burdens.

**DATES:** This order is effective October 30, 2017. The classification was applicable on February 16, 2017.

**FOR FURTHER INFORMATION CONTACT:** Xiaorui Tang, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2609, Silver Spring, MD 20993-0002, 301-796-6500, [xiaorui.tang@fda.hhs.gov](mailto:xiaorui.tang@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Upon request, FDA has classified the non-EEG physiological signal based seizure monitoring system as class II (special controls), which we have determined will provide a reasonable assurance of safety and effectiveness. In addition, we believe this action will enhance patients' access to beneficial innovation, in part by reducing regulatory burdens by placing the device into a lower device class than the automatic class III assignment.

The automatic assignment of class III occurs by operation of law and without any action by FDA, regardless of the level of risk posed by the new device. Any device that was not in commercial distribution before May 28, 1976, is automatically classified as, and remains within, class III and requires premarket approval unless and until FDA takes an action to classify or reclassify the device (see 21 U.S.C. 360c(f)(1)). We refer to these devices as "postamendments devices" because they were not in commercial distribution prior to the date of enactment of the Medical Device Amendments of 1976, which amended the Federal Food, Drug, and Cosmetic Act (the FD&C Act).

FDA may take a variety of actions in appropriate circumstances to classify or reclassify a device into class I or II. We may issue an order finding a new device to be substantially equivalent under section 513(i) of the FD&C Act (21

U.S.C. 360c(i)) to a predicate device that does not require premarket approval. We determine whether a new device is substantially equivalent to a predicate by means of the procedures for premarket notification under section 510(k) of the FD&C Act and part 807 (21 U.S.C. 360(k) and 21 CFR part 807, respectively).

FDA may also classify a device through "De Novo" classification, a common name for the process authorized under section 513(f)(2) of the FD&C Act. Section 207 of the Food and Drug Administration Modernization Act of 1997 established the first procedure for De Novo classification (Pub. L. 105-115). Section 607 of the Food and Drug Administration Safety and Innovation Act modified the De Novo application process by adding a second procedure (Pub. L. 112-144). A device sponsor may utilize either procedure for De Novo classification.

Under the first procedure, the person submits a 510(k) for a device that has not previously been classified. After receiving an order from FDA classifying the device into class III under section 513(f)(1) of the FD&C Act, the person then requests a classification under section 513(f)(2).

Under the second procedure, rather than first submitting a 510(k) and then a request for classification, if the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence, that person requests a classification under section 513(f)(2) of the FD&C Act.

Under either procedure for De Novo classification, FDA shall classify the device by written order within 120 days. The classification will be according to the criteria under section 513(a)(1) of the FD&C Act. Although the device was automatically placed within class III, the De Novo classification is considered to be the initial classification of the device.

We believe this De Novo classification will enhance patients' access to beneficial innovation, in part by reducing regulatory burdens. When FDA classifies a device into class I or II via the De Novo process, the device can serve as a predicate for future devices of

that type, including for 510(k)s (see 21 U.S.C. 360c(f)(2)(B)(i)). As a result, other device sponsors do not have to submit a De Novo request or premarket approval application in order to market a substantially equivalent device (see 21 U.S.C. 360c(i), defining "substantial equivalence"). Instead, sponsors can use the less-burdensome 510(k) process, when necessary, to market their device.

**II. De Novo Classification**

On November 10, 2014, Brain Sentinel, Inc., submitted a request for De Novo classification of the Brain Sentinel Monitoring and Alerting System. FDA reviewed the request in order to classify the device under the criteria for classification set forth in section 513(a)(1) of the FD&C Act. We classify devices into class II if general controls by themselves are insufficient to provide reasonable assurance of safety and effectiveness, but there is sufficient information to establish special controls that, in combination with the general controls, provide reasonable assurance of the safety and effectiveness of the device for its intended use (see 21 U.S.C. 360c(a)(1)(B)). After review of the information submitted in the request, we determined that the device can be classified into class II with the establishment of special controls. FDA has determined that these special controls, in addition to general controls, will provide reasonable assurance of the safety and effectiveness of the device.

Therefore, on February 16, 2017, FDA issued an order to the requestor classifying the device into class II. FDA is codifying the classification of the device by adding 21 CFR 882.1580. We have named the generic type of device non-EEG physiological signal based seizure monitoring system, and it is identified as a noninvasive prescription device that collects physiological signals other than EEG to identify physiological signals that may be associated with a seizure.

FDA has identified the following risks to health associated specifically with this type of device and the measures required to mitigate these risks in table 1.

**TABLE 1—NON-EEG PHYSIOLOGICAL SIGNAL BASED SEIZURE MONITORING SYSTEM RISKS AND MITIGATION MEASURES**

Identified risks	Mitigation measures
Adverse tissue reaction ..... Equipment malfunction leading to injury to users (shock, burn) .....	Biocompatibility evaluation. Electrical safety, thermal, and mechanical testing; Electromagnetic compatibility testing; and Labeling.
Interference with or from other electrical devices .....	Electromagnetic compatibility testing.

TABLE 1—NON-EEG PHYSIOLOGICAL SIGNAL BASED SEIZURE MONITORING SYSTEM RISKS AND MITIGATION MEASURES—Continued

Identified risks	Mitigation measures
<p>Incorrect alerts, including:</p> <ul style="list-style-type: none"> <li>• Missing a seizure—device fails to identify physiological signal that is associated with a seizure; or.</li> <li>• False alarm—device mistakenly identifies a physiological signal as being associated with a seizure.</li> </ul>	<p>Clinical performance testing;                      Non-clinical performance testing;                      Software verification, validation, and hazard analysis;                      Labeling; and                      Training.</p>

FDA has determined that special controls, in combination with the general controls, address these risks to health and provide reasonable assurance of the safety and effectiveness. In order for a device to fall within this classification, and thus avoid automatic classification in class III, it would have to comply with the special controls named in this final order. The necessary special controls appear in the regulation codified by this order. This device is subject to premarket notification requirements under section 510(k) of the FD&C Act.

At the time of classification, non-EEG physiological signal based seizure monitoring systems are for prescription use only. Prescription devices are exempt from the requirement for adequate directions for use for the layperson under section 502(f)(1) of the FD&C Act (21 U.S.C. 352(f)(1)) and 21 CFR 801.5, as long as the conditions of 21 CFR 801.109 are met.

**III. Analysis of Environmental Impact**

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

**IV. Paperwork Reduction Act of 1995**

This final order establishes special controls that refer to previously approved collections of information found in other FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in part 807, subpart E, regarding premarket notification submissions have been approved under OMB control number 0910–0120, and the collections of information in 21 CFR part 801, regarding labeling have been approved under OMB control number 0910–0485.

**List of Subjects in 21 CFR Part 882**

Medical devices.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 882 is amended as follows:

**PART 882—NEUROLOGICAL DEVICES**

- 1. The authority citation for part 882 continues to read as follows:  
**Authority:** 21 U.S.C. 351, 360, 360c, 360e, 360j, 360l, 371.
- 2. Add § 882.1580 to subpart B to read as follows:

**§ 882.1580 Non-electroencephalogram (EEG) physiological signal based seizure monitoring system.**

(a) *Identification.* A non-electroencephalogram (non-EEG) physiological signal based seizure monitoring system is a noninvasive prescription device that collects physiological signals other than EEG to identify physiological signals that may be associated with a seizure.

(b) *Classification.* Class II (special controls). The special controls for this device are:

(1) The technical parameters of the device, hardware and software, must be fully characterized and include the following information:

(i) Hardware specifications must be provided. Appropriate verification, validation, and hazard analysis must be performed.

(ii) Software, including any proprietary algorithm(s) used by the device to achieve its intended use, must be described in detail in the Software Requirements Specification (SRS) and Software Design Specification (SDS). Appropriate software verification, validation, and hazard analysis must be performed.

(2) The patient-contacting components of the device must be demonstrated to be biocompatible.

(3) The device must be designed and tested for electrical, thermal, and mechanical safety and electromagnetic compatibility (EMC).

(4) Clinical performance testing must demonstrate the ability of the device to function as an assessment aid for

monitoring for seizure-related activity in the intended population and for the intended use setting. Performance measurements must include positive percent agreement and false alarm rate.

(5) Training must be provided for intended users that includes information regarding the proper use of the device and factors that may affect the collection of the physiologic data.

(6) The labeling must include health care professional labeling and patient-caregiver labeling. The health care professional and the patient-caregiver labeling must include the following information:

(i) A detailed summary of the clinical performance testing, including any adverse events and complications.

(ii) Any instructions technicians and clinicians should convey to patients and caregivers regarding the proper use of the device and factors that may affect the collection of the physiologic data.

(iii) Instructions to technicians and clinicians regarding how to set the device threshold to achieve the intended performance of the device.

Dated: October 24, 2017.

**Lauren Silvis,**  
*Chief of Staff.*

[FR Doc. 2017–23516 Filed 10–27–17; 8:45 am]

**BILLING CODE 4164–01–P**

**DEPARTMENT OF HOMELAND SECURITY**

**Coast Guard**

**33 CFR Part 117**

[Docket No. USCG 2017–0162]

RIN 1625–AA09

**Drawbridge Operation Regulation; Nanticoke River, Seaford, DE**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is modifying the operating schedule that governs the SR 13 Bridge across the Nanticoke River, mile 39.6, in Seaford, Delaware (DE). This modification will require the

bridge to open on signal every Saturday and Sunday during the winter season, if at least 24 hours notice is given. This action is necessary to balance bridge operations and maintenance with the existing needs of navigation.

**DATES:** This rule is effective November 29, 2017.

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <http://www.regulations.gov>. Type USCG–2017–0162 in the “SEARCH” box and click “SEARCH.” Click on Open Docket Folder on the line associated with this rulemaking.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Mr. Martin A. Bridges, Fifth Coast Guard District (dpb), at (757) 398–6422, email [Martin.A.Bridges@uscg.mil](mailto:Martin.A.Bridges@uscg.mil).

**SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

**SUPPLEMENTARY INFORMATION:**

**I. Table of Abbreviations**

- CFR Code of Federal Regulations
- DHS Department of Homeland Security
- FR Federal Register
- NPRM Notice of proposed rulemaking
- § Section
- U.S.C. United States Code

**II. Background Information and Regulatory History**

On July 5, 2017, we published a notice of proposed rulemaking entitled, “Drawbridge Regulation; Nanticoke River, Seaford, DE” in the **Federal Register** (see 82 FR 127). We did not receive any comments on the proposed rule.

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

The Coast Guard is issuing this rule under authority 33 U.S.C. 499. The US 13 Bridge across the Nanticoke River, Mile 39.6, in Seaford, DE, owned and operated by the Delaware Department of Transportation, has a vertical clearance of 3 feet above mean high water in the closed-to-navigation position. There is a

monthly average of three bridge openings on Saturdays and Sundays, from 7:30 a.m. to 3:30 p.m., from November 1 through March 31, which allow one or more vessels to transit through the bridge during each opening. The bridge is normally maintained in the closed position, due to the volume of vehicular traffic crossing the bridge. The current operating schedule is published in 33 CFR 117.243(b). The Coast Guard’s authority to make a permanent change to a drawbridge operating schedule is contained in 33 CFR 117.8.

The Nanticoke River is used predominately by recreational vessels and pleasure craft. The three-year average number of bridge openings, maximum number of bridge openings, and weekend bridge openings between 7:30 a.m. and 3:30 p.m., by month and overall for 2014 through 2016, as drawn from the data contained in the bridge tender logs provided by the Delaware Department of Transportation, is presented below.

Month	Average openings	Maximum openings	Proposed weekends—average openings 7:30 a.m.–3:30 p.m.
January .....	11	31	3
February .....	1	3	1
March .....	21	53	4
April .....	72	91	N/A
May .....	138	192	N/A
June .....	150	168	N/A
July .....	280	175	N/A
August .....	198	223	N/A
September .....	144	214	N/A
October .....	51	66	N/A
November .....	8	13	5
December .....	1	4	1
Monthly .....	89	223	3
Daily .....	3	7	<1

**IV. Discussion of Comments, Changes and the Final Rule**

The Delaware Department of Transportation has requested to modify the operating regulation for the bridge, due to the limited number of requested openings of the bridge on Saturday and Sunday, from 7:30 a.m. to 3:30 p.m., from November 1 through March 31, over a period of approximately the past three years. The data presented in the table above demonstrate that the requested modification may be implemented with minimal impact to navigation. The modification requested will require the bridge to open on signal on Saturday and Sunday; from 7:31 a.m. to 3:29 p.m., from November 1 through March 31, if at least 24 hours notice is given. All other provisions of 33 CFR 117.243 (b) will remain the same.

The Coast Guard provided a comment period of 60 days and received zero comments on the proposed rule.

**V. Regulatory Analysis**

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 protesters.

*A. Regulatory Planning and Review*

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a

budgeting process. This rule has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, it has not been reviewed by the Office of Management and Budget (OMB) and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This is not considered a significant regulatory action. This determination is based on the findings that: (1) The potential impact is small, given the limited number of vessels requiring a bridge opening during the time frame of the proposed modification, and (2) vessels will be able to transit through the bridge during the time frame of the proposed modification, given the bridge will open on signal, if at least 24 hours notice is given.



### B. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 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 received zero comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. While some owners or operators of vessels intending to transit the bridge may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

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

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

### C. Collection of Information

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

### D. Federalism and Indian Tribal Government

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship

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

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. We received zero comments on this rule.

### 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 proposed rule will not result in such an expenditure, we do discuss the effects of this proposed rule elsewhere in this preamble. We received zero comments on this rule.

### F. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.ID, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a determination that this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule simply promulgates the operating regulations or procedures for drawbridges. This action is categorically excluded from further review, under figure 2–1, paragraph (32)(e), of the Instruction. A preliminary Record of Environmental Consideration and a Memorandum for the Record are not required for 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 117

Bridges.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

### PART 117—DRAWBRIDGE OPERATION REGULATIONS

■ 1. The authority citation for part 117 continues to read as follows:

**Authority:** 33 U.S.C. 499; 33 CFR 1.05–1; Department of Homeland Security Delegation No. 0170.1.

■ 2. Revise § 117.243(b) to read as follows:

#### § 117.243 Nanticoke River.

\* \* \* \* \*

(b) The draw of the SR 13 Bridge, mile 39.6, in Seaford shall:

(1) Open on signal, except from 6 p.m. to 8 a.m., from April 1 through October 31; from November 1 through March 31, Monday to Friday and on Saturday and Sunday from 3:30 p.m. to 7:30 a.m., if at least four hours notice is given.

(2) Open on signal, on Saturday and Sunday, from 7:31 a.m. through 3:29 p.m., from November 1 through March 31, if at least 24 hours notice is given.

Dated: October 10, 2017.

**M.L. Austin,**

*Rear Admiral, U.S. Coast Guard, Commander, Fifth Coast Guard District.*

[FR Doc. 2017–23559 Filed 10–27–17; 8:45 am]

**BILLING CODE 9110–04–P**

### ENVIRONMENTAL PROTECTION AGENCY

#### 40 CFR Part 180

[EPA–HQ–OPP–2017–0155; FRL–9968–12]

#### Hexythiazox; Pesticide Tolerances

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This regulation amends an existing tolerance for residues of the ovicide/miticide hexythiazox in/on hop, dried cones, by increasing the current tolerance from 2.0 parts per million (ppm) to 20 ppm. Gowan Company requested modification of this tolerance under the Federal Food, Drug, and Cosmetic Act (FFDCA).

**DATES:** This regulation is effective October 30, 2017. Objections and requests for hearings must be received

on or before December 29, 2017, 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-2017-0155, 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 L. Goodis, P.E., Director, 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](mailto: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 EPA's tolerance regulations at 40 CFR part 180 through the Government Printing Office's e-CFR site at [http://www.ecfr.gov/cgi-bin/textidx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab\\_02.tpl](http://www.ecfr.gov/cgi-bin/textidx?&c=ecfr&tpl=/ecfrbrowse/Title40/40tab_02.tpl).

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

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA-HQ-OPP-2017-0155 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 29, 2017. 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-2017-0155, by one of the following methods:

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

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

##### II. Summary of Petitioned-For Tolerance

In the **Federal Register** of June 8, 2017 (82 FR 26641) (FRL-9961-14), EPA issued a document pursuant to the Federal Food, Drug, and Cosmetic Act (FFDCA) section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide petition (PP #6F8489) by Gowan Company, P.O. Box 5569, Yuma, AZ 85366-5569. This petition requested

that 40 CFR 180.448 be amended by establishing a tolerance for residues of hexythiazox in or on hop, dried cones at 20 ppm. This document referenced a summary of the petition prepared by Gowan Company, the registrant, which is available in the docket, <http://www.regulations.gov>. No comments were received in response to the referenced notice of filing.

##### III. Aggregate Risk Assessment and Determination of Safety

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

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

###### A. Toxicological Profile

EPA has evaluated the available toxicity data and considered its validity, completeness, and reliability as well as the relationship of the results of the studies to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children.

Hexythiazox has low acute toxicity by the oral, dermal, and inhalation routes of exposure. It produces mild eye irritation and is not a skin irritant or skin sensitizer. Hexythiazox is associated with toxicity of the liver and

adrenals following subchronic and chronic exposure to dogs, rats, and mice, with the dog being the most sensitive species. The prenatal developmental studies in rabbits and rats and the two-generation reproduction study in rats showed no indication of increased susceptibility to *in utero* or postnatal exposure to hexythiazox. Reproductive toxicity was not observed. There is no concern for immunotoxicity or neurotoxicity following exposure to hexythiazox. The toxicology database for hexythiazox does not show any evidence of treatment-related effects on the immune system.

Hexythiazox is classified as “Likely to be Carcinogenic to Humans” based on a treatment-related increase in benign and malignant liver tumors in female mice and the presence of mammary gland tumors (fibroadenomas) in male rats; however, the evidence as a whole was not strong enough to warrant the use of a linear low dose extrapolation model applied to the animal data ( $Q_1^*$ ) for a quantitative estimation of human risk because the common liver tumors (benign and malignant) were only observed in high-dose female mice, and benign mammary gland tumors were

only observed in high-dose male rats. Since the effects seen in the study that serves as the basis for the chronic reference dose (cRfD) occurred at doses substantially below the lowest dose that induced tumors (and there is no mutagenic concern for hexythiazox), the cRfD is considered protective of all chronic effects, including potential carcinogenicity.

Specific information on the studies received and the nature of the adverse effects caused by hexythiazox as well as the no-observed-adverse-effect-level (NOAEL) and the lowest-observed-adverse-effect-level (LOAEL) from the toxicity studies can be found at <http://www.regulations.gov> within the document entitled “Hexythiazox. Human Health Risk Assessment for Amended Use on Hops,” dated September 5, 2017, which can be found in docket ID number EPA-HQ-OPP-2017-0155.

#### B. Toxicological Points of Departure/Levels of Concern

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

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

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR HEXYTHIAZOX FOR USE IN HUMAN HEALTH RISK ASSESSMENT

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Acute Dietary (All populations)	No risk is expected from this exposure scenario as no hazard was identified in any toxicity study for this duration of exposure.		
Chronic Dietary (All populations).	NOAEL= 2.5 mg/kg/day. UF <sub>A</sub> = 10x UF <sub>H</sub> = 10x FQPA SF = 1x	Chronic RfD = 0.025 mg/kg/day. cPAD = 0.025	One-Year Feeding Toxicity Study—Dogs. LOAEL = 12.5 mg/kg/day based on increased absolute and relative adrenal weights, and associated adrenal histopathology.
Incidental Oral Short-Term (1 to 30 days) and Intermediate-Term (1 to 6 months).	NOAEL= 30 mg/kg/day. UF <sub>A</sub> = 10x UF <sub>H</sub> = 10x FQPA SF = 1x	Residential LOC for MOE = 100.	2-Generation Reproduction Study—Rat. LOAEL = 180 mg/kg/day, based on decreased pup body weight during lactation and delayed hair growth and/or eye opening, and decreased parental body-weight gain and increased absolute and relative liver, kidney, and adrenal weights.
Dermal Short- and Intermediate-term.	A quantitative dermal risk assessment is not necessary since no dermal hazard is anticipated. There is no evidence of increased quantitative or qualitative susceptibility of the young following <i>in utero</i> and pre-and post-natal exposure to hexythiazox.		
Inhalation Short-Term (1 to 30 days) and Intermediate-Term (1 to 6 months).	Oral NOAEL= 30 mg/kg/day. UF <sub>A</sub> = 10x UF <sub>H</sub> = 10x FQPA SF = 1x	Residential LOC for MOE = 100.	2-Generation Reproduction Study—Rat. LOAEL = 180 mg/kg/day, based on decreased pup body weight during lactation and delayed hair growth and/or eye opening, and decreased parental body-weight gain and increased absolute and relative liver, kidney, and adrenal weights.

TABLE—SUMMARY OF TOXICOLOGICAL DOSES AND ENDPOINTS FOR HEXYTHIAZOX FOR USE IN HUMAN HEALTH RISK ASSESSMENT—Continued

Exposure/scenario	Point of departure and uncertainty/safety factors	RfD, PAD, LOC for risk assessment	Study and toxicological effects
Cancer (oral, dermal, and inhalation).	Classification: "Likely to be Carcinogenic to Humans." A quantification of risk using a non-linear approach; <i>i.e.</i> , RfD, for hexythiazox will adequately account for all chronic toxicity, including carcinogenicity, that could result from exposure to hexythiazox.		

FQPA SF = Food Quality Protection Act Safety Factor. LOAEL = lowest-observed-adverse-effect-level. LOC = level of concern. mg/kg/day = milligram/kilogram/day. MOE = margin of exposure. NOAEL = no-observed-adverse-effect-level. PAD = population adjusted dose (a = acute, c = chronic). RfD = reference dose. UF = uncertainty factor. UF<sub>A</sub> = extrapolation from animal to human (interspecies). UF<sub>H</sub> = potential variation in sensitivity among members of the human population (intraspecies).

### C. Exposure Assessment

1. *Dietary exposure from food and feed uses.* In evaluating dietary exposure to hexythiazox, EPA considered exposure under the petitioned-for tolerances as well as all existing hexythiazox tolerances in 40 CFR 180.448. EPA assessed dietary exposures from hexythiazox in food as follows:

i. *Acute exposure.* Quantitative acute dietary exposure and risk assessments are performed for a food-use pesticide, if a toxicological study has indicated the possibility of an effect of concern occurring as a result of a 1-day or single exposure. No toxic effects attributable to a single dose of hexythiazox were observed in the toxicology database; therefore, a quantitative acute dietary exposure and risk assessment is unnecessary.

ii. *Chronic exposure.* In conducting the chronic dietary (food and drinking water) exposure assessment, EPA used the Dietary Exposure Evaluation Model (DEEM-FCID), Version 3.16, which uses food consumption data from the U.S. Department of Agriculture's National Health and Nutrition Examination Survey, What We Eat in America (NHANES/WWEIA) from 2003–2008. As to residue levels in food, EPA used tolerance-level residues, assumed 100 percent crop treated (PCT), and incorporated DEEM 7.81 default processing factors when processing data were not available.

iii. *Cancer.* Based on the data summarized in Unit III.A., EPA has concluded that a nonlinear RfD approach is appropriate for assessing cancer risk to hexythiazox. Cancer risk was assessed using the same exposure estimates as discussed in Unit III.C.1.ii., *Chronic exposure.*

iv. *Anticipated residue and percent crop treated (PCT) information.* EPA did not use anticipated residue and/or PCT information in the dietary assessment for hexythiazox. Tolerance-level residues and/or 100 PCT were assumed for all food commodities.

2. *Dietary exposure from drinking water.* The Agency used screening-level water exposure models in the dietary exposure analysis and risk assessment for hexythiazox in drinking water. These simulation models take into account data on the physical, chemical, and fate/transport characteristics of hexythiazox. 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>.

Surface water and groundwater estimated drinking water concentrations (EDWCs) do not result in any change to the existing EDWCs determined from a recent drinking water assessment derived on hops. Specifically, since hops is already a registered use that was recently assessed during registration review, no new drinking water scenarios were identified with this proposed increase in application rates that would require a new drinking water assessment to be conducted. In fact, the highest EDWCs associated with all uses of hexythiazox continue to be from use on sorghum in the Western U.S., using the Pesticide Root Zone Model (PRZM) surface water modeling scenario. Furthermore, based on the Agency's previous assessment, the EDWCs of hexythiazox for chronic exposures are estimated to be 4.3 parts per billion (ppb) for surface water and 2.4 ppb for ground water (DP 433290, 5/9/2016; DP 404023, 1/17/2012), and the higher of these values was used in the dietary exposure model to assess chronic dietary risk.

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). Hexythiazox is currently registered for the following residential uses, including ornamental landscape plantings, turf, and fruit and nut trees in residential sites.

EPA assessed residential exposure using the following assumptions: Residential handler exposures are expected to be short-term (1 to 30 days) via either the dermal or inhalation routes of exposures. Since a quantitative dermal risk assessment is not needed for hexythiazox, handler MOEs were calculated for the inhalation route of exposure only. EPA uses the term "post-application" to describe exposure to individuals that occur as a result of being in an environment that has been previously treated with a pesticide. There is potential for post-application for individuals exposed as a result of being in an environment that has been previously treated with hexythiazox. Adult residential post-application dermal exposures were not assessed since no dermal hazard was identified for hexythiazox. The residential post-application exposure assessment for children included incidental oral exposure resulting from transfer of residues from the hand-to-mouth, object to-mouth, and from incidental ingestion of soil.

Further information regarding EPA standard assumptions and generic inputs for residential exposures may be found at <http://www.epa.gov/pesticides/science/residential-exposure-sop.html>.

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 hexythiazox to share a common mechanism of toxicity with any other substances, and hexythiazox does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action; therefore, EPA has assumed that hexythiazox 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>.

#### D. Safety Factor for Infants and Children

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

2. *Prenatal and postnatal sensitivity.* The prenatal and postnatal toxicology data base indicates no increased susceptibility of rats or rabbits to in utero and/or postnatal exposure to hexythiazox.

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

- i. The toxicity database for hexythiazox is complete.
- ii. There is no indication that hexythiazox is a neurotoxic chemical and there is no need for a developmental neurotoxicity study or additional UFs to account for neurotoxicity.
- iii. There is no evidence that hexythiazox results in increased susceptibility in *in utero* rats or rabbits in the prenatal developmental studies or in young rats in the 2-generation reproduction study.

iv. There are no residual uncertainties identified in the exposure databases. EPA made conservative (protective) assumptions in the ground and surface water modeling used to assess exposure to hexythiazox 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 hexythiazox.

#### E. Aggregate Risks and Determination of Safety

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

1. *Acute risk.* An acute aggregate risk assessment takes into account acute exposure estimates from dietary consumption of food and drinking water. No toxic effects attributable to a single dose of hexythiazox were observed in the toxicology database; therefore, a quantitative acute aggregate risk assessment for hexythiazox is not required.

2. *Chronic risk.* Using the exposure assumptions described in this unit for chronic exposure, EPA has concluded that chronic exposure to hexythiazox from food and water will utilize 93% of the cPAD for children 1–2 years of age, the population group receiving the greatest exposure. Based on the explanation in Unit III.C.3., regarding residential use patterns, chronic residential exposure to residues of hexythiazox is not expected.

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 exposure level).

Hexythiazox is currently registered for uses that could result in short-term residential exposure, and the Agency has determined that it is appropriate to aggregate chronic exposure through food and water with short-term residential exposures to hexythiazox. Using the exposure assumptions described in this unit for short-term exposures, EPA has concluded the combined short-term food, drinking water, and residential inhalation exposures result in an aggregate MOE for adults (7,500) that greatly exceeds the LOC of 100, and is not of concern.

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

Hexythiazox is currently registered for uses that could result in intermediate-term residential exposure, and the

Agency has determined that it is appropriate to aggregate chronic exposure through food and water with intermediate-term residential exposures to hexythiazox. Using the exposure assumptions described in this unit for intermediate-term exposures, EPA has concluded the combined intermediate-term food, drinking water, and residential oral exposures result in an aggregate MOE for children (1,150) that greatly exceeds the LOC of 100, and is not of concern.

5. *Aggregate cancer risk for U.S. population.* As discussed in Unit III.C.1.iii., EPA concluded that regulation based on the cRfD will be protective for both chronic and carcinogenic risks. As noted in this unit, there are no chronic risks of concern; therefore, the Agency concludes that aggregate exposure to hexythiazox will not pose a cancer risk.

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

#### IV. Other Considerations

##### A. Analytical Enforcement Methodology

An adequate High performance liquid chromatography using ultra-violet detection (HPLC/UV) analytical method is available for the enforcement of tolerances for residues of hexythiazox and its metabolites containing the PT–1–3 moiety in crop and livestock commodities. This method is listed in the U.S. EPA Index of Residue Analytical Methods under hexythiazox as method AMR–985–87. The limit of quantification (LOQ) for hexythiazox residues is 0.02 ppm.

##### 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 Federal Food, Drug and Cosmetic Act (FFDCA) section 408(b)(4). The Codex Alimentarius is a joint United Nations Food and Agriculture Organization/World Health Organization food standards program, and it is recognized as an international food safety standards-setting organization in trade agreements to which the United States is a party. EPA may establish a tolerance that is different from a Codex MRL; however,

FFDCA section 408(b)(4) requires that EPA explain the reasons for departing from the Codex level.

Codex has established an MRL for residues of hexythiazox on hops at 3 ppm. The U.S. tolerance for residues of hexythiazox on hops cannot be harmonized based on approved label instructions. Based on available residue data, compliance with label instructions would result in exceedances of a tolerance harmonized with the Codex MRL.

**V. Conclusion**

Therefore, the existing tolerance for residues of the ovicide/miticide hexythiazox and its metabolites containing the (4-chlorophenyl)-4-methyl-2-oxo-3-thiazolidine moiety in/on hop, dried cones is increased from 2.0 ppm to 20 ppm.

**VI. Statutory and Executive Order Reviews**

This action amends an existing 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).

**VII. Congressional Review Act**

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

**List of Subjects in 40 CFR Part 180**

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

Dated: October 6, 2017.

**Daniel J. Rosenblatt,**  
*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. Section 180.448 is amended by revising the entry “Hop, dried cones” in the table in paragraph (a) to read as follows:

**§ 180.448 Hexythiazox; tolerances for residues.**

(a) \* \* \*

Commodity	Parts per million
* * * * *	*
Hop, dried cones .....	20
* * * * *	*

\* \* \* \* \*  
[FR Doc. 2017–23439 Filed 10–27–17; 8:45 am]  
**BILLING CODE 6560–50–P**

**DEPARTMENT OF TRANSPORTATION**

**National Highway Traffic Safety Administration**

**49 CFR Part 571**

[Docket No. NHTSA–2015–0056]

RIN 2127–AL78

**Motor Vehicle Safety Standards; Electronic Stability Control Systems for Heavy Vehicles**

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

**ACTION:** Final rule; response to petition for reconsideration.

**SUMMARY:** This final rule addresses a petition for reconsideration of the final rule for FMVSS No. 136, *Electronic stability control systems for heavy vehicles*. The petitioner, Truck and Engine Manufacturers Association (EMA), requested that NHTSA amend the test conditions for the agency’s performance test by allowing a larger lane width for long wheelbase truck tractors. After a careful technical review of the petition and the issues raised by the petitioner, the agency has decided to grant the petition because there is sufficient evidence to indicate that a larger lane width is needed for testing of long wheelbase truck tractors.

**DATES:** The effective date of this final rule is November 29, 2017.

*Petitions for reconsideration:* Petitions for reconsideration of this final rule must be received not later than December 14, 2017.

**ADDRESSES:** Petitions for reconsideration of this final rule must refer to the docket and notice number set forth above and be submitted to the Administrator, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590.

**FOR FURTHER INFORMATION CONTACT:** For technical issues, you may contact

Patrick Hallan, Office of Crash Avoidance Standards, by telephone at (202) 366-9146, and by fax at (202) 493-2990. For legal issues, you may contact David Jasinski, Office of the Chief Counsel, by telephone at (202) 366-2992, and by fax at (202) 366-3820. You may send mail to both of these officials at the National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590.

**SUPPLEMENTARY INFORMATION:**

**I. FMVSS No. 136 and J-Turn Test Maneuver**

On June 23, 2015, NHTSA published a final rule establishing Federal Motor

Vehicle Safety Standard (FMVSS) No. 136, *Electronic stability control systems for heavy vehicles*, requiring electronic stability control (ESC) systems on truck tractors and certain buses with a gross vehicle weight rating greater than 11,793 kilograms (26,000 pounds).<sup>1</sup> ESC systems in truck tractors and large buses are designed to reduce untripped rollovers and mitigate severe understeer or oversteer conditions that lead to loss of control using automatic computer-controlled braking and reducing engine torque output.

To test the performance of ESC systems, NHTSA included a 150-foot radius J-turn test maneuver. The test

course for the test maneuver is shown in Figure 1. This maneuver involves accelerating to a constant speed on a straight stretch of high-friction track before entering into a 150-foot radius curve. After entering the curve, the driver attempts to maintain the lane. At a speed that is up to 1.3 times the lowest entrance speed at which the ESC system activates, but no less than 48.3 km/h (30 mph), an ESC system must activate the vehicle's service brakes to slow the vehicle to 46.7 km/h (29 mph) within 3 seconds after entering the curve and 45.1 km/h (28 mph) within 4 seconds after entering the curve. The test vehicle must also remain within the lane.

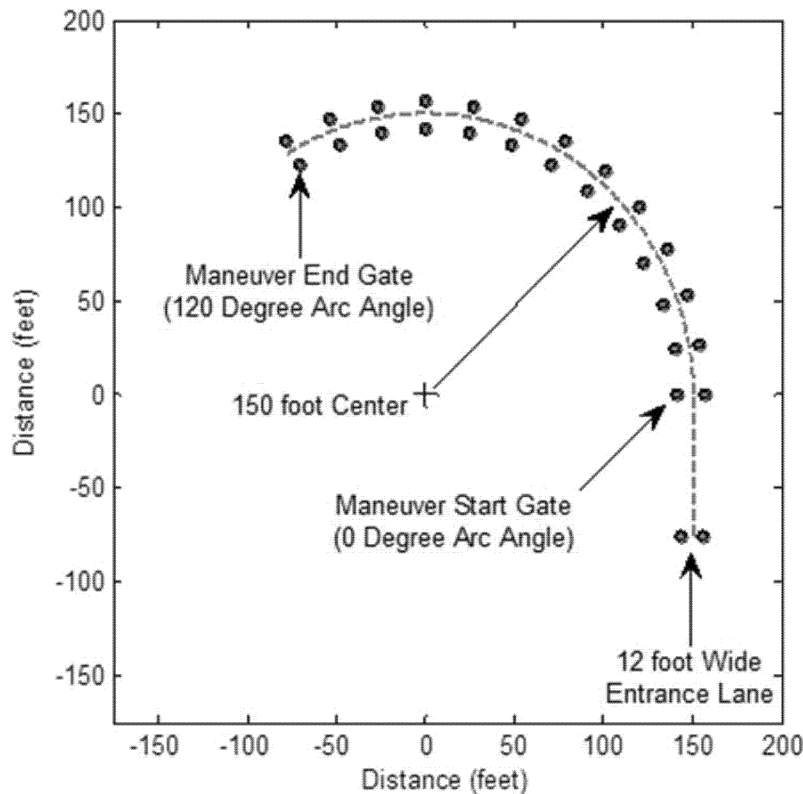


Figure 1. J-turn Test Maneuver Course (shown with the curved lane section in the counter-clockwise direction – the test is conducted in both the counter-clockwise and clockwise directions)

For truck tractors, the lane width is 3.7 meters (12 feet) for both the straight section and the curved section of the course. However, after testing large buses, the agency determined that large buses require additional lane width on the curved section of the course because buses have longer wheelbases, which make it substantially more difficult to

maintain a narrower lane within the curve. During testing of buses on a 3.7 meter (12 foot) width lane, the bus could not maintain the lane because of the geometry of the vehicle, not because of lack of stability. NHTSA determined that 4.3 meters (14 feet) was an appropriate lane width for testing large buses.

As described in the final rule, the nature of the J-turn test provides two criteria for ensuring vehicle responsiveness: Maintaining the lane within the fixed radius curve and a minimum test speed. These criteria for vehicle responsiveness are needed because there is a possibility of a manufacturer designing a vehicle that

<sup>1</sup> 80 FR 36049.

responds poorly to the operator's speed and steering inputs, which would mask the actual performance of the ESC system.

The first responsiveness criterion is the requirement that the vehicle maintain the lane during at least six of eight runs in the roll stability performance test series or at least two of four runs in the engine torque reduction test. This requirement ensures that, during J-turn test runs at increasing speeds, the ESC system activates before the vehicle becomes unstable. We allowed multiple test runs, instead of a single test run, to account for driver variability and possible driver error in conducting the maneuver. Absent driver error, we do not expect any vehicle equipped with a properly functioning ESC system to exceed the lane width during any of the tests using the J-turn maneuver.

The other responsiveness criterion in the final rule is the minimum vehicle entry speed, which is 48 km/h (30 mph) for the roll performance test. The reason for this requirement is to discourage a manufacturer from designing a system that unnecessarily intervenes at very low speeds, thus artificially decreasing the speed at which the vehicle will enter the curve during the roll performance test.

## II. EMA Petition

On August 7, 2015, the Truck and Engine Manufacturers Association (EMA) submitted a petition to NHTSA, pursuant to 49 CFR 553.35, requesting that the agency reconsider its June 2015 final rule establishing FMVSS No. 136. EMA is a trade association representing manufacturers of commercial motor vehicles, including medium- and heavy-duty truck tractors. EMA's petition indicated that the 3.7 meter (12 foot) lane width used in the FMVSS No. 136 test procedure presents difficulty in successfully completing the J-turn test for a small subset of truck tractors to achieve certification. According to EMA, long wheelbase truck tractors, such as specialty tractors and severe service tractors, cannot navigate the curve of the test course for the J-turn test maneuver because the radius paths of the trucks are dimensionally too large. This physical limitation does not allow the rear wheels to stay inside the 12-foot-wide lane. The petitioner states that this issue only affects certain long wheelbase truck tractors, which make up about one percent of the annual sales of the new truck tractor market.

EMA asserted that the curved section of the 12-foot-wide lane is too narrow, and therefore, it is impracticable for the testing of a long wheelbase truck tractor

with a wheelbase equal to or greater than 7112 millimeters (280 inches). EMA stated that it was challenging for the drivers of tractors with wheelbases larger than 280 inches to complete the maneuver in the 12-foot-wide lane, because there was not an adequate margin of physical space to account for test variability. EMA listed factors that contribute to the variability of its test results which included: (i) The length of the tractor's wheelbase, (ii) the experience level of the test driver, (iii) whether the maneuver is conducted in the clockwise or counter-clockwise direction, and (iv) other vehicle attributes such as steering system, suspensions, axles, and tires. EMA has shown that there are dimensional limitations for certain long wheelbase truck tractors to conduct the J-turn test maneuver within 12-foot-wide lane and a larger lane width is needed to adequately test the ESC systems.

In support of the petition for reconsideration, on June 30, 2016, EMA submitted data from testing and computer simulations indicating that a lane width of 4.3 meters (14 feet) was necessary for these long wheelbase truck tractors. EMA tested three truck tractors with three test drivers of varying degrees of experience in conducting the J-turn maneuver in both directions (clockwise and counterclockwise). EMA also performed computer simulations on three example tractors to do a static analysis showing the clearance of the truck tractor within the lane. Based on engineering recommendations from all of the major heavy-duty tractor manufacturers using the results of the computer simulations and the vehicle testing, EMA requests that truck tractors with a wheelbase equal to or greater than 7112 mm (280 inches) be conducted on a J-turn test course with a lane width of 4.3 meters (14 feet).

## III. Agency Decision

Pursuant to the process established under 49 CFR 553.37, after carefully considering all aspects of the petition and its subsequent data submission, the agency has decided to grant the petition without further proceedings. EMA's vehicle testing and computer simulation data support its position that truck tractors with a wheelbase equal to or greater than 7112 millimeters (280 inches) should be conducted on a test course with a wider lane, and we believe the suggested width of 4.3 meters (14 feet) is appropriate. The agency had made similar provisions for large buses by allowing a 14-foot-wide lane after first considering a 12-foot-

wide lane.<sup>2</sup> During bus testing, NHTSA observed a decrease in clearance between a vehicle and the lane boundaries as wheelbase length increases. EMA's submission further reinforces this work and applies it to truck tractors. NHTSA agrees that there are dimensional limitations for long wheelbase vehicles that potentially make it impractical to conduct the J-turn test maneuver within 12-foot-wide lane, and a larger lane width is needed to adequately test the ESC systems.

In order to ensure that the J-turn test maneuver tests the ESC system and not a test driver's ability to maintain a narrow lane, NHTSA will adopt EMA's suggested 4.3 meter (14 foot) lane width for testing longer wheelbase truck tractors. Despite the increased lane width requirement for these long wheelbase truck tractors, NHTSA is confident that the ESC systems in these long wheelbase truck tractors will be adequately tested for minimum performance using the J-turn test maneuver because the driver must maintain the lane within the same fixed radius curve and travel at the same minimum test speed as all other truck tractors.

This change requires two clarifications. First, as with buses, the wider lane is used only in the curved section of the test course. The lane width of the straight section will remain 3.7 meters (12 feet). The dimensional considerations that require a wider lane width for long wheelbase vehicles do not apply to straight sections of the test course.

Second, NHTSA is clarifying the definition of wheelbase by including the definition in the regulatory text. For two-axle vehicles, the wheelbase is generally clear—the distance between the center of the front axle and the center of the rear axle. Moreover, for typical 6x4 truck tractors, which have tandem rear axles, we believe the definition of wheelbase is also clear—the distance between the center of the front axle and the center of the rear tandem axles. However, to clarify wheelbase for all vehicles, including those with liftable axles or tag axles, NHTSA is specifying that the wheelbase is the longitudinal distance between the center of the front axle and the center of the rear axle. For vehicles with tandem axles, the center of the axle is considered to be the midpoint between the centers of the most forward and most rearward of the tandem axles, measured with any liftable axles down.

<sup>2</sup> See Stability Control System Test Track Research with a 2014 Prevost X3-45 Passenger Motorcoach, Docket No. NHTSA-2012-0065-0063.



This definition is designed to directly reflect the geometrical concerns raised in the petition. Because all testing is done with any liftable axles in the lowered position, the wheelbase will be measured with liftable axles down so the wheelbase measurement accurately reflects the turning radius of the truck tractor. The term “tandem axle” is defined as it is in FMVSS Nos. 105 and 121 as a group or set of two or more axles placed in close arrangement, one behind the other, with the centerlines of adjacent axles not more than 72 inches apart.

#### IV. Rulemaking Analyses and Notices

##### A. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

The agency has considered the impact of this rulemaking action under Executive Orders 12866 and 13563 and the DOT’s regulatory policies and procedures. This action was not reviewed by the Office of Management and Budget under Executive Order 12866. The agency has considered the impact of this action under the Department of Transportation’s regulatory policies and procedures (44 FR 11034; February 26, 1979), and has determined that it is not “significant” under them.

This action addresses a petition for reconsideration of the June 2015 final rule requiring ESC on truck tractors and certain large buses. However, the petition only addresses one test condition applicable to approximately one percent of truck tractors. This final rule amends the standard to allow long wheelbase truck tractors to be tested in a wider lane to account for the geometry of a turning vehicle and to ensure that the J-turn remains a test of the vehicle’s stability and not the test driver. This final rule imposes no costs and adjusts FMVSS No. 136 to give more flexibility to manufacturers testing long wheelbase trucks. This action will not have any safety impacts.

##### B. Executive Order 13771

Executive Order 13771 titled “Reducing Regulation and Controlling Regulatory Costs,” directs that, unless prohibited by law, whenever an executive department or agency publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed. In addition, any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs. Only those rules deemed significant under

section 3(f) of Executive Order 12866, “Regulatory Planning and Review,” are subject to these requirements. As discussed above, this rule is not a significant rule under Executive Order 12866 and, accordingly, is not subject to the offset requirements of Executive Order 13771.

NHTSA has determined that this rulemaking is a deregulatory action under Executive Order 13771, as it imposes no costs and, instead, amends FMVSS No. 136 to give more flexibility to manufacturers of long wheelbase truck tractors by allowing a wider lane in the test course. Although NHTSA was not able to quantify any cost savings for this rule, in adopting an optional wider lane width for the testing of long wheelbase truck tractors, this final rule adjusts the standard to accommodate the larger physical size of certain truck tractors and improves the efficiency of testing. This issue only affects long wheelbase truck tractors, which make up about one percent of the annual sales of truck tractors. The optional wider lane width will remove the difficulties cited by the petitioner associated with navigating the test course for long wheelbase truck tractors under the current test conditions in the standard.

##### C. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), 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 effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small governmental jurisdictions). The Small Business Administration’s regulations at 13 CFR part 121 define a small business, in part, as a business entity “which operates primarily within the United States.” (13 CFR 121.105(a)). No regulatory flexibility analysis is required if the head of an agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

NHTSA has considered the effects of this final rule under the Regulatory Flexibility Act. I certify that this final rule will not have a significant economic impact on a substantial

number of small entities. NHTSA does not believe that any truck tractor manufacturers affected by this rule qualify as small entities. To the extent any business entities affected by this final rule do qualify as small entities, this final rule will not have a significant economic impact. This final rule addresses one test condition applicable to only one percent of truck tractors. This action will not result in added expenses for those manufacturers.

##### D. Privacy Act

Anyone is able to search the electronic form of all documents received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78) or you may visit <http://www.transportation.gov/privacy>.

##### E. Other Rulemaking Analyses and Notices

In the June 2015 final rule, the agency discussed relevant requirements related to Executive Order 13132 (Federalism), Executive Order 12988 (Civil Justice Reform); Executive Order 13045 (Protection of Children from Environmental Health and Safety Risks); the Paperwork Reduction Act, the National Technology Transfer and Advancement Act, the Unfunded Mandates Reform Act, and the National Environmental Policy Act. As today’s final rule merely adjusts one test condition in FMVSS No. 136 for approximately one percent of truck tractors subject to the standard, it will not have any effect on the agency’s analyses in those areas.

##### List of Subjects in 49 CFR Parts 571

Imports, Incorporation by reference, Motor vehicle safety, Reporting and recordkeeping requirements, Tires.

In consideration of the foregoing, NHTSA amends 49 CFR part 571 as follows:

#### **PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS**

■ 1. The authority citation for part 571 continues to read as follows:

**Authority:** 49 U.S.C. 322, 30111, 30115, 30117, and 30166; delegation of authority at 49 CFR 1.95.

■ 2. In § 571.136, amend S4 by adding in alphabetical order the definitions of “tandem axle” and “wheelbase” and by revising S6.2.4.2 to read as follows:

**§ 571.136 Standard No. 136; Electronic stability control systems for heavy vehicles.**

\* \* \* \* \*

**S4 Definitions.**

\* \* \* \* \*

*Tandem axle* means a group or set of two or more axles placed in close arrangement, one behind the other, with the centerlines of adjacent axles not more than 72 inches apart.

\* \* \* \* \*

*Wheelbase* means the longitudinal distance between the center of the front axle and the center of the rear axle. For vehicles with tandem axles, the center of the axle is the midpoint between the centers of the most forward and most rearward tandem axles, measured when all liftable axles are in the lowered position.

\* \* \* \* \*

S6.2.4.2 For truck tractors, the lane width of the test course is 3.7 meters (12 feet). At the manufacturer's option, for truck tractors with a wheelbase equal to or greater than 7112 mm (280 inches) the lane width of the test course is 3.7 meters (12 feet) for the straight section and is 4.3 meters (14 feet) for the curved section. For buses, the lane width of the test course is 3.7 meters (12 feet) for the straight section and is 4.3 meters (14 feet) for the curved section.

\* \* \* \* \*

Issued on October 20, 2017 in Washington, DC, under authority delegated in 49 CFR 1.95 and 501.5.

**Heidi R. King,**

*Deputy Administrator.*

[FR Doc. 2017-23531 Filed 10-27-17; 8:45 am]

**BILLING CODE 4910-59-P**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 679**

[Docket No. 160920866-7167-02]

RIN 0648-XF798

**Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Ocean Perch in the Western Regulatory Area of the Gulf of Alaska**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for Pacific ocean perch in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2017 total allowable catch of Pacific ocean perch in the Western Regulatory Area of the GOA.

**DATES:** Effective 1200 hours, Alaska local time (A.l.t.), October 25, 2017, through 2400 hours, A.l.t., December 31, 2017.

**FOR FURTHER INFORMATION CONTACT:** Steve Whitney, 907-586-7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2017 total allowable catch (TAC) of Pacific ocean perch in the Western Regulatory Area of the GOA is 2,679 metric tons (mt) as established by the final 2017 and 2018 harvest specifications for groundfish of the Gulf of Alaska (82 FR 12032, February 27, 2017).

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2017 TAC of Pacific ocean perch in the Western Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 2,579 mt, and is setting aside 100 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific ocean perch in the Western Regulatory Area of the GOA.

After the effective date of this closure the maximum retainable amounts at

§ 679.20(e) and (f) apply at any time during a trip.

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of directed fishing for Pacific ocean perch in the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 23, 2017.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.20 and is exempt from review under Executive Order 12866.

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

Dated: October 25, 2017.

**Emily H. Menashes,**

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

[FR Doc. 2017-23536 Filed 10-25-17; 4:15 pm]

**BILLING CODE 3510-22-P**

# Proposed Rules

Federal Register

Vol. 82, No. 208

Monday, October 30, 2017

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.

## NATIONAL CREDIT UNION ADMINISTRATION

### 12 CFR Part 702

RIN 3133-AE80

### Capital Planning and Supervisory Stress Testing

**AGENCY:** National Credit Union Administration (NCUA).

**ACTION:** Proposed rule.

**SUMMARY:** The NCUA Board (“Board”) proposes to amend its regulations regarding capital planning and stress testing for federally insured credit unions with \$10 billion or more in assets (covered credit unions). The proposal would reduce regulatory burden by removing some of the capital planning and stress testing requirements currently applicable to certain covered credit unions. The proposal would also make the NCUA’s capital planning and stress testing requirements more efficient for covered credit unions and the NCUA by, among other things, authorizing credit unions to conduct their own stress tests in accordance with the NCUA’s requirements and allowing those credit unions to incorporate the stress test results into their capital plan submissions.

**DATES:** Comments must be received on or before December 29, 2017.

**ADDRESSES:** You may submit comments by any of the following methods, but please send comments by one method only:

- *Federal eRulemaking Portal:* <https://www.regulations.gov/>. Follow the instructions for submitting comments.
- *NCUA Web site:* <https://www.ncua.gov/regulation-supervision/Pages/rules/proposed.aspx>. Follow the instructions for submitting comments.
- *Email:* Address to [regcomments@ncua.gov](mailto:regcomments@ncua.gov). Include “[Your name]—Comments on Proposed Rule—Capital Planning and Supervisory Stress Testing” in the email subject line.

• *Fax:* (703) 518–6319. Use the subject line described above for email.

• *Mail:* Address to Gerard Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.

• *Hand Delivery/Courier:* Same as mail address.

**FOR FURTHER INFORMATION CONTACT:**

*Technical information:* Dale Klein, Senior Financial Analyst—CPST, Office of National Examinations and Supervision, at the above address or telephone (703) 518–6629; or *legal information:* John H. Brolin, Senior Staff Attorney, Office of General Counsel, at the above address or telephone (703) 518–6540.

**SUPPLEMENTARY INFORMATION:**

#### I. Background

In April 2014, the Board issued a final rule requiring capital planning and stress testing for FICUs with assets of \$10 billion or more (covered credit unions).<sup>1</sup> The NCUA recognizes that covered credit unions present a systemic risk to the National Credit Union Share Insurance Fund (NCUSIF) thereby necessitating that they be subject to more stringent prudential standards than apply to other federally insured credit unions. This approach is consistent with that taken by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency (the other banking agencies). Capital planning requires covered credit unions to assess their financial condition and risks over the planning horizon under both expected and more adverse conditions. Annual supervisory stress testing has allowed the NCUA to obtain an independent test of these credit unions under stress scenarios. By setting a regulatory minimum stress test capital ratio, the April 2014 final rule requires a covered credit union to take corrective action before it becomes undercapitalized to an extent that it may cause a risk of loss to the NCUSIF.

In July 2015, the Board amended the NCUA’s capital planning and stress testing regulation to align its annual planning and testing schedule with the timelines being adopted by the other

banking agencies. Among the reasons for this schedule change was that the NCUA’s stress test scenarios are based on the supervisory stress test scenarios developed by the other banking agencies for their regulated institutions. The other banking agencies changed their schedule for publishing scenarios, which precipitated the modification of the NCUA’s supervisory stress testing schedule.

Based on the other banking agencies’ experiences implementing the annual Dodd-Frank Act stress tests (DFAST), the NCUA tiered its own capital planning expectations for covered credit unions during the first three years of its program. By “tiered,” we mean that the NCUA aligned its capital planning and analysis expectations based on the size, complexity, and financial condition of each covered credit union. As the Board expected, credit union capital planning practices have evolved over the three-year period since 2014. Covered credit unions, consistent with their size, complexity, financial condition, have operated under the NCUA’s tiered supervisory expectations. The Board believes that taking a graduated supervisory approach to capital planning has been beneficial for credit unions, and is consistent with the NCUA’s overall supervisory objectives.

When the NCUA’s current capital planning and stress testing rule was adopted in April 2014, the Board believed it was important for the agency to initially conduct all stress tests to ensure the NCUA had an independent assessment of risk for covered credit unions.<sup>2</sup> Current § 702.506(c) provides, however, that after the NCUA has completed three consecutive supervisory stress tests of a covered credit union, the covered credit union may, with the NCUA’s approval, conduct the tests described in subpart E of part 702. The preamble to the April 2014 final rule also states that the April 2014 final rule was not the end of the process on stress testing, but just the beginning.<sup>3</sup> Accordingly, after three productive and informative years of practical experience implementing the current capital planning and stress testing regulations, the Board now believes it is appropriate for the NCUA to revisit those regulations.

<sup>1</sup> 12 CFR part 702, subpart E; 79 FR 24311 (Apr. 30, 2014).

<sup>2</sup> 79 FR 24311, 24312 (Apr. 30, 2014).

<sup>3</sup> *Id.*

## II. Summary of the Proposed Rule

The Board is proposing to amend the NCUA's capital planning and stress testing regulations. The proposed changes reflect the NCUA's experiences in implementing the current rule's requirements, while also taking into consideration the systemic risk that covered credit unions pose to the NCUSIF. As explained in more detail below, these proposed changes are intended to reduce regulatory burdens by removing some of the more onerous capital planning and stress testing requirements currently applicable to covered credit unions.

The proposed changes to the NCUA's capital planning requirements would more closely align the agency's regulatory requirements with its current supervisory expectations for covered credit unions. Under the proposal, covered credit unions would be subject to new tiered regulatory requirements that would further ensure their capital plans are tailored to reflect their size, complexity, and financial condition. For a tier I credit union, which is a covered credit union that has completed fewer than three capital planning cycles and has less than \$20 billion in total assets, review of its capital plan would be incorporated into the NCUA's supervisory oversight of that covered credit union. For a tier II credit union, which is a covered credit union that has completed three or more capital planning cycles and has less than \$20 billion in total assets, or is otherwise designated as a tier II credit union by the NCUA, review of its capital plan also would be incorporated into its supervisory oversight from the NCUA. For a tier III credit union, which is a covered credit union that has \$20 billion or more in total assets, or is otherwise designated as a tier III credit union by the NCUA, review of its capital plan would continue to be subject to the current requirement that the NCUA formally approve or reject it.

Stress testing requirements under the proposal also would be tiered. Tier I credit unions would not be subject to any stress testing requirements. Once a tier I credit union satisfies the criteria for becoming a tier II credit union, which generally would be three years after it reaches total assets of \$10 billion or more, that covered credit union would be required to conduct stress testing. Unlike their larger counterparts in tier III, however, tier II credit unions would not be subject to a 5% minimum stress test capital threshold. Further, under the proposal, the NCUA would no longer conduct the annual supervisory stress tests on applicable covered credit

unions. Rather, the covered credit unions themselves would conduct the stress tests. Since stress testing standards were first adopted in 2014, the NCUA has conducted annual supervisory stress tests on all covered credit unions.

While the Board recognizes that all covered credit unions are of systemic importance to the NCUSIF, the Board it is appropriate to differentiate the capital planning requirements applicable to such institutions based on their individual characteristics. Specifically, size, complexity, and financial condition are significant determinants regarding each covered credit union's risk to the NCUSIF, as well as to each covered credit union's ability to support sound capital planning and supervisory stress testing expectations. The application of the NCUA's capital planning and stress testing requirements defined by size, complexity, and financial condition would provide certain covered credit unions with a more reasonable period of time over which they can develop the policies and processes necessary to develop sound capital plans and analyses. However, the Board seeks comments on whether these characteristics are the appropriate factors, or whether other considerations should also be taken into account in assessing risk for purposes of differentiating capital planning and stress testing requirements.

As noted above, all covered credit unions pose a degree of systemic risk to the NCUSIF and the credit union industry. This proposal, however, seeks to balance the higher risk that the larger, more complex covered credit unions may pose to the NCUSIF, with the time and resources these institutions need to prepare themselves to meet the NCUA's capital planning and supervisory stress testing expectations. The Board also seeks to tailor the NCUA's capital planning and stress testing requirements in such a manner as to reduce the regulatory burden imposed on those smaller covered credit unions which pose less risk to the NCUSIF.

### *Proposed Tiers of Covered Credit Unions*

The proposal identifies three tiers of covered credit unions and would impose varying levels of regulatory requirements based on those tiers. In brief, the tier comprised of the smallest covered credit unions would have the least regulatory requirements, with a concomitant increase in requirements for each tier as the size and complexity of those covered credit unions increases. The three tiers are as follows:

- A *tier I credit union* would be a covered credit union that has completed fewer than three capital planning cycles and has less than \$20 billion in total assets;
- A *tier II credit union* would be a covered credit union that has completed three or more capital planning cycles and has less than \$20 billion in total assets, or is otherwise designated as a tier II credit union by the NCUA; and
- A *tier III credit union* would be a covered credit union that has \$20 billion or more in total assets, or is otherwise designated as a tier III credit union by the NCUA.

Under the proposal, the level of the NCUA's capital planning requirements for tier I and tier II credit unions would generally decrease from the current regulatory requirements, but would generally remain the same for tier III credit unions. This proposed approach would reduce regulatory burdens on tier I and tier II credit unions while allowing them to focus on establishing sound capital planning and capital adequacy assessment processes. The tier III credit unions, on the other hand, which may pose the greatest systemic risk to the NCUSIF and which are most capable of complying with the current requirements, would remain subject to most of the current requirements. The Board seeks specific comments on whether this approach is appropriate and whether it sufficiently balances regulatory relief for covered credit unions with the NCUA's objective of managing risk to the NCUSIF.

Under the proposal, the NCUA's capital planning and stress testing rule would distinguish between a tier II and a tier III credit union at the threshold level of \$20 billion in total assets. Setting the threshold level at \$20 billion would mean that a covered credit union would generally not be subject to the regulation's most rigorous requirements until it had doubled in size from the time it was first classified as a covered credit union. Setting the threshold at this level should help ensure that covered credit unions have adequate time to plan and prepare for compliance. The Board specifically requests comment, however, on whether the threshold level should be set higher, at \$25 billion in total assets, to provide covered credit unions with even more time to plan and prepare for compliance. In addition, the Board requests comment on whether setting the threshold at this higher level would be reasonable and why.

*Proposed Revisions to the NCUA’s Capital Planning Requirements*

This proposal would retain the current requirement that all covered credit unions submit capital plans to the NCUA no later than May 31st of each year. Tier 1 and tier II credit unions, however, would no longer be required to have their capital plans formally approved by the NCUA. Capital plan reviews for tier I and tier II credit unions would be conducted as part of the NCUA’s supervision of the credit union, with any deficiencies addressed as part of the supervisory process. This approach would provide the NCUA greater latitude when reviewing capital plan submissions. This proposed change is also intended to provide the NCUA with additional flexibility to use the supervisory process to address plan deficiencies, especially for credit unions newly covered by the NCUA’s capital planning requirements. The Board believes that any increased risk to the NCUSIF that may occur as a result of providing regulatory relief can be addressed through the supervisory process.

This proposal would retain the current requirement for the NCUA to formally approve or reject a tier III credit union’s capital plan. Because the failure of a tier III credit union poses the most significant risk to the NCUSIF, the Board believes it is prudent to retain the current, more formal requirements for tier III credit unions.

The NCUA’s formal rejection of a capital plan would be subject to the Supervisory Review Committee process.

The Board specifically requests comment on this aspect of the proposal.

*Proposed Revisions to the NCUA’s Supervisory Stress Testing Requirements*

*Credit Union-Conducted Stress Tests.* Under the current rule, the NCUA is required to conduct supervisory stress tests for all covered credit unions. When the Board approved the current regulation in 2014, it believed the agency should initially conduct all stress tests to ensure the NCUA had an independent assessment of risk for covered credit unions. The preamble to the final rule acknowledged, however, that it might be appropriate in the future for certain covered credit unions to conduct their own supervisory stress tests, and the Board adopted a provision in the final rule to allow for that. In particular, current § 702.506(c) provides that after the NCUA has completed three consecutive supervisory stress tests of a covered credit union, the covered credit union may, with the NCUA’s approval, conduct the tests described in subpart E of part 702 on its own. Having now completed three annual stress testing cycles, the Board believes that changing the NCUA’s regulations to have covered credit unions conduct their own supervisory stress tests, without needing to obtain approval from the NCUA, is appropriate. Accordingly, under the proposal, the requirement that the NCUA conduct supervisory stress tests would be eliminated.

The Board believes that credit unions are better informed of risk when they

perform their own capital analyses. Having covered credit unions conduct their own supervisory stress tests also eliminates any unintentional, negative consequences that could result from the NCUA conducting those tests, namely concerns that a covered credit union might abdicate its responsibility to perform rigorous capital analyses to the NCUA. As a safeguard, however, the proposal would retain the provision in the current rule that reserves the NCUA’s right to conduct the stress tests on any covered credit union at any time, and to request qualitative and quantitative information from the covered credit unions that pertains to supervisory stress testing.

*Incremental Approach.* Running a supervisory stress test requires internal controls that enable the credit union to effectively challenge all material aspects of its capital planning and analysis. For a covered credit union to develop the ability to obtain, cleanse, and manage internal and external data, and perform adequate capital analyses, it must possess a level of experience and operational scale that is unlikely to be in place or quickly developed by a credit union when it first reaches the \$10 billion threshold. Accordingly, the Board is proposing to adopt an incremental regulatory approach to supervisory stress testing that would gradually increase regulatory requirements on a covered credit union over time without making the requirements too burdensome too soon.

TABLE 1—INCREMENTAL APPROACH

Tier	Description	Stress test	Capital plan review
I .....	First three years .....	Not required .....	Incorporated as part of the NCUA’s supervisory oversight.
II .....	3 years or more, but less than \$20 billion in total assets.	Credit unions run stress tests using the NCUA stress-test scenarios and NCUA guidance, but are not subject to the 5% minimum stress-test ratio.	Incorporated as part of the NCUA’s supervisory oversight.
III .....	\$20 billion or more in total assets	Credit unions run stress tests using the NCUA stress-test scenarios and NCUA guidance, and are subject to the 5% minimum stress-test ratio.	The NCUA accepts or rejects credit union capital plans—qualitative and quantitative assessment.

*Tier I.* Under the proposal, a tier I credit union would not be subject to any supervisory stress testing requirements, nor would it be required to incorporate the NCUA’s stress test scenarios within its capital plan. This proposed approach would allow a tier I credit union time after it reaches the \$10 billion threshold level to obtain the policies and processes necessary to develop sound capital plans and analyses prior to incorporating supervisory stress testing. Once the tier I credit union satisfies the

tier II criteria, which generally would be three years after reaching the \$10 billion threshold, it would then be required to comply with all tier II requirements described below.

*Tier II.* This proposal would require a tier II credit union to incorporate the NCUA’s annual stress test scenarios into its capital plan submissions. The Board does not believe this particular requirement imposes additional regulatory burden on a tier II credit union because, as the NCUA has

observed over the last three years of implementing the stress testing regulations, covered credit unions already incorporate the NCUA’s supervisory stress testing scenarios into their capital plans even though they are not required to do so under the current rule.

*Tier III.* The proposal would require a tier III credit union to incorporate the NCUA’s stress test scenarios into its capital plan. Because a tier III credit union poses the greatest level of

systemic risk to the NCUSIF, it must also submit a plan to build capital or mitigate the risk if the credit union shows that its stress test capital ratio would fall below the 5% minimum stress test capital threshold. This is consistent with the supervisory stress testing requirements in current § 702.506(c).

The proposal would apply the tier III threshold of \$20 billion as of the March 31 measurement date of each year, and the threshold would be effective at the beginning of the next capital planning cycle. The capital planning cycle would begin on June 1 of that year and run through the capital plan submission date of May 31 of the following year.

*Web site Instructions.* If the Board adopts a final rule on this matter, the NCUA will publish on its Web site instructions for tier II and tier III credit unions on how to administer their own supervisory stress tests. The Board believes that a covered credit union's ability to maintain independence and flexibility is essential to the overall success of the NCUA's supervisory stress testing program. Accordingly, under the proposal, tier II and tier III credit unions would be required to conduct their own stress tests in accordance with the instructions provided by the NCUA. The standards for conducting the tests would differ for tier II and tier III credit unions and would be commensurate with their level of systemic risk to the NCUSIF.

*Conforming and Clarifying Amendments.* Finally, the proposal would also make a number of minor conforming and clarifying amendments to the current rule. These conforming and clarifying amendments would include removing, changing, and adding certain definitions, and making other small amendments to various provisions in subpart E to part 702.

The proposed changes outlined above are discussed in more detail in the Section-by-Section Analysis below.

### III. Legal Authority

The NCUA is issuing this proposal pursuant to its authority under the Federal Credit Union Act (FCUA).<sup>4</sup> Section 120(a) of the FCUA authorizes the Board to "prescribe rules and regulations for the administration of" the FCUA.<sup>5</sup> Section 204 of the FCUA authorizes the Board, through its examiners, "to examine any [federally] insured credit union . . . to determine the condition of any such credit union for insurance purposes."<sup>6</sup> Section

206(e) of the FCUA authorizes the Board to take certain actions against a federally insured credit union, if, in the opinion of the Board, the credit union "is engaging or has engaged, or the Board has reasonable cause to believe that the credit union or any institution affiliated party is about to engage, in any unsafe or unsound practice in conducting the business of such credit union."<sup>7</sup>

### IV. Section-by-Section Analysis

This proposed rule would retain most of the current language in subpart E of part 702. In particular, current §§ 702.501, and 702.503 would remain unchanged under this proposal. The proposed changes to §§ 702.502, 702.504, 702.505, and 702.506 are described and explained in more detail below.

#### Section 702.502 Definitions

The proposal would retain most of the definitions from current § 702.502, without change, with the following exceptions.

#### Adverse Scenario

The proposal would remove the definition of "adverse scenario" from § 702.502 and replace this term throughout subpart E with terms more commonly used within the financial services industry. This change is intended to reduce confusion for covered credit unions. No substantive changes to the requirements of subpart E are intended by this change.

#### Capital Planning Cycle

The proposal would add a definition for the new term "capital planning cycle" to § 702.502. The proposal would provide that "capital planning cycle" means a complete round of capital planning over a one year period. The definition would provide further that the capital planning cycle begins on June 1st of a given year and ends on May 31st of the following year when the capital plan submission is due. This change is intended to reduce confusion for covered credit unions regarding when they would be subject to certain stress testing and other requirements, which are discussed in more detail below.

#### Covered Credit Union

The proposal would make conforming amendments to the current definition of "covered credit union" in § 702.502. In particular, the proposed definition would remove the words "capital planning and stress testing" from the second sentence in the definition and

add in their place the word "applicable." The proposed definition would provide that "covered credit union" means a federally insured credit union whose assets are \$10 billion or more. The definition would provide further that a credit union that crosses that asset threshold as of March 31st of a given calendar year is subject to the applicable requirements of subpart E in the capital planning cycle that begins on June 1st of that calendar year. As explained in more detail below, this change would help clarify that a covered credit union is only subject to the applicable requirements of subpart E.

#### Scenarios

The proposal would make conforming amendments to the current definition of "scenarios" in § 702.502. In particular, the proposal would remove the words "adverse, and severely adverse" from the current definition and add in their place the words "scenarios, and stress." The revised definition would provide that "scenarios" are those sets of conditions that affect the U.S. economy or the financial condition of a covered credit union that serve as the basis for stress testing, including, but not limited to, NCUA-established baseline scenarios, and stress scenarios.

#### Severely Adverse Scenario

The proposal would delete the definition of "severely adverse scenario" from § 702.502 and replace this term throughout subpart E with terms more commonly used within the financial services industry. This change is intended to reduce confusion for covered credit unions. No substantive changes to the requirements of subpart E are intended by this change.

#### Stress Scenario

The proposal would add the definition "stress scenario" to § 702.502. The definition would provide that "stress scenario" means a scenario that is more adverse than that associated with the baseline scenario.

#### Tier I Credit Union

The proposal would add the definition of "tier I credit union" to § 702.502. The definition would provide that "tier I credit union" means a covered credit union that has completed fewer than three capital planning cycles and has less than \$20 billion in total assets. Generally, a covered credit union would be categorized as a tier I credit union for the first three years after its total assets reached \$10 billion or more. After three years, a tier I credit union

<sup>4</sup> 12 U.S.C. 1751 *et seq.*

<sup>5</sup> 12 U.S.C. 1766(a).

<sup>6</sup> 12 U.S.C. 1784(a).

<sup>7</sup> 12 U.S.C. 1786(e).

would become a tier II credit union with the corresponding requirements.

The definition of a tier I credit union would provide regulatory relief for qualifying covered credit unions. The Board believes it is appropriate to adjust the expectations for credit unions that newly meet the criteria for covered credit unions. As noted earlier, the NCUA has conducted the review and assessment of covered credit union capital planning activities in a phased manner since inception of the final rule in 2014. The proposed creation of the tier I distinction would allow the NCUA to better align regulatory expectations based on the size, complexity, and financial condition of each covered credit union.

#### *Tier II Credit Union*

The proposal would add the definition of “tier II credit union” to § 702.502. The definition would provide that “tier II credit union” means a covered credit union that has completed three or more capital planning cycles and has less than \$20 billion in total assets, or is otherwise designated as a tier II credit union by NCUA. The tier II credit union definition would recognize the iterative nature of the NCUA’s capital planning and stress testing processes, and acknowledge that covered credit unions get better at developing and implementing their capital plans over time and through repetition. The Board believes these proposed changes would provide regulatory relief for tier II credit unions.

#### *Tier III Credit Union*

The proposal would add the definition of “tier III credit union” to § 702.502. The definition would provide that “tier III credit union” means a covered credit union that has \$20 billion or more in total assets, or is otherwise designated as a tier III credit union by NCUA. The proposal identifies credit unions with total assets of \$20 billion or more as posing the highest degree of risk to the NCUSIF. While the Board considers qualitative and quantitative capital plan supervision and credit union-run stress test review to be appropriate for covered credit unions with less than \$20 billion in total assets, it does not for larger covered credit unions. For covered credit unions with total assets of \$20 billion or more, the Board believes it is prudent, given the size of the NCUSIF and the potential loss associated with the failure of a credit union that large, to establish formal triggers requiring the NCUA and credit union actions to further mitigate NCUSIF risk exposure.

Unless otherwise delegated to the NCUA’s staff, the Board would retain the authority to designate a covered credit union as a tier II credit union or tier III credit union, respectively. The Board invites comment on what criteria would be appropriate to apply when considering such a designation.

#### *Section 702.504 Capital Planning*

##### (a) Annual Capital Planning

###### (a)(1)

The proposal would retain most of current § 702.504 without change, with the following exceptions. Proposed § 702.504(a)(1) would no longer include the last sentence in current § 702.504(a)(1), which provides that the NCUA will assess whether the capital planning and analysis process is sufficiently robust in determining whether to accept a credit union’s capital plan. Given the other changes in this proposal, this sentence would no longer be necessary. Proposed § 702.504(a)(1) would provide that a covered credit union must develop and maintain a capital plan. It also would provide that a covered credit union must submit this plan and its capital policy to the NCUA by May 31 each year, or such later date as directed by the NCUA. It also would provide that the plan must be based on the covered credit union’s financial data as of December 31 of the preceding calendar year, or such other date as directed by the NCUA.

##### (b) Mandatory Elements

###### (b)(4)

The proposal would delete current § 702.504(b)(4) from the regulation. Current § 702.504(b)(4) provides that if a credit union conducts its own stress test under § 702.506(c), its capital plan must include a discussion of how the credit union will maintain a stress test capital ratio of 5 percent or more under baseline, adverse, and severely adverse conditions in each quarter of the 9-quarter horizon. This sentence would no longer be necessary in this section because it would be fully addressed in proposed § 702.506(f).

#### *Section 702.505 NCUA Action on Capital Plans*

##### (a) Timing

The proposal would amend current § 702.505(a) by dividing paragraph (a) into two subparts. Proposed § 702.505(a)(1) would provide that the NCUA will address any deficiencies in the capital plans submitted by tier I and tier II credit unions through the supervisory process. The intent of this

change is to provide regulatory relief to tier I and tier II credit unions by removing the regulatory review and regulatory “accept or reject” assessment of their capital plans. It also provides the NCUA with additional flexibility in addressing plan deficiencies.

Proposed § 702.505(a)(2) would continue to require that the NCUA accept or reject tier III credit unions’ capital plans. The Board is not proposing to remove this requirement for Tier III credit unions at this time for the reasons discussed above. Accordingly, proposed § 702.505(a)(2) would provide that the NCUA will notify tier III credit unions of the acceptance or rejection of their capital plans by August 31 of the year in which their plan is submitted.

The proposal also would make additional conforming changes throughout § 702.505 to clarify that only tier III credit unions would be required to operate under a capital plan formally accepted by the NCUA. No substantive changes, other than those discussed above, are intended.

#### *Section 702.506 Annual Supervisory Stress Testing*

Much of the substance of current § 702.506 would remain unchanged under the proposal. Each of the proposed substantive amendments are discussed in detail below. The proposal also would make a number of non-substantive conforming amendments to address certain changes in terminology.

##### (a) General Requirements

The proposal would amend current § 702.506(a) by adding a new clarifying sentence to the beginning of proposed paragraph (a). The new sentence would provide that only tier II and tier III credit unions are required to conduct supervisory stress tests. The Board believes that exempting tier I credit unions from supervisory stress testing provides prudent regulatory relief and enables tier I credit union time to develop their own capital adequacy assessments. The Board considers the supervisory stress testing exemption for tier I credit unions, which generally would be three years, after which the tier I credit union becomes a tier II credit union, to be sufficient time to develop internal capabilities to perform credit union-run supervisory stress tests.

##### NCUA-Run Tests

The proposal would delete current § 702.506(b), which, because of the other changes being proposed to part 702, would be overridden. The NCUA already reserves, in proposed

§ 702.506(b)(3), the right to conduct stress tests on covered credit unions if it deems such action necessary.

(b) Credit Union-Run Supervisory Stress Tests

The proposal would make significant revisions to current § 702.506(c) to require tier II and tier III credit unions to conduct their own stress tests instead of first having to get approval from the NCUA. Proposal § 702.506(b) would be split into three new subparagraphs, each of which is described in more detail below.

(b)(1) General

Proposed § 702.506(b)(1) would provide that all supervisory stress tests must be conducted according to the NCUA's instructions. The Board is proposing to add this requirement to ensure that supervisory stress tests performed by tier II and tier III credit unions are conducted in a manner that promotes consistency and comparability. Credit union-run stress tests must adhere to these principles in order for the NCUA to assess inherent risk in the portfolios of covered credit unions and establish supervisory benchmarks. The NCUA will publish credit union-run supervisory stress test instructions each year on its Web site. The instructions will contain general directives, and where appropriate, differentiate between tier II and tier III requirements.

(b)(2) Tier III Credit Unions

Proposed § 702.506(b)(2) would provide that when conducting its stress test, a tier III credit union must apply the minimum stress test capital ratio to all time periods in the planning horizon. The Board believes this requirement of the current remains pertinent, but only for tier III credit unions.

(b)(3) NCUA Tests

Proposed § 702.506(b)(3) would retain the last two sentences in current § 702.506(c), without change. Proposed § 702.506(b)(3) would provide that the NCUA reserves the right to conduct the tests described in this section on any covered credit union at any time. Proposed paragraph (b)(3) would provide further that where both the NCUA and a covered credit union have conducted the tests, the results of the NCUA's tests will determine whether the covered credit union has met the requirements of part 702. No substantive changes are being proposed with regard to these two sentences.

(f) Supervisory Actions

The proposal would retain much of the language in current § 702.506(g), but would insert some additional language. The section would also be broken into three subsections, each of which is discussed in more detail below.

(f)(1)

Proposed § 702.506(f)(1) would provide that if a *credit union-run* stress test shows a tier III credit union does not have the ability to maintain a stress test capital ratio of 5 percent or more under expected and stressed conditions in each quarter of the planning horizon, the credit union must incorporate into its capital plan a stress test capital enhancement plan showing how it will meet that target.

(f)(2)

This section of the proposal would retain the language from the first sentence in current § 702.506(g) and limit the application of paragraph (f)(2) to tier III credit unions. Proposed paragraph (f)(2) would provide that if an *NCUA-run* stress test shows that a tier III credit union does not have the ability to maintain a stress test capital ratio of 5 percent or more under expected and stressed conditions in each quarter of the planning horizon, the credit union must provide the NCUA, by November 30 of the calendar year in which the NCUA conducted the tests, a stress test capital enhancement plan showing how it will meet that target. As explained above, the NCUSIF risk exposure to a tier I and tier II credit union is sufficiently mitigated through qualitative and quantitative supervision of the credit union's capital planning and capital adequacy analysis. Accordingly, the proposed rule offers regulatory relief as tier 1 and tier II credit unions would no longer be subject to the minimum stress test capital ratio.

(f)(3)

This section of the proposal would retain the language in the last sentence in current § 702.506(g) and move it to proposed § 702.506(f)(3). The proposal also would limit the application of this section to only tier III credit unions. Proposed § 702.506(f)(3) would provide that a tier III credit union operating without an NCUA-approved stress test capital enhancement plan required under this section may be subject to supervisory action. A tier III credit union operating without an accepted capital plan or an approved stress test capital enhancement plan will be considered poorly managed and/or operating with insufficient capital to

support the credit union's risk profile. The Board believes it is prudent to subject a tier III credit union to heightened regulatory scrutiny under such circumstances.

**IV. Regulatory Procedures**

*1. Regulatory Flexibility Act*

The Regulatory Flexibility Act requires the NCUA to prepare an analysis of any significant economic impact any proposed regulation may have on a substantial number of small entities (primarily those under \$100 million in assets).<sup>8</sup> The proposed rule and its requirements will apply to only the largest credit unions, those with \$10 billion or more in total assets. Accordingly, the Board certifies that it will not have a significant economic impact on a substantial number of small entities.

*2. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden (44 U.S.C. 3507(d)). For purposes of the PRA, a paperwork burden may take the form of a reporting, recordkeeping, or a third-party disclosure requirement, referred to as information collections.

The NCUA is seeking comments on proposed revisions to the information collection requirements contained in Subpart E of part 702, which has been submitted to the Office of Management and Budget (OMB) for review and approval OMB control number 3133-0199. The information collection requirements are found in § 702.504, that requires FICUs with assets of at least \$10 billion (covered credit unions) to develop, maintain, and submit capital plans annually to NCUA. Proposed change amend § 702.506 to require tier 2 and 3 credit unions to conduct stress tests in a manner prescribed by NCUA. This reporting requirement will have an effect on five credit unions by increasing the information collection burden by an estimated 100 hours for each.

*Estimated number of respondents: 7.*

*Estimated number of responses per respondent: 1.*

*Estimated total annual responses: 7.*

*Estimated burden per response: 393 hours.*

*Total annual burden: 2,750 hours.*

*Comments are invited on:* (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including

<sup>8</sup> 5 U.S.C. 603(a); 12 U.S.C. 1787(c)(1).



whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) 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 on the proposed information collection requirements may be sent to the 1. Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for NCUA, New Executive Office Building, Room 10235, Washington, DC 20503, or email at *OIRA\_Submission@OMB.EOP.gov* and 2. NCUA PRA Clearance Officer, 1775 Duke Street, Alexandria, VA 22314, Suite 5067, or email at *PRAComments@ncua.gov*.

3. Executive Order 13132

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

4. Assessment of Federal Regulations and Policies on Families

The Board has determined that this proposed rule will not affect family well-being within the meaning of § 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105-277, 112 Stat. 2681 (1998).

List of Subjects in 12 CFR Part 702

Credit unions, Reporting and record keeping requirements.

By the National Credit Union Administration Board, on October 19, 2017. Gerard Poliquin, Secretary of the Board.

For the reasons discussed above, the National Credit Union Administration proposes to amend 12 CFR part 702 as follows:

PART 702—CAPITAL ADEQUACY

■ 1. Revise the authority citation for part 702 to read as follows:

Authority: 12 U.S.C. 1766(a), 1784(a), 1786(e), 1790d.

Subpart E—Capital Planning and Stress Testing

- 2. Amend § 702.502 as follows:
■ a. Remove the definition of "adverse scenario";
■ b. Add the definition of "capital planning cycle";
■ c. Remove from the definition of "covered credit union" the words "capital planning and stress testing" and add in their place the word "applicable";
■ d. Remove from the definition of "scenarios" the words "adverse and severely adverse" and add in their place the words "scenarios and stress";
■ e. Remove the definition of "severely adverse scenario";
■ f. Add the definition of "stress scenario"; and
■ g. Add the definitions of "tier I credit union", "tier II credit union", and "tier III credit union".

The additions and revisions read as follows:

§ 702.502 Definitions.

\* \* \* \* \*
Capital planning cycle means a complete round of capital planning over a one year period. The capital planning cycle begins on June 1 of a calendar year and ends on May 31, the capital plan submission date, of the following calendar year.

\* \* \* \* \*
Stress scenario means a scenario that is more adverse than that associated with the baseline scenario.

\* \* \* \* \*
Tier I credit union means a covered credit union that has completed fewer than three capital planning cycles and has less than \$20 billion in total assets.

Tier II credit union means a covered credit union that has completed three or more capital planning cycles and has less than \$20 billion in total assets, or is otherwise designated as a tier II credit union by NCUA.

Tier III credit union means a covered credit union that has \$20 billion or more

in total assets, or is otherwise designated as a tier III credit union by NCUA.

§ 702.504 [Amended]

- 3. Amend § 702.504 as follows:
■ a. Remove the last sentence in paragraph (a)(1);
■ b. Remove paragraph (b)(4); and
■ c. Redesignate paragraphs (b)(5) and (6) as paragraphs (b)(4) and (5), respectively.
■ 4. Amend § 702.505 as follows:
■ a. Revise paragraph (a);
■ b. In paragraph (d) introductory text, add the words "tier III" before the words "credit union's capital plan,"; and
■ c. In paragraph (e), remove the word "covered" and add in its place the words "tier III".

The revision reads as follows:

§ 702.505 NCUA action on capital gains.

(a) Timing—(1) Tier I & tier II credit unions. NCUA will address any deficiencies in the capital plans submitted by tier I and tier II credit unions through the supervisory process.

(2) Tier III credit unions. NCUA will notify tier III credit unions of the acceptance or rejection of their capital plans by August 31 of the year in which their plan is submitted.

\* \* \* \* \*

■ 5. Section 702.506 is revised to read as follows:

§ 702.506 Annual supervisory stress testing.

(a) General requirements. Only tier II and tier III credit unions are required to conduct supervisory stress tests. The supervisory stress tests consist of a baseline scenario, and stress scenarios, which NCUA will provide by February 28 of each year. The tests will be based on the credit union's financial data as of December 31 of the preceding calendar year, or such other date as directed by NCUA. The tests will take into account all relevant exposures and activities of the credit union to evaluate its ability to absorb losses in specified scenarios over a planning horizon. The minimum stress test capital ratio is 5 percent.

(b) Credit union-run supervisory stress tests—(1) General. All supervisory stress tests must be conducted according to NCUA's instructions.

(2) Tier III Credit Unions. When conducting its stress test, a tier III credit union must apply the minimum stress test capital ratio to all time periods in the planning horizon.

(3) NCUA tests. NCUA reserves the right to conduct the tests described in this section on any covered credit union at any time. Where both NCUA and a

covered credit union have conducted the tests, the results of NCUA's tests will determine whether the covered credit union has met the requirements of this subpart.

(c) *Potential impact on capital.* In conducting stress tests under this subpart, NCUA or the credit union will estimate the following for each scenario during each quarter of the planning horizon:

(1) Losses, pre-provision net revenues, loan and lease loss provisions, and net income; and

(2) The potential impact on the stress test capital ratio, incorporating the effects of any capital action over the planning horizon and maintenance of an allowance for loan losses appropriate for credit exposures throughout the horizon. NCUA or the credit union will conduct the stress tests without assuming any risk mitigation actions on the part of the credit union, except those existing and identified as part of the credit union's balance sheet, or off-balance sheet positions, such as derivative positions, on the date of the stress test.

(d) *Information collection.* Upon request, the credit union must provide NCUA with any relevant qualitative or quantitative information requested by NCUA pertinent to the stress tests under this subpart.

(e) *Stress test results.* A credit union required to conduct stress tests under this section must incorporate the results of its tests in its capital plan.

(f) *Supervisory actions.* (1) If a credit union-run stress test shows a tier III credit union does not have the ability to maintain a stress test capital ratio of 5 percent or more under expected and stressed conditions in each quarter of the planning horizon, the credit union must incorporate, into its capital plan, a stress test capital enhancement plan that shows how it will meet that target.

(2) If an NCUA-run stress test shows that a tier III credit union does not have the ability to maintain a stress test capital ratio of 5 percent or more under expected and stressed conditions in each quarter of the planning horizon, the credit union must provide NCUA, by November 30 of the calendar year in which NCUA conducted the tests, a stress test capital enhancement plan showing how it will meet that target.

(3) A tier III credit union operating without an NCUA approved stress test capital enhancement plan required under this section may be subject to supervisory actions.

(g) *Consultation on proposed action.* Before taking any action under this section against a federally insured, state-chartered credit union, NCUA will

consult and work cooperatively with the appropriate State official.

[FR Doc. 2017-23212 Filed 10-27-17; 8:45 am]

BILLING CODE 7535-01-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 622

[Docket No. 170828813-7813-01]

RIN 0648-BH15

#### Snapper-Grouper Fishery of the South Atlantic Region; Temporary Measures To Reduce Overfishing of Golden Tilefish

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

**ACTION:** Proposed temporary rule; request for comments.

**SUMMARY:** This proposed temporary rule would implement interim measures to reduce overfishing of golden tilefish in Federal waters of the South Atlantic. Beginning in 2018, this temporary rule would reduce the total annual catch limit (ACL), the commercial and recreational sector ACLs, and the quotas for the hook-and-line and longline components of the commercial sector. This proposed temporary rule would be effective for 180 days, although NMFS may extend the temporary rule's effectiveness for a maximum of an additional 186 days. The intended effect of this proposed temporary rule is to reduce overfishing of golden tilefish while the South Atlantic Fishery Management Council develops long-term management measures.

**DATES:** Written comments must be received by November 14, 2017.

**ADDRESSES:** You may submit comments on the proposed temporary rule, identified by "NOAA-NMFS-2017-0111," by either of the following methods:

- *Electronic submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal: <http://www.regulations.gov>. Go to [www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0111](http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0111) click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

- *Mail:* Submit written comments to Karla Gore, NMFS Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in required fields if you wish to remain anonymous).

Electronic copies of an environmental assessment (EA) supporting these interim measures may be obtained from the Southeast Regional Office Web site at [http://sero.nmfs.noaa.gov/sustainable\\_fisheries/s\\_atl/sg/2017/golden\\_tilefish\\_interim/index.html](http://sero.nmfs.noaa.gov/sustainable_fisheries/s_atl/sg/2017/golden_tilefish_interim/index.html). The EA includes a Regulatory Flexibility Act (RFA) analysis.

**FOR FURTHER INFORMATION CONTACT:**

Karla Gore, NMFS Southeast Regional Office, telephone: 727-551-5753, or email: [karla.gore@noaa.gov](mailto:karla.gore@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The snapper-grouper fishery in the South Atlantic region is managed under the Fishery Management Plan for Snapper-Grouper Fishery of the South Atlantic Region (FMP) and includes golden tilefish, along with other snapper-grouper species. The FMP was prepared by the South Atlantic Fishery Management Council (Council) and is implemented by NMFS through regulations at 50 CFR part 622 under authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

#### Background

The Magnuson-Stevens Act requires that NMFS and regional fishery management councils prevent overfishing and achieve, on a continuing basis, the optimum yield from federally managed fish stocks. These mandates are intended to ensure that fishery resources are managed for the greatest overall benefit to the nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems.

Golden tilefish are harvested by both commercial and recreational fishermen throughout the South Atlantic, although total landings are dominated by the commercial sector using bottom longline gear. Golden tilefish are also harvested commercially using hook-and-line gear, while the recreational

sector harvests at a much lower level than either component of the commercial sector. Using data through 2010, the golden tilefish stock was assessed in 2011 through the Southeast Data, Assessment, and Review (SEDAR) stock assessment process (SEDAR 25). SEDAR 25 results indicated that golden tilefish was not subject to overfishing, and was not overfished. Based upon the results of SEDAR 25, Amendment 18B to the FMP and its implementing final rule allocated the total ACL among the sectors and commercial gear components, and specified the ACLs based upon the allocation percentages, among other actions (78 FR 23858, April 23, 2013). For golden tilefish, 97 percent of the total ACL is allocated to the commercial sector, with 25 percent of the commercial ACL available for harvest by the hook-and-line component and 75 percent available for the longline component. The recreational sector is allocated three percent of the total ACL.

In April 2016, an update to SEDAR 25 was completed for golden tilefish using data through 2014 (SEDAR 25 Update 2016). The SEDAR 25 Update 2016 indicated that golden tilefish is undergoing overfishing but is not overfished. NMFS notified the Council of the updated stock status determination in a letter dated January 4, 2017. As mandated by the Magnuson-Stevens Act, NMFS and the Council must prepare and implement a plan amendment and regulations to end overfishing of golden tilefish.

In May 2016, the Council's Scientific and Statistical Committee (SSC) reviewed the SEDAR 25 Update 2016 and provided fishing level recommendations for the stock. The SSC determined that the SEDAR 25 Update 2016 was based on the best scientific information available. The Council received the results of the SEDAR 25 Update 2016 and the SSC recommendations in June 2016, and Council members stated their concern over the large differences in biological benchmarks between SEDAR 25 and the SEDAR 25 Update 2016 and the much lower fishing level recommendations in the SEDAR 25 Update 2016. The Council subsequently requested that the SSC review the SEDAR 25 Update 2016, primarily as a result of their concerns about the socio-economic consequences of the large catch level reductions suggested by the SEDAR 25 Update 2016, and the large buffer recommended between the acceptable biological catch (ABC) and the overfishing limit.

In May 2017, the SEDAR Steering Committee considered a Council request for another golden tilefish update assessment, which was intended to

address the SEDAR 25 Update 2016 concerns raised by the Council and their SSC during their earlier reviews. While an update assessment could not be included in the SEDAR schedule for 2017, the Southeast Fisheries Science Center agreed to revise the SEDAR 25 Update 2016 to address these Council concerns.

The revised stock assessment for golden tilefish will be reviewed by the SSC at its October 2017 meeting, and the Council is scheduled to discuss the revised assessment results at their December 2017 meeting. The results of the revised assessment will be used to develop Amendment 45 to the FMP, which is intended to end overfishing of golden tilefish with long-term management measures.

The revised ABC recommendations from the Council's SSC will not be available until late October 2017, which provides insufficient time for the Council and NMFS to develop and implement management measures, respectively, to end overfishing of golden tilefish in time for the start of the 2018 fishing year on January 1, 2018. Therefore, in a letter to NMFS dated June 27, 2017, the Council requested that NMFS implement interim measures to immediately reduce overfishing of golden tilefish while long-term measures can be developed through Amendment 45. For 2018, the Council recommended setting the total ACL at the projected yield at 75 percent of the yield produced by the fishing mortality rate at maximum sustainable yield, which would be 323,000 lb (146,510 kg), gutted weight, 361,760 lb (164,092 kg), round weight. The interim measures in a final temporary rule would be effective for 180 days after the publication date in the **Federal Register** and may be extended for an additional 186 days. If NMFS does not extend the proposed interim measures beyond 180 days, the total and sector ACLs, as well as the quotas for the hook-and-line and longline components of the commercial sector would revert to their current values.

#### **Management Measures Contained in This Proposed Temporary Rule**

During the effectiveness of this proposed temporary rule in 2018, the total ACL for golden tilefish would be 323,000 lb (146,510 kg), gutted weight, 361,760 lb (164,092 kg), round weight. This proposed temporary rule would also specify the commercial and recreational sector ACLs and component commercial quotas using the existing sector allocations of 97 percent commercial and 3 percent recreational, as well as 25 percent of the commercial

ACL available for the hook-and-line component and 75 percent available for the longline component. Therefore, during the effectiveness of this proposed temporary rule in 2018, the commercial ACL would be 313,310 lb (142,115 kg), gutted weight. The commercial quota for the hook-and-line component would be 78,328 lb (35,529 kg), gutted weight, and the commercial quota for the longline component would be 234,982 lb (106,586 kg), gutted weight. The recreational ACL during the effectiveness of this proposed temporary rule in 2018 would be 2,187 fish, which is equivalent to 9,690 lb (4,395 kg), gutted weight.

The temporary reductions in the ACLs could result in earlier in-season closures particularly for the commercial sector. The earlier closures would likely result in short-term adverse socio-economic effects. However, the temporary ACLs and quotas are expected to minimize future adverse socio-economic effects by potentially reducing future reductions in the ACLs and quotas required to end overfishing through Amendment 45. The temporary ACLs and quotas would also provide biological benefits to the golden tilefish stock by reducing the current levels of fishing mortality.

#### **Future Action**

NMFS has determined that this proposed temporary rule is necessary to reduce overfishing of golden tilefish in the South Atlantic. NMFS will consider all public comments received on this proposed temporary rule in determining whether to proceed with a final temporary rule and, if so, whether any revisions to the final temporary rule would be appropriate. If NMFS issues a final temporary rule, it would be effective for not more than 180 days after the date of publication in the **Federal Register**, as authorized by section 305(c) of the Magnuson-Stevens Act. The final temporary rule could be extended if NMFS publishes a temporary rule extension in the **Federal Register** for up to an additional 186 days, provided that the public has had an opportunity to comment on the rule, such as through this proposed temporary rule.

#### **Classification**

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed temporary rule is consistent with the Magnuson-Stevens Act, and other applicable laws, subject to further consideration after public comment.

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

NMFS prepared an initial regulatory flexibility analysis (IRFA) for this proposed temporary rule, as required by section 603 of the RFA, 5 U.S.C. 603. The IRFA describes the economic impact that this proposed temporary rule, if implemented, would have on small entities. A description of this proposed temporary rule, why it is being considered, and the objectives of, and legal basis for this proposed temporary rule are contained at the beginning of this section in the preamble and in the **SUMMARY** section of the preamble. A copy of the full analysis is available from the NMFS (see **ADDRESSES**). A summary of the IRFA follows.

The Magnuson-Stevens Act provides the statutory basis for this rule. No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting, record-keeping, or other compliance requirements are introduced by this proposed temporary rule. Accordingly, this rule does not implicate the Paperwork Reduction Act.

This proposed temporary rule, if implemented, would be expected to directly affect all commercial vessels that harvest South Atlantic golden tilefish under the FMP. The change in recreational ACL in this proposed temporary rule would not directly apply to or regulate charter vessel and headboat (for-hire) businesses. Any impact to the profitability or competitiveness of for-hire fishing businesses would be the result of changes in for-hire angler demand and would therefore be indirect in nature. The RFA does not consider recreational anglers, who would be directly affected by this proposed temporary rule, to be small entities, so they are outside the scope of this analysis and only the effects on commercial vessels were analyzed. For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including affiliates), and has combined annual receipts not in excess of \$11 million for all its affiliated operations worldwide.

As of August 10, 2017, there were 544 vessels with valid or renewable Federal South Atlantic snapper-grouper unlimited permits, 114 valid or

renewable 225-lb trip limited permits, and 22 golden tilefish longline endorsements. The golden tilefish longline endorsement system started in 2013. From 2012 through 2016, an average of 23 longline vessels per year landed golden tilefish in the South Atlantic. These vessels, combined, averaged 255 trips per year in the South Atlantic on which golden tilefish were landed, and 182 trips taken in the South Atlantic on which no golden tilefish were harvested or in areas outside the South Atlantic. The average annual total dockside revenue (2016 dollars) for these vessels combined was approximately \$1.56 million from golden tilefish, \$0.10 million from other species co-harvested with golden tilefish (on the same trips), and \$0.43 million from trips in the South Atlantic on which no golden tilefish were harvested or in areas outside the South Atlantic. Total average annual revenue from all species harvested by longline vessels harvesting golden tilefish in the South Atlantic was approximately \$2.10 million, or approximately \$92,000 per vessel. Longline vessels generated approximately 74 percent of their total revenues from golden tilefish. For the same period, an average of 82 vessels per year landed golden tilefish using other gear types (mostly hook-and-line) in the South Atlantic. These vessels, combined, averaged 483 trips per year in the South Atlantic on which golden tilefish were landed, and 2,862 trips taken in the South Atlantic on which no golden tilefish were harvested or in areas outside the South Atlantic. The average annual total dockside revenue (2016 dollars) for these 82 vessels was approximately \$0.36 million from golden tilefish, \$0.66 million from other species co-harvested with golden tilefish (on the same trips in the South Atlantic), and \$4.13 million from trips in the South Atlantic on which no golden tilefish were harvested or in areas outside the South Atlantic. The total average annual revenue from all species harvested by these 82 vessels was approximately \$5.16 million, or approximately \$62,000 per vessel. Approximately seven percent of these vessels' total revenues came from golden tilefish. Based on the foregoing revenue information, all commercial vessels using longlines or other gear types (mostly hook-and-line) affected by the proposed temporary rule may be assumed to be small entities.

Because all entities expected to be directly affected by this proposed temporary rule are assumed to be small entities, NMFS has determined that this proposed temporary rule would affect a

substantial number of small entities. For the same reason, the issue of disproportionate effects on small versus large entities does not arise in the present case.

Reducing the South Atlantic stock ACL for golden tilefish would reduce the specific ACLs for the commercial and recreational sectors. These ACL reductions would result in ex-vessel revenue losses of approximately \$229,000 for hook-and-line vessels and \$600,000 for longline vessels over the entire 2018 fishing year. Ex-vessel revenue reductions for the commercial sector would result in profit reductions, although this is more likely for longline vessels as they are more dependent on golden tilefish than hook-and-line vessels.

The following discusses the alternatives that were not selected as preferred by the Council.

Four alternatives, including the preferred alternative as described above, were considered for reducing the stock and sector ACLs for South Atlantic golden tilefish. The first alternative, the no action alternative, would maintain the current economic benefits to all participants in the South Atlantic golden tilefish component of the snapper-grouper fishery. This alternative, however, would not address the need to curtail continued overfishing of the stock, very likely leading into the adoption of more stringent measures in the near future. The second alternative would reduce the ACLs more than the preferred alternative, and thus would be expected to result in larger revenue (and profit) losses to the commercial sector. The third alternative would establish higher ACLs than the preferred alternative. Although this alternative would result in lower revenue losses to the commercial sector, the ACLs it would establish may not be low enough to address the overfishing status of the stock. To an extent, this alternative would leave open a greater likelihood of implementing more stringent measures when more long-term management actions are implemented in Amendment 45.

#### List of Subjects in 50 CFR Part 622

Annual catch limit, Fisheries, Fishing, Golden tilefish, South Atlantic.

Dated: October 23, 2017.

**Samuel D. Rauch, III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

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

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

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

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

■ 2. In § 622.190, suspend paragraphs (a)(2)(i) through (iii) and add paragraphs (a)(2)(iv) through (vi) to read as follows:

**§ 622.190 Quotas.**

\* \* \* \* \*

(a) \* \* \*

(2) \* \* \*

(iv) *Hook-and-line and longline components combined*—313,310 lb (142,115 kg).

(v) *Hook-and-line component*—78,328 lb (35,529 kg).

(vi) *Longline component*—234,982 lb (106,586 kg).

\* \* \* \* \*

■ 3. In § 622.193, suspend paragraphs (a)(1)(i), (ii), and (iii), and (a)(2), and add paragraphs (a)(1)(iv), (v), and (vi), and (a)(3) to read as follows:

**§ 622.193 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).**

(a) \* \* \*

(1) \* \* \*

(iv) *Hook-and-line component.* If commercial landings for golden tilefish, as estimated by the SRD, reach or are projected to reach the commercial ACL (commercial quota) specified in § 622.190(a)(2)(v), the AA will file a notification with the Office of the Federal Register to close the hook-and-line component of the commercial sector for the remainder of the fishing year. Applicable restrictions after a commercial quota closure are specified in § 622.190(c).

(v) *Longline component.* If commercial landings for golden tilefish, as estimated by the SRD, reach or are projected to reach the commercial ACL (commercial quota) specified in § 622.190(a)(2)(vi), the AA will file a notification with the Office of the Federal Register to close the longline component of the commercial sector for the remainder of the fishing year. After the commercial ACL for the longline component is reached or projected to be reached, golden tilefish may not be fished for or possessed by a vessel with a golden tilefish longline endorsement. Applicable restrictions after a commercial quota closure are specified in § 622.190(c).

(vi) If commercial landings of golden tilefish, as estimated by the SRD, exceed the commercial ACL (including both the hook-and-line and longline component

quotas) specified in § 622.190(a)(2)(iv), and the combined commercial and recreational ACL of 323,000 lb (146,510 kg), gutted weight, 361,760 lb (164,092 kg), round weight, is exceeded during the same fishing year, and golden tilefish are overfished based on the most recent Status of U.S. Fisheries Report to Congress, the AA will file a notification with the Office of the Federal Register to reduce the commercial ACL for that following fishing year by the amount of the commercial ACL overage in the prior fishing year.

\* \* \* \* \*

(3) *Recreational sector.* (i) If recreational landings of golden tilefish, as estimated by the SRD, reach or are projected to reach the recreational ACL of 2,187 fish, the AA will file a notification with the Office of the Federal Register to close the recreational sector for the remainder of the fishing year regardless if the stock is overfished, unless NMFS determines that no closure is necessary based on the best scientific information available. On and after the effective date of such a notification, the bag and possession limits for golden tilefish in or from the South Atlantic EEZ are zero.

(ii) If recreational landings of golden tilefish, as estimated by the SRD, exceed the recreational ACL, then during the following fishing year recreational landings will be monitored for a persistence in increased landings, and if necessary, the AA will file a notification with the Office of the Federal Register to reduce the length of the recreational fishing season and the recreational ACL by the amount of the recreational ACL overage, if the species is overfished based on the most recent Status of U.S. Fisheries Report to Congress, and if the combined commercial and recreational ACL of 323,000 lb (146,510 kg), gutted weight, 361,760 lb (164,092 kg), round weight, is exceeded during the same fishing year. The AA will use the best scientific information available to determine if reducing the length of the recreational fishing season and recreational ACL is necessary. When the recreational sector is closed as a result of NMFS reducing the length of the recreational fishing season and ACL, the bag and possession limits for golden tilefish in or from the South Atlantic EEZ are zero.

\* \* \* \* \*

[FR Doc. 2017-23453 Filed 10-27-17; 8:45 am]

**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 622**

[Docket No. 170619570-7570-01]

**RIN 0648-BG92**

**Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Modifications to the Number of Unrigged Hooks Carried On Board Bottom Longline Vessels**

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes to implement management measures described in an abbreviated framework action to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP), as prepared by the Gulf of Mexico (Gulf) Fishery Management Council (Council). This proposed rule would remove the limit on the number of unrigged hooks that a commercial reef fish vessel with a bottom longline endorsement is allowed on board when using or carrying bottom longline gear in the Federal waters of the eastern Gulf. The proposed rule would not change the limit of 750 hooks that these vessels can have rigged for fishing at any given time. The purpose of the proposed rule is to reduce the regulatory and potential economic burden to bottom longline fishers.

**DATES:** Written comments must be received by November 14, 2017.

**ADDRESSES:** You may submit comments on the proposed rule, identified by “NOAA-NMFS-2017-0081” by either of the following methods:

- *Electronic Submission:* Submit all electronic comments via the Federal Rulemaking Portal. Go to [www.regulations.gov/](http://www.regulations.gov/)

- *#!docketDetail;D=NOAA-NMFS-2017-0081*, click the “Comment Now!” icon, complete the required fields, and enter your attached comments.

- *Mail:* Submit all written comments to Kelli O'Donnell, NMFS Southeast Regional Office (SERO), 263 13th Avenue South, St. Petersburg, FL 33701.

- *Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record

and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in required fields if you wish to remain anonymous).

Electronic copies of the abbreviated framework action, which includes an environmental assessment, Regulatory Flexibility Act (RFA) analysis, and a regulatory impact review, may be obtained from [www.regulations.gov](http://www.regulations.gov) or the SERO Web site at [http://sero.nmfs.noaa.gov/sustainable\\_fisheries/gulf\\_fisheries/reef\\_fish/2017/Unrigged%20hooks/Unrigged\\_hooks\\_index.html](http://sero.nmfs.noaa.gov/sustainable_fisheries/gulf_fisheries/reef_fish/2017/Unrigged%20hooks/Unrigged_hooks_index.html).

**FOR FURTHER INFORMATION CONTACT:**

Kelli O'Donnell, NMFS SERO, telephone: 727-824-5305, email: [Kelli.ODonnell@noaa.gov](mailto:Kelli.ODonnell@noaa.gov).

**SUPPLEMENTARY INFORMATION:** The Gulf reef fish fishery includes the commercial bottom longline component and is managed under the FMP. The Council prepared the FMP and NMFS implements the FMP under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) through regulations at 50 CFR part 622.

**Background**

The Magnuson-Stevens Act requires NMFS and regional fishery management councils to prevent overfishing and achieve, on a continuing basis, the optimum yield from federally managed fish stocks to ensure that fishery resources are managed for the greatest overall benefit to the nation.

In 2008, using data from Federal fishery observers, the NMFS Southeast Fisheries Science Center estimated sea turtle takes by the commercial bottom longline component of the Gulf reef fish fishery exceeded the 3-year anticipated take levels that were described in the 2005 Endangered Species Act biological opinion on the reef fish fishery. Therefore, the Council and NMFS developed management measures in Amendment 31 to the FMP to reduce sea turtle takes by the bottom longline component of the Gulf reef fish fishery (75 FR 21512; April 26, 2010). These management measures require an endorsement to the Federal commercial reef fish permit to fish for reef fish using bottom longline gear in the Gulf east of 85°30' west longitude (near Cape San Blas, FL), and a seasonal closure for bottom longline gear use in that area. In

addition, vessels in that area that have the endorsement and are fishing with bottom longline gear or have bottom longline gear on board cannot possess more than 1,000 hooks total per vessel of which no more than 750 hooks can be rigged for fishing.

**Management Measures Contained in This Proposed Rule**

This proposed rule would remove the current limitation on the number of unrigged hooks allowed per bottom longline vessel in the eastern Gulf EEZ, while retaining the limit of 750 hooks that can be rigged for fishing.

Since the implementation of Amendment 31, bottom longline endorsement holders using bottom longline gear in the eastern Gulf EEZ have reported increases in bottom longline hook losses due to shark bite-offs and through normal fishing effort. Therefore, vessel operators that use bottom longline gear in the eastern Gulf EEZ requested that the Council increase the number of total unrigged hooks per vessel, while still keeping in place the restriction of 750 hooks rigged to fish at any one time.

Observer data from 2010–2016 has shown the average amount of hooks lost per commercial bottom longline trip in the eastern Gulf EEZ is 300 hooks. Under the current total possession limit, if more than 250 hooks are lost, a vessel either has to fish with fewer than 750 hooks, get additional hooks from other vessels to maintain the maximum number of hooks in the water, or return to port. Based on public testimony, removing the restriction on the total number of hooks kept on board is expected to make trips more economical by allowing fishing with the maximum number of hooks to continue without having to return to port or request additional hooks from other vessels. In addition, maintaining the current limit of 750 hooks rigged for fishing would preserve the reductions in sea turtle interactions since the implementation of Amendment 31.

**Classification**

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with the FMP, the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment.

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

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the

Small Business Administration (SBA) that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification is as follows.

A description of this proposed rule, why it is being considered, and the objectives of, and legal basis for this proposed rule are contained in the preamble.

This proposed rule would directly affect commercial fishing vessels that use bottom longline gear to harvest reef fish from the Gulf EEZ east of 85°30' west longitude, east of Cape San Blas, FL. These vessels are required to have an eastern Gulf reef fish bottom longline endorsement, and as of July 6, 2017, 62 vessels have that endorsement.

NMFS estimates up to 62 commercial longline vessels could be directly affected annually, and that 36 to 37 businesses own these 62 vessels. These businesses represent approximately 6 percent of the 631 businesses that own at least one commercial fishing vessel with a Gulf reef fish permit. NMFS expects that most to all of the directly affected vessels make their landings in Florida, and from 2011 through 2015, an annual average of 59 longline vessels landed Gulf reef fish in the state and individually landed an average of 71,130 lb (32,264 kg), gutted weight, of reef fish annually. With an average 2015 dockside price of \$4.01 per lb, gutted weight, the average longline vessel had annual dockside revenue of \$285,231 from reef fish landings. That annual revenue is estimated to represent approximately 98 to 99 percent of the average longline vessel's annual revenues from all landings.

For RFA purposes, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily involved in commercial fishing (NAICS 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and its combined annual receipts are not in excess of \$11 million for all of its affiliated operations worldwide. Based on the average annual dockside revenue of a longline vessel, it is expected that most to all of the businesses that would be directly affected by the proposed rule are small.

Since May 2010, within the Gulf EEZ east of 85°30' west longitude, a vessel for which a valid eastern Gulf reef fish bottom longline endorsement has been issued and that is fishing bottom longline gear or has bottom longline

gear on board cannot possess more than a total of 1,000 hooks, and no more than 750 hooks can be rigged for fishing at any given time.

Industry representatives have indicated that a total of 1,000 hooks is not enough on long trips to compensate for hook losses due to sharks' biting hooks off and other general reasons. Under the current total possession limit, if more than 250 hooks are lost, a vessel either has to fish with fewer than 750 hooks or acquire additional hooks from other vessels to maintain the maximum number of hooks in the water. A third option is for the vessel to end the trip and return to port; however, that reduces the vessel landings. Observer data indicates an average of over 250 hooks were lost per trip from 2011 through 2016; however, despite the total hook limit and the average hook loss, average landings of reef fish per longline trip increased over that time.

The proposed rule would allow a vessel with a longline endorsement to possess an unlimited number of hooks, but it would not change the maximum number that can be rigged for fishing. Any bottom longline vessel that would increase the total number of hooks it possesses beyond 1,000 would do so only if there were an economic benefit of doing so. Removing the limit on the number of unrigged hooks that can be onboard is expected to improve fishers' ability to maintain the maximum number of rigged hooks over the duration of a trip. There is insufficient information to estimate the number of vessels that may benefit from possessing more than 1,000 hooks and the magnitude of such a benefit.

NMFS expects this proposed rule would not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required and none has been prepared.

No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting, record-keeping, or other compliance requirements are introduced by this proposed rule. Accordingly, this proposed rule does not implicate the Paperwork Reduction Act.

#### List of Subjects in 50 CFR Part 622

Bottom longline gear, Fisheries, Fishing, Gulf of Mexico, Reef fish.

Dated: October 24, 2017.

**Samuel D. Rauch, III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

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

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

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

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

■ 2. In § 622.35, revise the first sentence of paragraph (b)(3) to read as follows:

#### **§ 622.35 Gear restricted areas.**

\* \* \* \* \*

(b) \* \* \*

(3) Within the Gulf EEZ east of 85°30' W. long., a vessel for which a valid eastern Gulf reef fish bottom longline endorsement has been issued that is fishing bottom longline gear or has bottom longline gear on board cannot possess more than 750 hooks rigged for fishing at any given time. \* \* \*

\* \* \* \* \*

[FR Doc. 2017-23460 Filed 10-27-17; 8:45 am]

**BILLING CODE 3510-22-P**

#### **DEPARTMENT OF COMMERCE**

#### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 660**

[Docket No. 170627602-7602-01]

**RIN 0648-BG98**

#### **Magnuson-Stevens Act Provisions; Fisheries Off West Coast States; Pacific Coast Groundfish Fishery; Pacific Whiting; Pacific Coast Groundfish Fishery Management Plan; Amendment 21-3; Trawl Rationalization Program**

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes this interim measure to change the management of the Pacific whiting at-sea sectors' (*i.e.*, the Mothership (MS) and Catcher/Processor (C/P) sectors) allocations for darkblotched rockfish and Pacific ocean perch (POP) by managing the allocations as set-asides rather than as total catch limits. This rule also proposes

regulations in accordance with Amendment 21-3 to the Pacific Coast Groundfish Fishery Management Plan (PCGFMP) (see electronic access under **SUPPLEMENTARY INFORMATION**). The proposed action would revise regulations so that higher than anticipated harvest of darkblotched rockfish or POP that exceeds a sector's initial distribution of those species would not require automatic closure of one or more of the Pacific whiting at-sea sectors. This action is intended to reduce the risk of those sectors not attaining their respective Pacific whiting allocations based on the incidental catch of darkblotched rockfish or POP, when allowing the sector(s) to remain open would not exceed their respective annual catch limit (ACLs). This action would not change or increase the risk of exceeding darkblotched rockfish or POP ACL, as the proposed rule would also allow NMFS to close one or both of the MS and C/P sectors via automatic action if the species-specific set-aside amounts plus the available reserve for unforeseen catch events, known colloquially as the "buffer," are anticipated to be exceeded.

**DATES:** Comments on this proposed rule must be received no later than November 27, 2017.

**ADDRESSES:** You may submit comments on this document, identified by NOAA-NMFS-2017-0102 by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to [www.regulations.gov](http://www.regulations.gov) / `#!docketDetail;D=NOAA-NMFS-2017-0102`, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Mail:* Barry A. Thom, Regional Administrator, West Coast Region, NMFS, 7600 Sand Point Way NE., Seattle, WA 98115-0070, Attn: Miako Ushio.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (*e.g.*, name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in

Microsoft Word, Excel, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:**

Miako Ushio, phone: 206–526–4644, or email: [miako.ushio@noaa.gov](mailto:miako.ushio@noaa.gov).

**SUPPLEMENTARY INFORMATION:**

**Electronic Access**

This proposed rule is accessible via the Internet at the Office of the Federal Register Web site at <https://www.federalregister.gov>. Background information and documents are available at the NMFS West Coast Region Web site at <http://www.westcoast.fisheries.noaa.gov/fisheries/groundfish/index.html> and at the Pacific Fishery Management Council's Web site at <http://www.pcouncil.org/groundfish/fishery-management-plan/groundfish-amendments-in-development/>. On September 27, 2017, NMFS published a notice of availability of Amendment 21–3 to the PCGFMP (82 FR 44984). Consistent with requirements of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), NMFS must make a decision to approve, disapprove, or partially approve the amendment by December 26, 2017. Comments on the approvability of the amendment must be submitted to NMFS by November 26, 2017.

**Background: Fishery**

Bycatch of rockfish species in the Pacific whiting fishery occurs at very low rates, but sporadically and unpredictably. Regulations at 50 CFR 660.55 address the allocation of these groundfish. Darkblotched rockfish and POP are caught almost exclusively by vessels in the shorebased Individual Fishing Quota (IFQ) and at-sea Pacific whiting sectors of the groundfish fishery. NMFS declared both species overfished in 2000 and 1999, respectively, and both stocks are currently managed under rebuilding plans as a result. Populations of both species have shown dramatic improvement in recent years. Darkblotched rockfish was declared rebuilt in June 2017, and a draft 2017 stock assessment indicates that POP may be rebuilt. They are currently managed as allocations, and NMFS automatically closes a fishery sector when it has reached its allocation of either species.

In recent years, both at-sea sectors of the Pacific whiting fishery have exceeded their initial annual allocation of darkblotched rockfish (C/P sector in 2011, and the MS sector in 2014). The latter resulted in an emergency Pacific

Fishery Management Council (Council) meeting in order to re-open the fishery. The risk of an inseason closure of these sectors remains high, although the rebuilding ACLs of these rockfish are far from being reached. For example: The most recent fishing mortality estimates by NMFS' Northwest Fisheries Science Center indicate that 44 and 38 percent of the darkblotched rockfish and POP ACLs, respectively, were caught in 2015. While harvest of these species at a level below the ACL may rebuild stocks more quickly, there is a negative socioeconomic impact from preventing harvest of Pacific whiting, as intended in the PCGFMP.

**Background: Current Allocations Under Amendment 21**

The Council established allocations of darkblotched rockfish and POP for the at-sea sectors in Amendment 21 to the PCGFMP. When the Council considered allocation of these species, the analysis only incorporated data on catch through 2005, and took the overfished status of the species into account when they set up the allocation structure. Ten years of additional data on bycatch in the at-sea sectors are now available. Additionally, six full years of the Shorebased IFQ Program (which was implemented in 2011, 75 FR 60868) fishery information is available. This new information indicates that the stocks of both species are currently much healthier than they were at the time Amendment 21 was implemented.

The Council's Amendment 21 allocation recommendation was based, in part, on the idea that the C/P and MS sectors could avoid early closures by moving to areas of lower rockfish encounter rates if they were approaching a bycatch allocation. However, experience has shown that this assumption was likely too simplistic. Despite the mitigating measures enacted by the C/P and MS coops, darkblotched rockfish bycatch remains particularly variable with the potential for rapid accumulation. The 2014 closure of the MS sector provides an illustration; closure occurred after six hauls caught 4.5 mt of darkblotched rockfish, nearly 75 percent of their 2014 allocation, with the bulk coming from three of the hauls. Some of the largest hauls were delivered to motherships so closely in time that feedback on the size of the catches from observers came too late for the MS coop to effectively respond. Prior to this "lightning strike" event, the sector had made 969 hauls and caught only 2.5 mt of darkblotched rockfish. After the sector was re-opened by an emergency meeting of the Council, the sector made 330 additional

hauls that brought in over 14,500 mt of Pacific whiting and only 0.1 mt of additional darkblotched rockfish. The C/P sector has experienced even more rapid accumulations of darkblotched rockfish bycatch, and would have been closed late in the 2011 season if unused allocation had not been available from the MS sector, which had already completed fishing. These events indicate that the current management structure may be adversely impacting the at-sea sectors to a greater degree than was anticipated when the Council adopted the current allocation structure under Amendment 21, due to unpredictability and high volume of bycatch events.

**Background: Amendment 21–3**

The Council has discussed a variety of solutions to reducing the risk of closure of the Pacific whiting at-sea sectors prior to attainment of their Pacific whiting allocations, such as allowing transfer of rockfish quota between sectors, but it determined that those solutions are too complex to be analyzed and implemented in a timely manner. At its September 2016 meeting, the Council recommended the interim measure of amending the PCGFMP and implementing revised regulations, so that the amounts of darkblotched rockfish and POP allocated to the C/P and MS sectors are managed as set-asides rather than as total catch limits. The Council also recommended giving NMFS inseason authority to automatically close one or both of the C/P and MS sectors in the event the species-specific set-aside amounts plus the available reserve for unforeseen catch events, known colloquially as the "buffer," are anticipated to be exceeded.

This action would not revise allocations between sectors, which were set by Amendment 21 to the PCGFMP, and is intended to be an interim solution to address the immediate needs of the C/P and MS sectors. Long-term solutions are being reviewed by a Council-appointed Community Advisory Board as part of the 5-year review of the trawl rationalization program. A long-term solution to address the needs of the C/P and MS sectors will focus specifically on fairly and equitably revising the allocation between the trawl sectors, and among all the groundfish fishery sectors, while leaving any applicable stock rebuilding plans unaffected.

**Intent of the Action**

This proposed action is intended to substantially reduce the risk of the Pacific whiting at-sea sectors not attaining their respective Pacific whiting



allocations based on the incidental catch of darkblotched rockfish or POP, when allowing the sector(s) to remain open would not exceed ACLs for these rebuilding stocks. It would revise regulations so that higher than anticipated harvest of darkblotched rockfish or POP that exceeds the initial distribution of those species to the at-sea sectors will not require automatic closure of one or more of the at-sea sectors.

The proposed rule would also allow NMFS to close one or both of the C/P and MS sectors of the Pacific whiting fishery via automatic action when the set-aside for that sector, plus the available reserve for unforeseen catch events, is reached or is expected to be reached for either darkblotched rockfish or POP. Because of near real-time monitoring by the C/P and MS Coop Programs, and the ability of those programs to respond quickly to changing fishery conditions, closures would occur before allocations to other fisheries or the ACLs are reached, thus limiting the potential effects and precluding potential negative biological and socioeconomic impacts of the proposed action.

#### Classification

Pursuant to section 304 (b)(1)(A) of the Magnuson-Stevens Act, NMFS has preliminarily determined that this proposed rule is consistent with the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment. In making its final determination, NMFS will take into account the complete record, including the data, views, and comments received during the comment period.

NMFS has determined that the proposed action would not have a significant effect, individually or cumulatively, on the human environment and does not involve any extraordinary circumstances listed in The National Oceanic and Atmospheric Administration (NOAA) Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities (NOAA Administrative Order (NAO) 216-6A and the Companion Manual for NAO 216-6A). For purposes of review under the National Environmental Protection Act, the proposed action is not part of any larger action, and can be reviewed independently. Furthermore, NMFS determined that the proposed action may appropriately be categorically excluded from the requirement to prepare either an environmental assessment or environmental impact

statement, in accordance with the Companion Manual for NAO 216-6A.

Under the Regulatory Flexibility Act (RFA), an agency does not need to conduct an Initial Regulatory Flexibility Act Analysis or Final Regulatory Flexibility Act Analysis if a certification can be made that the proposed rule, if adopted, will not have a significant adverse economic impact on a substantial number of small entities, as defined below (5 U.S.C. 601). The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities as described in this document.

The Small Business Administration has established the following size criteria for entities classified under North American Industry Classification System (NAICS). Standards are expressed either in number of employees or annual receipts in millions of dollars. The number of employees or annual receipts indicates the maximum allowed for a concern and its affiliates to be considered small (13 CFR 121.201). A fish and seafood merchant wholesaler primarily engaged in servicing the fishing industry is a small business if it employs 100 or fewer persons, on a full-time, part-time, temporary, or other basis, at all its affiliated operations worldwide (NAICS 424460). A business primarily engaged in seafood product preparation and packaging is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 750 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide (NAICS 311710). For purposes of this action, NMFS West Coast Region is applying the seafood processor standard to C/Ps and MS processor ships, which earn the majority of their revenue from selling processed seafood product. Under SBA size standards, a nonprofit organization is determined to be a small entity if (1) it is not dominant in its field of operation; and (2) for environmental, conservation, or professional organizations if combined annual receipts are \$15 million or less (NAICS 813312, 813920), and for other organizations if combined annual receipts are \$7.5 million or less (NAICS 813319, 813410, 813910, 813930, 813940, 813990). For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing; a business primarily engaged in

commercial fishing (NAICS 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including affiliates), and has combined annual receipts not in excess of \$11 million for all its affiliated operations worldwide (50 CFR 200.2).

For the purposes of the RFA, small governmental jurisdictions such as governments of cities, counties, towns, townships, villages, school districts, or special districts are considered small jurisdictions if their populations are less than 50,000 (5 U.S.C. 601).

*A description and estimate of the number of small entities to which the rule applies and economic impacts on small entities, by entity size and industry.*

Four companies own seven permitted mothership vessels. Each year, three to six MS vessels participate in the Pacific whiting fishery. The average number of crew on each MS vessel is 104 individuals. When considering operations in Alaska, none of the MSs would be considered small businesses.

The 17 catcher vessels that participated in the mothership coop spend about 30 percent of their total annual fishing days processing in the Pacific whiting fishery. The majority of their time is spent in the Alaska Pollock fishery. Almost 90 percent of the overall round weight taken by these vessels is taken in Alaska, and approximately 11 percent is taken in the Pacific whiting fishery.

Three companies own nine permitted C/P fleet vessels. C/Ps are large vessels with an average crew of 131 individuals.

Vessels in the C/P fleet spend about 20 percent of their total days fishing in the Pacific whiting fishery and 80 percent in the Alaska Pollock fishery. About 90 percent of the total round weigh taken by the C/Ps is taken in Alaska, and approximately 10 percent is taken in the Pacific whiting fishery. When considering operations from Alaska, none of the C/Ps would be considered small businesses.

*An explanation of the criteria used to evaluate whether the rule would impose "significant impacts" on small entities.*

The proposed action is primarily administrative in nature, as it does not change the ACLs for either the Pacific whiting at-sea sectors or the allocations levels of darkblotched rockfish and POP. This action is not expected to significantly reduce profit for a substantial number of small entities, because there are no associated compliance requirements or costs.

*An explanation of the criteria used to evaluate whether the rule would impose*

impacts on “a substantial number” of small entities.

Two MS permit/processor owning companies self-identified on the most recent (2016) permit renewal as small businesses, and the other two identified as not being small businesses. All three companies owning C/P permits and vessels responded as not being small entities on the most recent (2016) permit renewal form. Of the 35 MS catcher vessel permits, 34 were registered to vessels with the MS catcher vessel endorsement. 27 MS catcher vessel endorsed permits were owned by 22 companies that self-identified as small entities, and the other 8 were owned by 5 companies that self-identified as not being small entities.

*A description of, and an explanation of the basis for, assumptions used.*

Data collected from the trawl rationalization program Economic Data Collection was used for this analysis.

No Federal rules have been identified that duplicate, overlap, or conflict with this action. There are no reporting, recordkeeping or other compliance requirements in the proposed rule.

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the PCGFMP. Consistent with the Magnuson-Stevens Act (16 U.S.C. 1852(b)(5)), one of the voting members of the Pacific Council is a representative of an Indian tribe with Federally recognized fishing rights from the area of the Council’s jurisdiction.

This proposed rule would not alter the effects on species listed under the Endangered Species Act, or on marine mammals, over what has already been considered for the regulations governing the fishery.

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

**List of Subjects in 50 CFR Part 660**

Fisheries, Fishing, Indian Fisheries.

Dated: October 24, 2017.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

**PART 660—FISHERIES OFF WEST COAST STATES**

■ 1. The authority citation for part 660 continues to read as follows:

**Authority:** 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 773 *et seq.*, and 16 U.S.C. 7001 *et seq.*

■ 2. In § 660.55, (c)(1)(i) introductory text, and (c)(1)(i)(A) and (B) are revised to read as follows:

**§ 660.55 Allocations.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) *Trawl fishery allocation.* The allocation for the limited entry trawl fishery is derived by applying the trawl allocation percentage by species/species group and area as specified in paragraph (c) of this section and as specified during the biennial harvest specifications process to the fishery harvest guideline for that species/species group and area. For IFQ species other than darkblotched rockfish, Pacific ocean perch, and widow rockfish, the trawl allocation will be further subdivided among the trawl sectors (MS, C/P, and IFQ) as specified in §§ 660.140, 660.150, and 660.160 of subpart D. For darkblotched rockfish, Pacific ocean perch, and widow rockfish, the trawl allocation is further subdivided among the trawl sectors (MS, C/P, and IFQ) as follows:

(A) *Darkblotched rockfish.* Distribute 9 percent or 25 mt, whichever is greater, of the total trawl allocation of darkblotched rockfish to the Pacific whiting fishery (MS sector, C/P sector, and Shorebased IFQ sectors). The distribution of allocation of darkblotched rockfish to each of these sectors will be done pro rata relative to the sector’s allocation of the commercial harvest guideline for Pacific whiting. Darkblotched rockfish distributed to the MS sector and C/P sector are managed as set-asides at Table 2d, subpart C. The allocation of darkblotched rockfish to the Pacific whiting IFQ fishery contributes to the Shorebased IFQ allocation. After deducting allocations for the Pacific whiting fishery, the remaining trawl allocation is allocated to the Shorebased IFQ Program.

(B) *Pacific Ocean Perch (POP).* Distribute 17 percent or 30 mt, whichever is greater, of the total trawl allocation of POP to the Pacific whiting fishery (MS sector, C/P sector, and Shorebased IFQ sector). The distribution of POP to each sector will be done pro rata relative to the sector’s allocation of the commercial harvest guideline for Pacific whiting. POP distributed to the MS sector and C/P sector are managed as set-asides, at Table 2d, subpart C. The allocation of POP to the Pacific whiting

IFQ fishery contributes to the Shorebased IFQ allocation. After deducting allocations for the Pacific whiting fishery, the remaining trawl allocation is allocated to the Shorebased IFQ Program.

\* \* \* \* \*

■ 3. In § 660.60, add paragraph (d)(1)(vii) to read as follows:

**§ 660.60 Specifications and management measures.**

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(vii) Close one or both the MS or C/P sector when the set-aside for that sector, described in Table 2d, subpart C, plus the available reserve for unforeseen catch events, described in Table 2a, subpart C, combined, is reached or is expected to be reached for either darkblotched rockfish or Pacific ocean perch.

\* \* \* \* \*

■ 4. In § 660.150, revise paragraphs (c)(1)(i) and (ii) to read as follows:

**§ 660.150 Mothership (MS) Coop Program.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) Species with formal allocations to the MS Coop Program are Pacific whiting, canary rockfish and widow rockfish;

(ii) Species with set-asides for the MS and C/P Coop Programs, as described in Table 2d, subpart C.

\* \* \* \* \*

■ 5. In § 660.160, revise paragraphs (c)(1)(i) and (ii) to read as follows:

**§ 660.160 Catcher/processor (C/P) Coop Program.**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) Species with formal allocations to the C/P Coop Program are Pacific whiting, canary rockfish, and widow rockfish;

(ii) Species with set-asides for the MS and C/P Programs, as described in Table 2d, subpart C.

\* \* \* \* \*

■ 5. In § 660 Subpart C, revise Tables 2b and 2d to read as follows:

\* \* \* \* \*

**Table 2b. to Part 660, Subpart C – 2018, and Beyond, Allocations by Species or Species Group (Weight in Metric Tons)**

Species	Area	Fishery HG or ACT	Trawl		Non-trawl	
			Percent	Mt	Percent	Mt
BOCACCIO a/	S. of 40°10' N. lat.	725.6	39	283.3	61	442.3
COWCOD a/b/	S. of 40°10' N. lat.	4.0	36	1.4	64	2.6
DARKBLOTCHED ROCKFISH c/	Coastwide	575.8	95	547.0	5	28.8
PACIFIC OCEAN PERCH d/	N. of 40°10' N. lat.	231.6	95	220.0	5	11.6
YELLOW EYE ROCKFISH a/	Coastwide	14.0	NA	1.1	NA	12.9
Arrowtooth flounder	Coastwide	11,644.9	95	11,062.6	5	582.2
Big skate a/	Coastwide	436.6	95	414.8	5	21.8
Canary rockfish a/e/	Coastwide	1,466.6	NA	1,060.1	NA	406.5
Chilipepper	S. of 40°10' N. lat.	2,461.1	75	1,845.8	25	615.3
Dover sole	Coastwide	48,406.3	95	45,986.0	5	2,420.3
English sole	Coastwide	7,324.2	95	6,958.0	5	366.2
Lingcod	N. of 40°10' N. lat.	2,831.8	45	1,274.3	55	1,557.5
Lingcod	S. of 40°10' N. lat.	1,135.0	45	510.8	55	624.3
Longnose skate a/	Coastwide	1,853.0	90	1,667.7	10	185.3
Longspine thornyhead	N. of 34°27' N. lat.	2,700.2	95	2,565.2	5	135.0
Pacific cod	Coastwide	1,091.0	95	1,036.4	5	54.5
Pacific whiting	Coastwide	TBD	100	TBD	0	TBD
Petrale sole	Coastwide	2,772.1	95	2,633.5	5	138.6
Sablefish	N. of 36° N. lat.	N/A	See Table 2c			
Sablefish	S. of 36° N. lat.	1,939.0	42	814.4	58	1,124.6
Shortspine thornyhead	N. of 34°27' N. lat.	1,639.0	95	1,557.0	5	81.9
Shortspine thornyhead	S. of 34°27' N. lat.	855.7	NA	50.0	NA	805.7
Splitnose rockfish	S. of 40°10' N. lat.	1,750.3	95	1,662.8	5	87.5
Stary flounder	Coastwide	1,271.7	50	635.9	50	635.9
Widow rockfish f/	Coastwide	12,437.3	91	11,317.9	9	1,119.4
Yellowtail rockfish	N. of 40°10' N. lat.	4,972.1	88	4,375.4	12	596.6
Minor Shelf Rockfish a/	N. of 40°10' N. lat.	1,963.2	60	1,181.8	40	781.4
Minor Slope Rockfish	N. of 40°10' N. lat.	1,688.9	81	1,368.0	19	320.9
Minor Shelf Rockfish a/	S. of 40°10' N. lat.	1,576.8	12	192.37	88	1,384.4
Minor Slope Rockfish	S. of 40°10' N. lat.	688.8	63	433.9	37	254.9
Other Flatfish	Coastwide	7,077.0	90	6,369.3	10	707.7

a/ Allocations decided through the biennial specification process.

b/ The cowcod fishery harvest guideline is further reduced to an ACT of 4.0 mt.

c/ Consistent with regulations at §660.55(c), 9 percent (49.2 mt) of the total trawl allocation for darkblotched rockfish is allocated to the Pacific whiting fishery, as follows: 20.7 mt for the Shorebased IFQ Program, 11.8 mt is managed as a set-aside for the MS sector, and 16.7 mt is managed as a set-aside for the C/P sector. The tonnage calculated here for the Pacific whiting IFQ fishery contributes to the total shorebased trawl allocation, which is found at §660.140(d)(1)(ii)(D).

d/ Consistent with regulations at §660.55(c), 17 percent (37.4 mt) of the total trawl allocation for POP is allocated to the Pacific whiting fishery, as follows: 15.7 mt for the Shorebased IFQ Program, 9.0 mt is managed as a set-aside the MS sector, and 12.7 mt is managed as a set-aside for the C/P sector. The tonnage calculated here for the Pacific whiting IFQ fishery contributes to the total shorebased trawl allocation, which is found at §660.140(d)(1)(ii)(D).

e/ Canary rockfish is allocated approximately 72 percent to trawl and 28 percent to non-trawl. 46 mt of the total trawl allocation of canary rockfish is allocated to the MS and C/P sectors, as follows: 30 mt for the MS sector, and 16 mt for the C/P sector.

f/ Consistent with regulations at §660.55(c), 10 percent (1,131.8 mt) of the total trawl allocation for widow rockfish is allocated to the Pacific whiting fishery, as follows: 475.4 mt for the Shorebased IFQ Program, 271.6 mt for the MS sector, and 384.8 mt for the C/P sector. The tonnage calculated here for the Pacific whiting IFQ fishery contributes to the total shorebased trawl allocation, which is found at §660.140(d)(1)(ii)(D).

**Table 2d. To Part 660, Subpart C - At-Sea Whiting Fishery Annual Set-Asides, 2018 and Beyond**

Species or Species Complex	Area	Set Aside (mt)
BOCACCIO	S. of 40° 10 N. lat.	NA
COWCOD	S. of 40° 10 N. lat.	NA
DARKBLOTCHED ROCKFISH a/	Coastwide	28.5
PACIFIC OCEAN PERCH b/	N. of 40° 10 N. lat.	21.7
YELLOWEYE ROCKFISH	Coastwide	0
Arrowtooth flounder	Coastwide	70
Canary rockfish c/	Coastwide	Allocation
Chilipepper	S. of 40° 10 N. lat.	NA
Dover sole	Coastwide	5
English sole	Coastwide	5
Lingcod	N. of 40° 10 N. lat.	15
Lingcod	S. of 40° 10 N. lat.	NA
Longnose skate	Coastwide	5
Longspine thornyhead	N. of 34° 27 N. lat.	5
Longspine thornyhead	S. of 34° 27 N. lat.	NA
Minor Nearshore Rockfish	N. of 40° 10 N. lat.	NA
Minor Nearshore Rockfish	S. of 40° 10 N. lat.	NA
Minor Shelf Rockfish	N. of 40° 10 N. lat.	35
Minor Shelf Rockfish	S. of 40° 10 N. lat.	NA
Minor Slope Rockfish	N. of 40° 10 N. lat.	100
Minor Slope Rockfish	S. of 40° 10 N. lat.	NA
Other Fish	Coastwide	NA
Other Flatfish	Coastwide	20
Pacific cod	Coastwide	5
Pacific Halibut d/	Coastwide	10
Pacific Whiting	Coastwide	Allocation
Petrale sole	Coastwide	5
Sablefish	N. of 36° N. lat.	50
Sablefish	S. of 36° N. lat.	NA
Shortspine thornyhead	N. of 34° 27 N. lat.	20
Shortspine thornyhead	S. of 34° 27 N. lat.	NA
Starry flounder	Coastwide	5
Widow Rockfish c/	Coastwide	Allocation
Yellowtail rockfish	N. of 40° 10 N. lat.	300

a/ Darkblotched rockfish will be managed as set-asides for the MS and C/P sectors based on pro-rata distribution described at §660.55(c)(1)(i)(A), resulting in a set-aside of 11.8 mt for the MS sector, and a set-aside of and 16.7 mt for C/P sector.

b/ POP will be managed as set-asides for the MS and C/P sectors based on pro-rata distribution described at §660.55(c)(1)(i)(B), resulting in a set-aside of 9.0 mt for the MS sector, and a set-aside of and 12.7 mt for the C/P sector.

c/ See Table 1.b., to Subpart C, for the at-sea whiting allocations for these species.

d/ As stated in §660.55 (m), the Pacific halibut set-aside is 10 mt, to accommodate bycatch in the at-sea Pacific whiting fisheries and in the shorebased trawl sector south of 40° 10 N. lat. (estimated to be approximately 5 mt each).

\* \* \* \* \*

[FR Doc. 2017-23456 Filed 10-27-17; 8:45 am]

BILLING CODE 3510-22-C

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 665**

[Docket No. 170120106-7999-01]

RIN 0648-XF186

**Pacific Island Fisheries; 2017 Annual Catch Limits and Accountability Measures**

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

**ACTION:** Proposed specifications; request for comments.

**SUMMARY:** NMFS proposes annual catch limits (ACLs) for Pacific Island crustacean, precious coral, and territorial bottomfish fisheries, and accountability measures (AMs) to correct or mitigate any overages of catch limits. The proposed ACLs and AMs would be effective for fishing year 2017. The proposed ACLs and AMs support the long-term sustainability of fishery resources of the U.S. Pacific Islands.

**DATES:** NMFS must receive comments by November 14, 2017.

**ADDRESSES:** You may submit comments on this document, identified by NOAA-NMFS-2017-0012, by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to <http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0012>, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.

- *Mail:* Send written comments to Michael D. Tosatto, Regional Administrator, NMFS Pacific Islands Region (PIR), 1845 Wasp Blvd., Bldg. 176, Honolulu, HI 96818.

*Instructions:* NMFS may not consider comments sent by any other method, to any other address or individual, or received after the end of the comment period. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible.

NMFS prepared environmental analyses that describe the potential impacts on the human environment that would result from the proposed ACLs and AMs. Copies of the environmental analyses and other supporting documents are available at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:**

Sarah Ellgen, NMFS PIR Sustainable Fisheries, 808-725-5173.

**SUPPLEMENTARY INFORMATION:** Fisheries in the U.S. Exclusive Economic Zone (EEZ, or Federal waters) around the U.S. Pacific Islands are managed under archipelagic fishery ecosystem plans (FEPs) for American Samoa, Hawaii, the Pacific Remote Islands, and the Mariana Archipelago (Guam and the Commonwealth of the Northern Mariana Islands (CNMI)). A fifth FEP covers pelagic fisheries. The Western Pacific Fishery Management Council (Council) developed the FEPs, and NMFS implemented them under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Each FEP contains a process for the Council and NMFS to specify ACLs and AMs; that process is codified at Title 50, Code of Federal Regulations, Section 665.4 (50 CFR 665.4). The regulations require NMFS to specify, every fishing year, an ACL for each stock and stock complex of management unit species (MUS) in an FEP, as recommended by the Council and considering the best available scientific, commercial, and other information about the fishery. If a fishery exceeds an ACL, the regulations require the Council to take action, which may include reducing the ACL for the subsequent fishing year by the amount of the overage, or other appropriate action.

NMFS proposes to specify ACLs for the crustacean and precious corals MUS in American Samoa, Guam, the CNMI, and Hawaii, and the bottomfish MUS in American Samoa, Guam, and the CNMI for fishing year 2017. The fishing year for each fishery began on January 1 and ends on December 31, except for precious coral fisheries, which began July 1 and ends on June 30 next year.

In this action, NMFS is not proposing to specify 2017 ACLs for Hawaii Kona crab and non-Deep 7 bottomfish, or coral reef ecosystem MUS in all island areas. This is because NMFS has new information for those MUS that may require additional environmental analyses to support the Council's recommendations. NMFS would propose those ACL specifications in a separate action(s). In addition, NMFS specified the 2017-2018 ACL and AM

for Hawaii Deep 7 bottomfish in June 2017 (82 FR 29778, June 30, 2017).

NMFS based the proposed specifications for crustacean, precious coral, and territorial bottomfish MUS on recommendations from the Council at its 164th meeting held October 21-22, 2015, its 166th meeting held June 6-10, 2016, and its 170th meeting held June 19-22, 2017. For this action, the Council recommended 36 ACLs: Seven each in American Samoa, Guam, and the CNMI, and 15 in Hawaii. The Council also recommended that NMFS specify multi-year ACLs and AMs in fishing years 2015-2018. NMFS proposes to implement the specifications for each year separately, prior to each fishing year. NMFS previously implemented the 2016 specifications for bottomfish, crustacean, precious coral, and coral reef ecosystem MUS (82 FR 18716, April 21, 2017). All of the proposed 2017 ACLs in this action would be the same as those specified in 2016 (82 FR 18716, April 21, 2017). NMFS also proposes to specify the same AMs as it did in 2016.

Data from these fisheries for fishing year 2016 indicate that catches from each fishery in 2016 did not exceed the fishery's ACL, with the exception of the CNMI slipper lobsters. NMFS proposes to specify an ACL of 60 lb for CNMI slipper lobsters, which is the same ACL that NMFS implemented in 2016, even though the average three-year catch for this fishery exceeded the ACL. For CNMI slipper lobsters, there is no OFL or maximum sustainable yield (MSY) estimate. Prior to 2016, there were only three years (2007-2009) of available catch information for slipper lobsters in the CNMI. Therefore, in 2014, at its 116th meeting, the SSC recommended a proxy for calculating the ACL for the CNMI slipper lobster stock complex. Using a catch-to-habitat-based proxy comparing data from the Hawaii slipper lobster fishery (the only area that has specifically documented harvesting of slipper lobster), the Council recommended setting an ACL for the CNMI slipper lobsters for 2016-2018 at a level equal to ABC, that is, 60 lb.

In 2015, NOAA started a pilot program to improve commercial vendor reporting in the CNMI. The Territory Science Initiative was designed to improve the data vendors submit to commercial receipt books, which track, among other stocks, the slipper lobster fishery. NMFS staff trained vendors to complete receipt books and incorporate the process into their day-to-day business routines. The program proved to be effective, and in 2016, the CNMI commercial receipt book program documented 304 lb of slipper lobsters sold by local fishermen. In comparison,

there have been no reported catches or sales of slipper lobster in the CNMI from 2010–2015.

The Council reviewed the 2016 CNMI slipper lobster fishery performance at its 170th meeting held June 19–22, 2017. The Council noted that the 304 lb reported catch in 2016, combined with zero reported catch in the past two years, resulted in a three-year average catch of 101 lb, which exceeded the ACL by 41 lb. The Council determined that the increase in reported catch was due to the Territory Science Initiative and the associated improvements in catch reporting, and not due to actual increase in harvest. The Council also concluded that the overage was not likely to have had an impact on stock sustainability or result in overfishing based on existing stock data. Based on the status of the stock, the 2016 AM was not applied, and the Council instead recommended maintaining the 2017 CNMI slipper lobster ACL at 60 lb.

The Final Environmental Assessment (EA) for this action supports this determination. In the EA, NMFS concluded that the current level of catch of slipper lobster in the CNMI was not likely to result in overfishing as there are no clear trends indicating that lobster stocks in the CNMI have been

declining. (EA Section 3.2.3). NMFS concluded that even if no ACL were specified for this fishery, the level of slipper lobster catch would be expected to remain small. NMFS also determined that an ACL of 60 lb, even if exceeded, would not result in any changes in fishing and would not be expected to have effects on the fishery different from if no ACL were specified.

In this proposed rule, NMFS is not proposing ACLs for MUS that are currently subject to Federal fishing moratoria or prohibitions. These MUS include all species of gold coral (78 FR 32181, May 29, 2013), the three Hawaii seamount groundfish (pelagic armorhead, alfonsin, and raftfish (75 FR 69015, November 10, 2010), and deepwater precious corals at the Westpac Bed Refugia (75 FR 2198, January 14, 2010). The current prohibitions on fishing for these MUS serve as the functional equivalent of an ACL of zero.

Additionally, NMFS is not proposing ACLs for bottomfish, crustacean, precious coral, or coral reef ecosystem MUS identified in the Pacific Remote Islands Area (PRIA) FEP. This is because fishing is prohibited in the EEZ within 12 nm of emergent land, unless authorized by the U.S. Fish and Wildlife

Service (USFWS) (78 FR 32996, June 3, 2013). To date, NMFS has not received fishery data that would support any such approvals. In addition, there is no suitable habitat for these stocks beyond the 12-nm no-fishing zone, except at Kingman Reef, where fishing for these resources does not occur. Therefore, the current prohibitions on fishing serve as the functional equivalent of an ACL of zero. However, NMFS will continue to monitor authorized fishing within the Pacific Remote Islands Monument in consultation with USFWS, and may develop additional fishing requirements, including monument-specific catch limits for species that may require them.

NMFS is also not proposing ACLs for pelagic MUS at this time, because NMFS previously determined that pelagic species are subject to international fishery agreements or have a life cycle of approximately one year and, therefore, are statutorily excepted from the ACL requirements.

**Proposed 2017 Annual Catch Limit Specifications**

The following four tables list the proposed ACL specifications for 2017.

TABLE 1—AMERICAN SAMOA

Fishery	Management unit species	Proposed ACL specification (lb)
Bottomfish	Bottomfish multi-species stock complex	106,000
Crustacean	Deepwater shrimp	80,000
	Spiny lobster	4,845
	Slipper lobster	30
	Kona crab	3,200
Precious Coral	Black coral	790
	Precious corals in the American Samoa Exploratory Area	2,205

TABLE 2—MARIANA ARCHIPELAGO—GUAM

Fishery	Management unit species	Proposed ACL specification (lb)
Bottomfish	Bottomfish multi-species stock complex	66,000
Crustaceans	Deepwater shrimp	48,488
	Spiny lobster	3,135
	Slipper lobster	20
	Kona crab	1,900
Precious Coral	Black coral	700
	Precious corals in the Guam Exploratory Area	2,205

TABLE 3—MARIANA ARCHIPELAGO—CNMI

Fishery	Management unit species	Proposed ACL specification (lb)
Bottomfish	Bottomfish multi-species stock complex	228,000
Crustacean	Deepwater shrimp	275,570
	Spiny lobster	7,410

TABLE 3—MARIANA ARCHIPELAGO—CNMI—Continued

Fishery	Management unit species	Proposed ACL specification (lb)
Precious Coral .....	Slipper lobster .....	60
	Kona crab .....	6,300
	Black coral .....	2,100
	Precious corals in the CNMI Exploratory Area .....	2,205

TABLE 4—HAWAII

Fishery	Management unit species	Proposed ACL specification (lb)
Crustacean .....	Deepwater shrimp .....	250,773
	Spiny lobster .....	15,000
Precious Coral .....	Slipper lobster .....	280
	Auau Channel black coral .....	5,512
	Makapuu Bed—Pink coral .....	2,205
	Makapuu Bed—Bamboo coral .....	551
	180 Fathom Bank—Pink coral .....	489
	180 Fathom Bank—Bamboo coral .....	123
	Brooks Bank—Pink coral .....	979
	Brooks Bank—Bamboo coral .....	245
	Kaena Point Bed—Pink coral .....	148
	Kaena Point Bed—Bamboo coral .....	37
	Keahole Bed—Pink coral .....	148
	Keahole Bed—Bamboo coral .....	37
	Precious corals in the Hawaii Exploratory Area .....	2,205

**Accountability Measures**

Each year, NMFS and local resource management agencies in American Samoa, Guam, the CNMI, and Hawaii collect information about MUS catches and apply them toward the appropriate ACLs. Pursuant to 50 CFR 665.4, when the available information indicates that a fishery is projected to reach an ACL for a stock or stock complex, NMFS must notify permit holders that fishing for that stock or stock complex will be restricted in Federal waters on a specified date. The restriction serves as the AM to prevent an ACL from being exceeded, and may include closing the fishery, closing specific areas, changing bag limits, or restricting effort.

However, local resource management agencies do not have the resources to process catch data in near-real time, so fisheries statistics are generally not available to NMFS until at least six months after agencies collect and analyze the data. Additionally, Federal logbook information and other reporting from fisheries in Federal waters is not sufficient to monitor and track catches for the evaluation of fishery performance against the proposed ACL specifications. This is because most fishing for bottomfish, crustacean, and precious coral MUS occurs in State or territorial waters, generally 0–3 nm from shore. For these reasons, NMFS proposes to continue to specify the

Council’s recommended AM, which is to apply a three-year average catch to evaluate fishery performance against the proposed ACLs. Specifically, NMFS and the Council would use the average catch of fishing years 2015, 2016, and 2017 to evaluate fishery performance against the 2017 ACL for a particular fishery. At the end of each fishing year, the Council would review catches relative to each ACL. If NMFS and the Council determine that the three-year average catch for any fishery exceeds the specified ACL, NMFS would reduce the ACL in the subsequent year for that fishery by the amount of the overage.

**Cultural Fishing in American Samoa**

On March 20, 2017, in *Territory of American Samoa v. NMFS, et al. (16–cv–95, D. Haw)*, a Federal judge vacated and set aside a NMFS rule that amended the American Samoa Large Vessel Prohibited Area (LVPA) for eligible pelagic longliners. The Court held that the action was inconsistent with the “other applicable law” provision of the Magnuson-Stevens Act by not considering the protection and preservation of cultural fishing rights in American Samoa under the Instruments of Cession. The Instruments of Cession do not specifically mention cultural fishing rights, and the Court’s decision, although recognizing the need to protect those rights, does not define them. The

Council is currently reevaluating the LVPA rule, including options to define cultural fishing rights in American Samoa that are subject to preservation and protection. NMFS specifically invites public comments on this proposed action that address the impact of the proposed ACL and AM specifications on cultural fishing rights in American Samoa.

NMFS will consider public comments on the proposed ACLs and AMs and will announce the final specifications in the **Federal Register**. NMFS must receive any comments by the date provided in the **DATES** heading, not postmarked or otherwise transmitted by that date. Regardless of the final ACL specifications and AMs, all other management measures will continue to apply in the fisheries.

**Classification**

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator for Fisheries has determined that these proposed specifications are consistent with the applicable FEPs, other provisions of the Magnuson-Stevens Act, and other applicable laws, subject to further consideration after public comment.

*Certification of Finding of No Significant Impact on Substantial Number of Small Entities*

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that these proposed specifications, if adopted, would not have a significant economic impact on a substantial number of small entities. A description of the proposed action, why it is being considered, and the legal basis for it are contained in the preamble to these proposed specifications.

The proposed action would specify annual catch limits (ACLs) and accountability measures (AMs) for Pacific Island crustaceans, precious coral, and territorial bottomfish fisheries in American Samoa, Guam, Hawaii, and the CNMI for 2017. The proposed 2017 ACLs for MUS covered in this proposed action are identical to those specified in 2016 (82 FR 18716, April 21, 2017). NMFS is not proposing to specify 2017 ACLs for Kona crab or non-Deep 7 bottomfish in Hawaii or coral reef ecosystem MUS in any island area because NMFS has obtained new information for those MUS that may require the agency to conduct additional environmental analyses to support the Council's recommendations. NMFS will propose those ACL specifications in a separate action(s).

The vessels affected by this action are federally permitted to fish under the Fishery Ecosystem Plans for American Samoa, the Marianas Archipelago (Guam and the CNMI), and Hawaii. The numbers of vessels permitted under these Fishery Ecosystem Plans permitted by this action are as follows: American Samoa (0), Marianas Archipelago (16), and Hawaii (9). For Regulatory Flexibility Act (RFA)

purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of \$11 million for all its affiliated operations worldwide. Based on available information, NMFS has determined that all affected entities are small entities under the SBA definition of a small entity, *i.e.*, they are engaged in the business of fish harvesting, are independently owned or operated, are not dominant in their field of operation, and have annual gross receipts not in excess of \$11 million. Therefore, there would be no disproportionate economic impacts between large and small entities. Furthermore, there would be no disproportionate economic impacts among the universe of vessels based on gear, home port, or vessel length.

Even though this proposed action would apply to a substantial number of vessels, this action should not result in significant adverse economic impact to individual vessels. NMFS and the Council are not considering in-season closures in any of the fisheries to which these ACLs apply because fishery management agencies are not able to track catch relative to the ACLs during the fishing year. As a result, fishermen would be able to fish throughout the entire year. In addition, the ACLs, as proposed, would not change the gear types, areas fished, effort, or participation of the fishery during the 2017 fishing year. A post-season review of the catch data would be required to

determine whether any fishery exceeded its ACL by comparing the ACL to the most recent three-year average catch for which data is available. If an ACL is exceeded, the Council and NMFS would take action in future fishing years to correct the operational issue that caused the ACL overage. NMFS and the Council would evaluate the environmental, social, and economic impacts of future actions, such as changes to future ACLs or AMs, after the required data are available. Specifically, if NMFS and the Council determine that the three-year average catch for a fishery exceeds the specified ACL, NMFS would reduce the ACL for that fishery by the amount of the overage in the subsequent year.

The proposed action does not duplicate, overlap, or conflict with other Federal rules and is not expected to have significant impact on small entities (as discussed above), organizations, or government jurisdictions. The proposed action also will not place a substantial number of small entities, or any segment of small entities, at a significant competitive disadvantage to large entities. For the reasons above, NMFS does not expect the proposed action to have a significant economic impact on a substantial number of small entities. As such, an initial regulatory flexibility analysis is not required and none has been prepared.

This proposed action is exempt from review under E.O. 12866.

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

Dated: October 23, 2017.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

[FR Doc. 2017-23457 Filed 10-27-17; 8:45 am]

**BILLING CODE 3510-22-P**



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

### Animal and Plant Health Inspection Service

[Docket No. APHIS–2017–0089]

#### Notice of Request for Revision to and Extension of Approval of an Information Collection; Importation of Tomatoes From France, Morocco, Western Sahara, Chile, and Spain

**ACTION:** Revision to and extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request a revision to and extension of approval of an information collection associated with the regulations for the importation of fresh tomatoes from France, Morocco, Western Sahara, Chile, and Spain.

**DATES:** We will consider all comments that we receive on or before December 29, 2017.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov#!docketDetail;D=APHIS-2017-0089>.

- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2017–0089, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road, Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov#!docketDetail;D=APHIS-2017-0089> or in our reading room, which is located in Room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be

sure someone is there to help you, please call (202) 799–7039 before coming.

**FOR FURTHER INFORMATION CONTACT:** For information on the regulations related to the importation of fresh tomatoes from France, Morocco, Western Sahara, Chile, and Spain, contact Dr. Robert Baca, Assistant Director for Compliance and Environmental Coordination, Plant Health Programs, Plant Protection and Quarantine, APHIS, 4700 River Road, Unit 150, Riverdale, MD 20737–1236; (301) 851–2292. For copies of more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851–2483.

**SUPPLEMENTARY INFORMATION:**

*Title:* Importation of Tomatoes From France, Morocco, Western Sahara, Chile, and Spain.

*OMB Control Number:* 0579–0131.

*Type of Request:* Revision to and extension of approval of an information collection.

*Abstract:* The Plant Protection Act (PPA, 7 U.S.C. 7701 *et seq.*) authorizes the Secretary of Agriculture to restrict the importation, entry, or interstate movement of plants, plant products, and other articles to prevent the introduction of plant pests into the United States or their dissemination within the United States. As authorized by the PPA, the Animal and Plant Health Inspection Service regulates the importation of fruits and vegetables into the United States from certain parts of the world as provided in “Subpart—Fruits and Vegetables” (7 CFR 319.56–1 through 319.56–80).

In accordance with § 319.56–28, fresh tomatoes from France, Morocco, Western Sahara, Chile, and Spain may be imported into the United States under certain conditions to prevent the introduction of plant pests into the United States. These conditions require the use of certain information collection activities including greenhouse, production site, and treatment facility registration; a trust fund agreement; documented quality control program; box labeling; application for import permit; appeal of denial or revocation of a permit; notice of arrival; emergency action notification; and recordkeeping. Also, each consignment of tomatoes must be accompanied by a phytosanitary certificate issued by the national plant protection organization

(NPPO) or similar agency of the country of origin with an additional declaration stating that the provisions of § 319.56–28 for that country have been met.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

*Estimate of burden:* The public burden for this collection of information is estimated to average 0.064 hours per response.

*Respondents:* Growers and importers of tomatoes from France, Morocco, Western Sahara, Chile, and Spain; and the NPPO or similar agency for these countries.

*Estimated annual number of respondents:* 20.

*Estimated annual number of responses per respondent:* 2,240.

*Estimated annual number of responses:* 44,809.

*Estimated total annual burden on respondents:* 2,867 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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.

Done in Washington, DC, this 25th day of October 2017.

**Michael C. Gregoire,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2017-23539 Filed 10-27-17; 8:45 am]

**BILLING CODE 3410-34-P**

## DEPARTMENT OF AGRICULTURE

### Animal and Plant Health Inspection Service

[Docket No. APHIS-2017-0092]

#### Notice of Request for Revision to and Extension of Approval of an Information Collection; Importation of Plants for Planting; Establishing a Category for Plants for Planting Not Authorized for Importation Pending Pest Risk Analysis

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Revision to and extension of approval of an information collection; comment request.

**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request revision to and extension of approval of an information collection associated with the category of plants for planting that are not authorized for importation pending pest risk analysis.

**DATES:** We will consider all comments that we receive on or before December 29, 2017.

**ADDRESSES:** You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov/#!docketDetail;D=APHIS-2017-0092>.

- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS-2017-0092 Regulatory Analysis and Development, PPD, APHIS, Station 3A-03.8, 4700 River Road, Unit 118, Riverdale, MD 20737-1238.

Supporting documents and any comments we receive on this docket may be viewed at <http://www.regulations.gov/#!docketDetail;D=APHIS-2017-0092> or in our reading room, which is located in room 1141 of the USDA South Building, 14th Street and Independence Avenue SW., Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call 202-799-7039 before coming.

**FOR FURTHER INFORMATION CONTACT:** For information on the importation of plants

for planting not authorized for importation pending pest risk analysis, contact Dr. Indira Singh, Botanist, Plants for Planting Policy, IRM, PPO, APHIS, 4700 River Road, Unit 133, Riverdale, MD 20737-1236; (301) 851-2020. For copies of more detailed information on the information collection, contact Ms. Kimberly Hardy, APHIS' Information Collection Coordinator, at (301) 851-2483.

#### SUPPLEMENTARY INFORMATION:

*Title:* Importation of Plants for Planting; Establishing a Category for Plants for Planting Not Authorized for Importation Pending Pest Risk Analysis.

*OMB Control Number:* 0579-0380.

*Type of Request:* Revision to and extension of approval of an information collection.

*Abstract:* Under the Plant Protection Act (7 U.S.C. 7701 *et seq.*), the Secretary of Agriculture is authorized to take such actions as may be necessary to prevent the introduction and spread of plant pests and noxious weeds within the United States. The Secretary has delegated this authority to the Animal and Plant Health Inspection Service (APHIS).

The regulations contained in "Subpart-Plants for Planting" (7 CFR 319.37 through 319.37-14) prohibit or restrict, among other things, the importation of living plants, plant parts, and seeds for propagation. These regulations are intended to ensure that imported plants for planting do not serve as a host for plant pests, such as insects or pathogens, which can cause damage to U.S. agricultural and environmental resources.

In accordance with § 319.37-2a, the importation of certain taxa of plants for planting poses a risk of introducing quarantine pests into the United States. Therefore, the importation of these taxa is not authorized pending the completion of a pest risk analysis, except as provided in the regulations. Requests to remove a taxa from the category of plants for planting whose importation is not authorized pending the completion of a pest risk analysis must be made in accordance with § 319.5. These requests contains information collection activities that include information about the requesting party, the commodity proposed for importation into the United States, shipping information, a description of the pests and diseases associated with the commodity, current practices for risk mitigation or management, and any additional information listed in § 319.5 that may be necessary for APHIS to complete a pest risk analysis.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of our estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.*, permitting electronic submission of responses.

*Estimate of burden:* The public burden for this collection of information is estimated to average 3.13 hours per response.

*Respondents:* National plant protection organizations of exporting countries and importers of plants for planting into the United States.

*Estimated annual number of respondents:* 16.

*Estimated annual number of responses per respondent:* 1.

*Estimated annual number of responses:* 16.

*Estimated total annual burden on respondents:* 50 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

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.

Done in Washington, DC, this 25th day of October 2017.

**Michael C. Gregoire,**

*Acting Administrator, Animal and Plant Health Inspection Service.*

[FR Doc. 2017-23540 Filed 10-27-17; 8:45 am]

**BILLING CODE 3410-34-P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the Virginia Advisory Committee

**AGENCY:** Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a meeting of the Virginia Advisory Committee to the Commission will convene by conference call at 12:00 p.m. (EST) on: Thursday, November 9, 2017. The purpose of the meeting is to receive updates from committee workgroups and continue project planning on the topic of hate crimes.

**DATES:** Thursday, November 9, 2017, at 12:00 p.m. EST.

**ADDRESSES:** Public call-in information: Conference call-in number: 1-800-474-8920 and conference call 8310490.

**FOR FURTHER INFORMATION CONTACT:** Ivy Davis at [ero@usccr.gov](mailto:ero@usccr.gov) or by phone at 202-376-7533.

**SUPPLEMENTARY INFORMATION:** Interested members of the public may listen to the discussion by calling the following toll-free conference call-in number: 1-800-474-8920 and conference call 8310490. Please be advised that before placing them into the conference call, the conference call operator will ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free conference call-in number.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service at 1-800-977-8339 and providing the operator with the toll-free conference call-in number: 1-800-474-8920 and conference call 8310490.

Members of the public are invited to make statements during the open comment period of the meeting or submit written comments. The comments must be received in the regional office approximately 30 days after each scheduled meeting. Written comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150, Washington, DC 20425, faxed to (202) 376-7548, or emailed to Evelyn Bohor at [ero@usccr.gov](mailto:ero@usccr.gov). Persons who desire additional information may contact the Eastern Regional Office at (202) 376-7533.

Records and documents discussed during the meeting will be available for public viewing as they become available at <https://database.faca.gov/committee/>

[meetings.aspx?cid=279](https://database.faca.gov/committee/meetings.aspx?cid=279), click the "Meeting Details" and "Documents" links. Records generated from this meeting may also be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, [www.usccr.gov](http://www.usccr.gov), or to contact the Eastern Regional Office at the above phone numbers, email or street address.

#### Agenda

Thursday, November 9, 2017, 12:00 p.m. EST

- Rollcall
- Project Planning: Collateral Consequences
- Update from Committee Workgroups
- Next Steps
- Other Business
- Open Comment
- Adjourn

Dated: October 24, 2017.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2017-23464 Filed 10-27-17; 8:45 am]

**BILLING CODE P**

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## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the West Virginia Advisory Committee

**AGENCY:** Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission), and the Federal Advisory Committee Act (FACA), that a meeting of the West Virginia Advisory Committee to the Commission will convene by conference call at 12:00 p.m. (EST) on: Friday, November 10, 2017. The purpose of the meeting is to receive updates from committee workgroups and continue project planning on the topic of collateral consequences.

**DATES:** Friday, November 10, 2017, at 12:00 p.m. EST.

**ADDRESSES:** Public call-in information: Conference call-in number: 1-877-604-9665 and conference call 5788080.

**FOR FURTHER INFORMATION CONTACT:** Ivy Davis at [ero@usccr.gov](mailto:ero@usccr.gov) or by phone at 202-376-7533.

**SUPPLEMENTARY INFORMATION:** Interested members of the public may listen to the discussion by calling the following toll-free conference call-in number: 1-877-604-9665 and conference call 5788080. Please be advised that before placing

them into the conference call, the conference call operator will ask callers to provide their names, their organizational affiliations (if any), and email addresses (so that callers may be notified of future meetings). Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free conference call-in number.

Persons with hearing impairments may also follow the discussion by first calling the Federal Relay Service at 1-800-977-8339 and providing the operator with the toll-free conference call-in number: 1-877-604-9665 and conference call 5788080.

Members of the public are invited to make statements during the open comment period of the meeting or submit written comments. The comments must be received in the regional office approximately 30 days after each scheduled meeting. Written comments may be mailed to the Eastern Regional Office, U.S. Commission on Civil Rights, 1331 Pennsylvania Avenue, Suite 1150, Washington, DC 20425, faxed to (202) 376-7548, or emailed to Evelyn Bohor at [ero@usccr.gov](mailto:ero@usccr.gov). Persons who desire additional information may contact the Eastern Regional Office at (202) 376-7533.

Records and documents discussed during the meeting will be available for public viewing as they become available at <https://database.faca.gov/committee/meetings.aspx?cid=281>, click the "Meeting Details" and "Documents" links. Records generated from this meeting may also be inspected and reproduced at the Eastern Regional Office, as they become available, both before and after the meetings. Persons interested in the work of this advisory committee are advised to go to the Commission's Web site, [www.usccr.gov](http://www.usccr.gov), or to contact the Eastern Regional Office at the above phone numbers, email or street address.

#### Agenda

Friday, November 10, 2017, 12:00 p.m. EST

- Rollcall
- Project Planning: Collateral Consequences
- Update from Committee Workgroups
- Next Steps
- Other Business
- Open Comment
- Adjourn

Dated: October 24, 2017.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2017-23465 Filed 10-27-17; 8:45 am]

**BILLING CODE P**

## COMMISSION ON CIVIL RIGHTS

### Notice of Public Meeting of the Alabama Advisory Committee for Orientation and To Discuss Voting in the State of Alabama as a Topic of SAC Study

**AGENCY:** U.S. Commission on Civil Rights.

**ACTION:** Announcement of meeting.

**SUMMARY:** Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights (Commission) and the Federal Advisory Committee Act that the Alabama Advisory Committee (Committee) will hold a meeting on Tuesday, November 7, 2017, at 11:00 a.m. (Central) for the purpose of a discussion of Voting in Alabama as a topic of study for the Committee.

**DATES:** The meeting will be held on Tuesday, November 7, 2017, at 11:00 a.m. (Central).

*Public Call Information:* Dial: 888-220-8670, Conference ID: 5681163.

**FOR FURTHER INFORMATION CONTACT:** David Barreras, DFO, at [dbarreras@usccr.gov](mailto:dbarreras@usccr.gov) or 312-353-8311.

**SUPPLEMENTARY INFORMATION:** Members of the public can listen to the discussion. This meeting is available to the public through the following toll-free call-in number: 888-220-8670, conference ID: 5681163. Any interested member of the public may call this number and listen to the meeting. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference call operator will ask callers to identify themselves, the organization they are affiliated with (if any), and an email address prior to placing callers into the conference room. Callers can expect to incur regular charges for calls they initiate over wireless lines, according to their wireless plan. The Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1-800-977-8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following the meeting. Written comments may be mailed to the Midwestern Regional Office, U.S. Commission on Civil Rights, 55 W. Monroe St., Suite 410, Chicago, IL 60615. They may also be faxed to the Commission at (312) 353-8324, or emailed to David Barreras at [dbarreras@usccr.gov](mailto:dbarreras@usccr.gov). Persons who desire additional information may contact the Midwestern Regional Office at (312) 353-8311.

Records generated from this meeting may be inspected and reproduced at the Midwestern Regional Office, as they become available, both before and after the meeting. Records of the meeting will be available via [www.facadatabase.gov](http://www.facadatabase.gov) under the Commission on Civil Rights, Alabama Advisory Committee link (<http://www.facadatabase.gov/committee/committee.aspx?cid=233&aid=17>). Persons interested in the work of this Committee are directed to the Commission's Web site, <http://www.usccr.gov>, or may contact the Midwestern Regional Office at the above email or street address.

### Agenda

Welcome and Roll Call  
Voting in Alabama (Committee to narrow as topic of study)  
Next Steps  
Public Comment  
Adjournment

*Exceptional Circumstance:* Pursuant to 41 CFR 102-3.150, the notice for this meeting is given less than 15 days prior to the meeting because of the exceptional circumstance of the Committee working in support of the Commission's statutory enforcement report due September 30, 2018.

Dated: October 24, 2017.

**David Mussatt,**

*Supervisory Chief, Regional Programs Unit.*

[FR Doc. 2017-23463 Filed 10-27-17; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

*Agency:* International Trade Administration.

*Title:* SABIT Program: Applications and Questionnaires.

*OMB Control Number:* 0625-0225.

*Form Number(s):* ITA-4143P.

*Type of Request:* Regular.

*Number of Respondents:* 3,500.

*Average Hours per Response:* 3 hours for application; 1 hour for program exit questionnaire; 1 hour for alumni success story form.

*Burden Hours:* 7,000.

*Needs and Uses:* The information collected by the SABIT application for participation in the SABIT Group Program will be used by ITA staff to determine the quality of applicants for SABIT's programs and create delegations of professionals from Eurasia and other regions. The program exit questionnaire will be used to improve the program by determining what worked and what did not work well. The alumni success form will be used to track SABIT alumni to determine how well the program is meeting its foreign policy objectives.

*Affected Public:* International individuals or households; International businesses or other for-profit organizations.

*Frequency:* Individuals can fill out up to one of each of the three types of forms per year.

*Respondent's Obligation:* All forms are collected on a strictly voluntary basis.

This information collection request may be viewed at [reginfo.gov](http://reginfo.gov). Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov) or fax to (202) 395-5806.

**Sheleen Dumas,**

*Departmental PRA Lead, Office of the Chief Information Officer.*

[FR Doc. 2017-23505 Filed 10-27-17; 8:45 am]

**BILLING CODE 3510-HE-P**

## DEPARTMENT OF COMMERCE

### Submission for OMB Review; Comment Request

The Department of Commerce has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

*Agency:* International Trade Administration.

*Title:* Annual Report from Foreign-Trade Zones.

OMB Control Number: 0625–0109.

Form Number(s): ITA–359P.

Type of Request: Regular Submission (revision/extension of a currently approved information collection).

Burden Hours: 10,784 hours.

Number of Respondents: 263.

Average Hours per Response: 1 to 76 hours (depending on size and structure of the foreign-trade zone).

Needs and Uses: The Foreign-Trade Zone Annual Report is the vehicle by which Foreign Trade Zone (FTZ) grantees report annually to the Foreign Trade Zones Board, pursuant to the requirements of the Foreign Trade Zones Act (19 U.S.C. 81a–81u). The annual reports submitted by grantees are the only complete source of compiled information on FTZ's. The data and information contained in the reports relates to international trade activity in FTZ's. The reports are used by the Congress and the Department to determine the economic effect of the FTZ program. The reports are also used by the FTZ Board and other trade policy officials to determine whether zone activity is consistent with U.S. international trade policy, and whether it is in the public interest. The public uses the information regarding activities carried on in FTZ's to evaluate their effect on industry sectors. The information contained in annual reports also helps zone grantees in their marketing efforts.

Affected Public: State, local, or tribal governments or not-for-profit institutions.

Frequency: Annually.

Respondent's Obligation: Required to obtain or retain benefits.

This information collection request may be viewed at [reginfo.gov](http://reginfo.gov). Follow the instructions to view Department of Commerce collections currently under review by OMB.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to [OIRA\\_Submission@omb.eop.gov](mailto:OIRA_Submission@omb.eop.gov) or fax to (202) 395–5806.

**Sheleen Dumas,**

Departmental PRA Lead, Office of the Chief Information Officer.

[FR Doc. 2017–23504 Filed 10–27–17; 8:45 am]

BILLING CODE 3510–DS–P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A–570–826]

#### Certain Paper Clips From the People's Republic of China: Continuation of Antidumping Duty Order

**AGENCY:** Enforcement and Compliance, International Trade Administration, Department of Commerce.

**SUMMARY:** As a result of the determinations by the Department of Commerce (Department) and the International Trade Commission (ITC) that revocation of the antidumping duty (AD) order on certain paper clips (paper clips) from the People's Republic of China (PRC) would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, the Department is publishing a notice of continuation of the AD order.

**DATES:** Applicable October 30, 2017.

**FOR FURTHER INFORMATION CONTACT:** Maliha Khan or Thomas Martin, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW., Washington, DC 20230; telephone: 202–482–0895 or 202–482–3936, respectively.

#### SUPPLEMENTARY INFORMATION:

##### Background

On November 25, 1994, the Department published in the **Federal Register** the AD order on paper clips from the PRC.<sup>1</sup> On June 1, 2016, the Department published in the **Federal Register** the initiation notice for the fourth sunset review of the AD duty order on paper clips from the PRC, pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).<sup>2</sup> The Department conducted this sunset review on an expedited basis, pursuant to section 751(c)(3)(B) of the Act and 19 CFR 351.218(e)(1)(ii)(C)(2), because it received a complete and adequate response from a domestic interested party, but no substantive responses from respondent interested parties. As a result of its review, the Department determined that revocation of the *Order* would likely lead to continuation or recurrence of dumping and notified the ITC of the magnitude of the margins likely to prevail should the *Order* be

revoked.<sup>3</sup> On August 30, 2017, the ITC published its determination that revocation of the *Order* would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time, pursuant to section 751(c) of the Act.<sup>4</sup>

#### Scope of the Order

The products covered by the *Order* are certain paper clips, wholly of wire of base metal, whether or not plated with nickel or other base metal (e.g., copper), with a wire diameter between 0.025 inches and 0.075 inches (0.64 to 1.91 millimeters), regardless of physical configuration, except as specifically excluded. The products subject to the *Order* may have a rectangular or ring-like shape and include, but are not limited to, clips commercially referred to as “No. 1 clips”, “No. 3 clips”, “Jumbo” or “Giant” clips, “Gem clips”, “Frictioned clips”, “Perfect Gems”, “Marcel Gems”, “Universal clips”, “Nifty clips”, “Peerless clips”, “Ring clips”, and “Glide-On clips”.

Specifically excluded from the scope of the *Order* are plastic and vinyl covered paper clips, butterfly clips, binder clips, or other paper fasteners that are not made wholly of wire of base metal and are covered under a separate subheading of the HTSUS.

The products subject to the order are currently classifiable under subheading 8305.90.3010 of the Harmonized Tariff Schedule of the United States (HTSUS). Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

#### Continuation of the Order

As a result of the determinations by the Department and the ITC that revocation of the *Order* would be likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act and 19 CFR 351.218(a), the Department hereby orders the continuation of the AD order on paper clips from the PRC. U.S. Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

<sup>3</sup> See *Certain Paper Clips from the People's Republic of China: Final Results of the Expedited Fourth Sunset Review of the Antidumping Duty Order*, 81 FR 69512 (October 6, 2016), and accompanying Issues and Decision Memorandum.

<sup>4</sup> See *Investigation No. 731–TA–663 (Fourth Review) Paper Clips from China*, 82 FR 41288 (August 30, 2017), and *Paper Clips from China: Investigation No. 731–TA–663 (Fourth Review)*, USITC Publication 4719 (August 2017).

<sup>1</sup> See *Antidumping Duty Order: Certain Paper Clips from the People's Republic of China*, 59 FR 60606 (November 25, 1994) (*Order*).

<sup>2</sup> See *Initiation of Five-Year (“Sunset”) Review*, 81 FR 34974 (June 1, 2016).

The effective date of the continuation of the *Order* will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, the Department intends to initiate the next five-year review of the *Order* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

This five-year sunset review and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: October 25, 2017.

**Gary Taverman,**

*Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance.*

[FR Doc. 2017-23537 Filed 10-27-17; 8:45 am]

**BILLING CODE 3510-DS-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**RIN 0648-XF795**

**North Pacific Fishery Management Council; Public Meeting**

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

**ACTION:** Notice of telephonic meeting.

**SUMMARY:** The North Pacific Fishery Management Council (Council) Social Science Plan Team will meet telephonically on November 14, 2017.

**DATES:** The meeting will be held on Tuesday, November 14, 2017, from 10 a.m. to 3 p.m. Alaska Time.

**ADDRESSES:** Teleconference only: (888) 456-5038; Participant passcode: 8480290.

*Council address:* North Pacific Fishery Management Council, 605 W. 4th Ave., Suite 306, Anchorage, AK 99501-2252; telephone: (907) 271-2809.

**FOR FURTHER INFORMATION CONTACT:** Sam Cunningham, Council staff; telephone: (907) 271-2809.

**SUPPLEMENTARY INFORMATION:**

**Agenda**

*Tuesday, November 14, 2017*

The Social Science Planning Team (SSPT) will hold an organizational teleconference in advance of its inaugural annual meeting that will occur in Spring 2018. SSPT will elect an executive officer, establish contributing

member roles and responsibilities, and discuss processes for public participation and reporting to the North Pacific Fishery Management Council and its advisory bodies. The meeting agenda also includes time to scope discussion topics for the Spring 2018 annual meeting; those topics should further the SSPT's objective of identifying information gaps or underutilized social science data collections, and strategizing to improve information resources over the medium- to long-term.

The Agenda is subject to change, and the latest version will be posted at <http://www.npfmc.org/committees/social-science-planning-team/>.

**Special Accommodations**

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Shannon Gleason at (907) 271-2809 at least 7 working days prior to the meeting date.

Dated: October 25, 2017.

**Tracey L. Thompson,**

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

[FR Doc. 2017-23530 Filed 10-27-17; 8:45 am]

**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**RIN 0648-XF787**

**Marine Mammals; File No. 21431**

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

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that Gregory Bossart, V.M.D., Ph.D., Georgia Aquarium, 225 Baker Street Northwest, Atlanta, GA 30313, has applied in due form for a permit to conduct research on bottlenose dolphins (*Tursiops truncatus*).

**DATES:** Written, telefaxed, or email comments must be received on or before November 29, 2017.

**ADDRESSES:** The application and related documents are available for review by selecting "Records Open for Public Comment" from the "Features" box on the Applications and Permits for Protected Species (APPS) home page, <https://apps.nmfs.noaa.gov>, and then selecting File No. 21431 from the list of available applications.

These documents are also available upon written request or by appointment in the Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 427-8401; fax (301) 713-0376.

Written comments on this application should be submitted to the Chief, Permits and Conservation Division, at the address listed above. Comments may also be submitted by facsimile to (301) 713-0376, or by email to [NMFS.Pr1Comments@noaa.gov](mailto:NMFS.Pr1Comments@noaa.gov). Please include File No. 21431 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits and Conservation Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

**FOR FURTHER INFORMATION CONTACT:** Shasta McClenahan or Amy Hapeman, (301) 427-8401.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant requests a five-year permit to assess individual, population, and comparative perspectives of bottlenose dolphin health in the Indian River lagoon and Mantanzas River, Florida. Up to 40 adult or juvenile bottlenose dolphins per year would be captured, sampled, and released for health assessments. Procedures for captured dolphins would include morphometrics, biological sampling (skin and blubber biopsy, blood, mucus membrane swabs, fecal, and urine), ultrasound, tooth extraction, and marking (freeze-brand or roto tag). Dolphins would only be sampled once per year. An additional 400 bottlenose dolphins may be harassed each year during vessel surveys for photography, videography, counts, and behavioral observations. Two unintentional mortalities may occur due to capture over the life of the permit.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the

application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: October 24, 2017.

**Julia Harrison,**

*Chief, Permits and Conservation Division,  
Office of Protected Resources, National  
Marine Fisheries Service.*

[FR Doc. 2017-23512 Filed 10-27-17; 8:45 am]

**BILLING CODE 3510-22-P**

## DEPARTMENT OF COMMERCE

### Patent and Trademark Office

[Docket No.: PTO-P-2017-0036]

#### Expanded Collaborative Search Pilot Program

**AGENCY:** United States Patent and Trademark Office, Commerce.

**ACTION:** Notice.

**SUMMARY:** The United States Patent and Trademark Office (USPTO) conducted two separate Collaborative Search Pilot Programs (CSPs) during the period of 2015 through 2017. One of these programs was conducted with the Japan Patent Office (JPO) and the other with the Korean Intellectual Patent Office (KIPO). Improvements in patent quality and examination pendency were identified as positive outcomes from these two original CSPs. Building on the success of these two programs, the USPTO is participating in a new, expanded CSP (Expanded CSP) in which applicants may request that multiple partnering Intellectual Property (IP) offices exchange search results for their counterpart applications prior to formulating and issuing their office actions. In Expanded CSP, each designated partner IP office will independently conduct a prior art search for its corresponding counterpart application. The search results will then be exchanged between the designated partner IP office(s) and the USPTO before any IP office issues an office action. By this exchange of search results, the examiners in all designated partner IP offices will have a more comprehensive set of prior art references to consider when making initial patentability determinations. In addition to changing the number of IP offices that may be providing search results to the USPTO, Expanded CSP provides applicants with more flexibility by not requiring that applicants follow the procedures of the First Action Interview Pilot Program (FAI). Expanded CSP will allow the USPTO to study the impact on examination processes resulting from exchanges of search results between the

USPTO and multiple partner IP offices prior to formulating and issuing office actions.

**DATES:** Under Expanded CSP, the USPTO and partner IP offices will each accept requests to participate from November 1, 2017, through November 1, 2020, and each IP office will not grant more than 400 requests per year per partner office. The offices may extend the pilot program (with or without modification), if necessary. Each office reserves the right to withdraw from the program at any time.

**FOR FURTHER INFORMATION CONTACT:**

Inquiries regarding the handling of any specific application participating in the pilot may be directed to Daniel Hunter, Director of International Work Sharing, Planning, and Implementation, Office of International Patent Cooperation, by telephone at (571) 272-8050. Any inquiries regarding this pilot program can be emailed to [msp@uspto.gov](mailto:msp@uspto.gov). Inquiries concerning this notice may be directed to Joseph F. Weiss, Jr., Senior Legal Advisor, Office of Patent Legal Administration, by phone (571) 272-7759.

**SUPPLEMENTARY INFORMATION:**

*I. Background:* The USPTO is continually looking for ways to improve the quality of issued patents and to promote work sharing with other IP offices throughout the world. Work sharing benefits applicants by promoting compact prosecution, reducing pendency, and supporting patent quality by reducing the likelihood of inconsistencies in patentability determinations (not predicated upon differences in national patent laws) between IP offices. The USPTO has launched numerous work sharing pilot programs, including the recently completed CSPs with JPO and KIPO. In these completed CSPs, the participating offices implemented administrative procedures to facilitate work sharing between the USPTO and a single designated partner IP office in the form of sharing search results of related counterpart applications. Feedback from the completed CSPs showed sufficiently positive benefits to justify expanding CSP to permit work sharing between the USPTO and more than one designated partner IP office for the same U.S. application.

The USPTO will cooperate in an Expanded CSP to determine whether exchanging the results from searches independently performed by multiple IP offices, which occur substantially simultaneously, also increases the efficiency and quality of patent examination. This Expanded CSP is designed so that this exchange of search

results would occur prior to the IP offices making initial patentability determinations. The current partner IP offices for the Expanded CSP are JPO and KIPO. The USPTO will announce future partner IP offices when they are designated.

Currently, applicants in the USPTO having U.S. applications with claims of foreign priority may have search results and prior art cited to them by the foreign IP office during pendency of their U.S. applications. Often, applicants submit the prior art after examination on the merits is already underway in their U.S. application. Upon evaluation of the search results and cited prior art, the U.S. examiner may determine that the prior art cited by the foreign office is relevant to patentability and merits being used in further examination before making a final determination on patentability of the pending claims. This delay caused by further examination results in additional cost to applicants and the USPTO that could have been avoided if the U.S. examiner was in possession of the foreign office's search results before commencing examination of the U.S. application. Furthermore, in light of the USPTO's various expedited examination programs, the possibility exists that a U.S. application may reach final disposition before the applicant is in receipt of a foreign office's search results. The exchange of search results between IP offices before an initial determination on patentability should increase efficiency and promote patent examination quality.

In order to study the benefits of the exchange of search results between multiple IP offices, current USPTO examination practice will be modified for applications in Expanded CSP so that a search will be conducted and search results generated, without issuance of an Office action. The U.S. applications in Expanded CSP will also be "made special" pursuant to USPTO procedures to ensure that they are contemporaneously searched with their corresponding counterpart applications.

In the original version of the CSP, the USPTO required the use of the First Action Interview Pilot Program (FAI), which bifurcated the prior art search from issuance of an Office action. The USPTO has determined that it is unnecessary to require applicants participating in Expanded CSP to use FAI procedures. Instead, applications in Expanded CSP will be accorded special status prior to first action on the merits (FAOM) and prior art references provided through the exchange of search results will be included in the FAOM.

Expanded CSP in the U.S. requires a petition to make special for the participating application and authorization to exchange information with the designated partner IP office(s) prior to an initial determination of patentability. As this work sharing program is operating under a common framework across all agreements between the USPTO and all partner offices, it is permissible to participate in Expanded CSP with multiple partner offices simultaneously, and the program is open to adding additional partner IP offices once appropriate agreements are in place.

*II. Overview of Expanded CSP:* An application must meet all the requirements set forth in section III of this notice to be accepted into Expanded CSP. Applicants must file a Petition to Make Special Under the Expanded Collaborative Search Pilot Program using form PTO/SB/437 via EFS-web in a U.S. application. Use of the form is mandatory and will assist applicants in complying with the pilot program's requirements, as well as assist the USPTO in quickly identifying participating applications. Form PTO/SB/437 is available at: <http://www.uspto.gov/patents-getting-started/international-protection/collaborative-search-pilot-program-csp>. The collection of information involved in this pilot program has been submitted to OMB. This collection will be available at OMB's Information Collection Review Web site, [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain).

In addition to a petition being filed with the USPTO, a request must also be filed in the corresponding counterpart applications in each applicant-designated partner IP office, in accordance with the requirements of that office. (Partner IP offices may require a petition or a request; therefore, for purposes of this notice, usage of the term 'request' refers to the initial submission that a partner IP office requires to initiate participation in Expanded CSP.) As each partner IP office's conditions for entry may differ, applicants should review the requirements of the relevant partner IP offices to ensure compliance.

No fee for a petition to make special under 37 CFR 1.102 is required for participation in Expanded CSP.

New patent applications are normally taken up for examination in the order of their U.S. filing date. Applications accepted into Expanded CSP will receive expedited processing by being granted special status and taken out of turn until issuance of an FAOM, but will not maintain special status thereafter. Designated partner IP offices

and the USPTO will be sharing search results before issuance of an initial determination on patentability. Participants in Expanded CSP should review the references cited in each respective office's initial determination on patentability. If the references cited by any partner IP office are not already of record in the USPTO application and the applicant wants to ensure that the examiner considers the references, then the applicant should file an Information Disclosure Statement (IDS) that includes a copy of the communication along with copies of any missing or newly cited references in accordance with 37 CFR 1.97, 37 CFR 1.98, and Manual of Patent Examining Procedure (MPEP) sec. 609.04(a)–(b). *See also* MPEP secs. 609 and 2001.06(a).

Each office may reevaluate the workload and resources needed to administer Expanded CSP at any time. The USPTO will provide notice of any substantive changes to the program (including early termination of the program) at least 30 days prior to implementation of any changes.

*III. Requirements for Participation in Expanded CSP:* The following requirements must be satisfied for a petition under Expanded CSP to be granted:

(1) The application must be a non-reissue, non-provisional utility application filed under 35 U.S.C. 111(a); or an international application that has entered the national stage in compliance with 35 U.S.C. 371, with an effective filing date of no earlier than March 16, 2013. For corresponding counterpart applications filed in accordance with the agreement between the USPTO and KIPO only, plant applications filed under 35 U.S.C. 161 are also eligible. The U.S. application and all corresponding counterpart applications must have a common earliest priority date that is no earlier than March 16, 2013. The disclosures of the U.S. application and all counterpart applications must support the claimed subject matter as of a common date. The U.S. application must be complete and eligible to receive a filing receipt at the time the petition is filed.

(2) A completed petition form PTO/SB/437 must be filed in the application via EFS-Web. Form PTO/SB/437 is available at: <http://www.uspto.gov/patents-getting-started/international-protection/collaborative-search-pilot-program-csp>. Based upon the agreements reached between the USPTO and the partner IP offices, a separate petition to make special must be filed in the U.S. application for each partner IP office that the applicant designates.

The petition (Form PTO/SB/437) includes:

(A) An express written consent under 35 U.S.C. 122(c) for the USPTO to accept and consider prior art references and comments from each designated partner IP office during the examination of the U.S. application;

(B) Written authorization for the USPTO to provide to the designated partner IP office access to the participating U.S. application's bibliographic data and search results in accordance with 35 U.S.C. 122(a) and 37 CFR 1.14(c); and

(C) A statement that the applicant agrees not to file a request for a refund of the search fee and any excess claim fees paid in the application after the mailing of the decision on the petition to join Expanded CSP. Note: Any petition for express abandonment under 37 CFR 1.138(d) to obtain a refund of the search fee and excess claim fee filed after the mailing of a decision on the petition will be granted, but the fees will not be refunded.

(3) Petitions must be filed before examination has commenced. Examination may commence at any time after an application has been assigned to an examiner. Petitions should preferably be filed before the application has been assigned to an examiner to ensure that the USPTO does not examine the application before recognizing the petition. Therefore, applicants should check the status of the application using the Patent Application Information and Retrieval (PAIR) system to see if the application has been assigned to an examiner. If the application has been assigned to an examiner, the applicant should contact the examiner to confirm that the application has not been taken up for examination and inform the examiner that a petition to participate in Expanded CSP is being filed. Following this guidance will minimize delays caused by remedial corrective action when a petition is not recognized before examination commences. Further, examination must not have commenced in the identified corresponding counterpart application(s) before each designated partner IP office when filing petitions requesting participation in the U.S. application.

(4) The petition filed in the USPTO and any request filed in a designated partner IP office must be filed within 15 days of each other. If the petition and request(s) are not filed within 15 days of each other, the applicant runs the risk of one of the pending applications being acted upon by an examiner before entry into the pilot program, which will result in the applications being denied entry into Expanded CSP. The request for



participation filed in the corresponding counterpart application(s) for Expanded CSP must be granted by at least one of the designated partner IP offices in order to participate in Expanded CSP.

(5) The petition submission must include a claims correspondence table, which at a minimum must establish “substantial corresponding scope” between all independent claims present in the U.S. application and the corresponding counterpart application(s) filed in the designated partner IP office(s). The claims correspondence table must individually list the claims of the instant U.S. application and correlate them to the claims of the corresponding counterpart application having a substantially corresponding scope. Claims are considered to have a “substantially corresponding scope” where, after accounting for differences due to claim format requirements, the scope of the corresponding claims in the corresponding counterpart application(s) would either anticipate or render obvious the subject matter recited under U.S. law. Additionally, claims in the U.S. application that introduce a new/different category of claims than those presented in the corresponding counterpart application(s) are not considered to substantially correspond. For example, where the corresponding counterpart application(s) contain only claims relating to a process of manufacturing a product, any product claims in the U.S. application are not considered to substantially correspond, even if the product claims are dependent on process claims that do substantially correspond to claims in the corresponding counterpart application(s). Applicants may file a preliminary amendment in compliance with 37 CFR 1.121 to amend the claims of the U.S. application to satisfy this requirement when attempting to make the U.S. application eligible for the program. A translated copy of the claims in English for each counterpart application is required if the application in the designated partner IP office(s) is not publicly available in English. A machine translation is sufficient. Non-corresponding claims need not be listed.

(6) The U.S. application must contain 3 or fewer independent claims and 20 or fewer total claims. The U.S. application must not contain any multiple dependent claims; the corresponding counterpart application may contain multiple dependent claims in accordance with national practice of the partner IP office where it is filed. For a U.S. application that contains more than 3 independent claims or 20

total claims, or any multiple dependent claims, applicants may file a preliminary amendment in compliance with 37 CFR 1.121 to cancel the excess claims and/or the multiple dependent claims to make the application eligible for the program.

*IV. Treatment of Petition:* As discussed in section III, the number of petitions to make special filed in the U.S. application must equal the number of designated partner IP offices where a corresponding counterpart application has been filed. At least one designated partner office must grant the request in order for that application and the counterpart U.S. application to participate in Expanded CSP.

If examination commences in either the U.S. or a given designated corresponding counterpart application before either the petition or request is filed, then that combination of U.S. application and designated corresponding counterpart application cannot participate in Expanded CSP. Applicants are advised that, even if they timely file a request with a designated partner office, if the USPTO is not informed by the designated partner office of the filing of the request in the corresponding counterpart application within 20 days of a petition filing with the USPTO, then the USPTO may initially dismiss the petition. In such situation, the applicant may request reconsideration, as discussed in Item B, below.

*A. Petition Grant by USPTO:* Once a determination is made that all the requirements of Section III of this notice are satisfied, the USPTO petition will be granted and the application will be placed on the examiner’s special docket until an FAOM is issued. The USPTO and the designated partner IP office(s) will then have four months to provide search results. As a result, once the USPTO grants the petition, the applicant will no longer have a right to file a preliminary amendment that amends the claims. Any preliminary amendment filed after the petition is granted and before issuance of an FAOM amending the claims will not be entered unless approved by the examiner. After the petition is granted and before issuance of the FAOM, the applicant may still submit preliminary amendments to the specification that do not affect the claims. All such submissions for the participating U.S. application must be filed via EFS-Web.

*B. Petition Dismissal by USPTO:* If the applicant files an incomplete Form PTO/SB/437, or if an application accompanied by Form PTO/SB/437 does not comply with the requirements set forth in this Notice, the USPTO will

notify the applicant of the deficiencies by dismissing the petition and the applicant will be given a single opportunity to correct the deficiencies. If the applicant still wishes to participate in the pilot program, the applicant must make appropriate corrections within 1 month or 30 days of the mailing date of the dismissal decision, whichever is longer. The time period for reply is *not* extendable under 37 CFR 1.136(a). If the applicant timely files a response to the dismissal decision correcting all the noted deficiencies without introducing any new deficiencies, the USPTO will grant the petition if a grantable request has been filed in a corresponding counterpart application.

If the applicant fails to correct the noted deficiencies within the time period set forth, the USPTO may dismiss the petition and notify the designated partner IP office(s). The U.S. application will then be taken up for examination in accordance with standard examination procedures, unless designated special in accordance with another established procedure (e.g., Request for Prioritized Examination, Petition to Make Special Based on Applicant’s Age).

*C. Withdrawal of Petition:* An application can be withdrawn from the pilot program only by filing a request to withdraw the petition to participate in the pilot program prior to issuance of a decision granting the petition. Once the petition for participation in the pilot program has been granted, withdrawal from the pilot program is not permitted.

*V. Requirement for Restriction:* The claims must be directed to a single invention. If the examiner determines that not all the claims presented are directed to a single invention, the telephone restriction practice set forth in MPEP sec. 812.01 will be followed. The applicant must make an election without traverse during the telephonic interview. If the applicant refuses to make an election without traverse, or if the examiner cannot reach the applicant after a reasonable effort (i.e., three business days), the examiner will treat the first claimed invention (the group of claim 1) as constructively elected without traverse for examination and include a basis for the restriction or lack of unity requirement in the FAOM. When a telephonic election is made, the examiner will provide a complete record of the telephonic interview, including the restriction or lack of unity requirement and the applicant’s election, in the FAOM. Applicants are strongly encouraged to ensure that applications submitted for Expanded CSP are written such that they claim a

single, independent, and distinct invention. The applicant is responsible to ensure the same invention is elected in both the U.S. and all corresponding counterpart applications for concurrent treatment in Expanded CSP.

*VI. First Action on the Merits (FAOM):* During examination, the USPTO examiner will consider all exchanged search results and all references submitted by the applicant in accordance with 37 CFR 1.97 and 37 CFR 1.98. Search results that are not received by the USPTO within four months may not be included in the FAOM. The examiner will prepare and issue an Office action and notify the applicant if any designated partner IP office did not provide search results prior to the issuance of the Office action. Once an FAOM issues, the application will no longer be treated as special under Expanded CSP.

Dated: October 25, 2017.

**Joseph Matal,**

*Associate Solicitor, performing the functions and duties of the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

[FR Doc. 2017-23661 Filed 10-27-17; 8:45 am]

**BILLING CODE 3510-16-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:* EC17-184-000.

*Applicants:* Puget Sound Energy, Inc., Macquarie Infrastructure Partners Inc.

*Description:* Supplement to September 19, 2017 Application for Authorization Under Section 203 of the Federal Power Act of Puget Sound Energy, Inc., et al.

*Filed Date:* 10/23/17.

*Accession Number:* 20171023-5173.

*Comments Due:* 5 p.m. ET 10/30/17.

Take notice that the Commission received the following electric rate filings:

*Docket Numbers:* ER08-1281-013.

*Applicants:* New York Independent System Operator, Inc.

*Description:* Motion to Terminate the Reporting Obligation of the New York Independent System Operator, Inc.

*Filed Date:* 3/27/2017.

*Accession Number:* 20170327-5298.

*Comments Due:* 5 p.m. ET 11/14/17.

*Docket Numbers:* ER17-2027-001.

*Applicants:* Southwest Power Pool, Inc.

*Description:* Tariff Amendment: Deficiency Response—Integrated Transmission Planning Process Tariff Revisions to be effective 10/1/2017.

*Filed Date:* 10/23/17.

*Accession Number:* 20171023-5477.

*Comments Due:* 5 p.m. ET 11/13/17.

*Docket Numbers:* ER17-2560-001.

*Applicants:* Avista Corporation.

*Description:* Tariff Amendment: Avista Corp NITSA BPA Kalispel SA T-1140 Amendment to be effective 10/1/2017.

*Filed Date:* 10/24/17.

*Accession Number:* 20171024-5114.

*Comments Due:* 5 p.m. ET 11/14/17.

*Docket Numbers:* ER18-135-000.

*Applicants:* AEP Texas Inc.

*Description:* § 205(d) Rate Filing: AEP TX-Oncor IA Second Amended & Restated to be effective 9/26/2017.

*Filed Date:* 10/23/17.

*Accession Number:* 20171023-5475.

*Comments Due:* 5 p.m. ET 11/13/17.

*Docket Numbers:* ER18-136-000.

*Applicants:* Midcontinent

Independent System Operator, Inc.  
*Description:* § 205(d) Rate Filing: 2017-10-23\_Revisions to MISO-PJM JOA to address congestion overlap issues to be effective 3/1/2018.

*Filed Date:* 10/23/17.

*Accession Number:* 20171023-5483.

*Comments Due:* 5 p.m. ET 11/13/17.

*Docket Numbers:* ER18-137-000.

*Applicants:* PJM Interconnection,

L.L.C.

*Description:* § 205(d) Rate Filing: Revisions to MISO-PJM JOA re: Overlapping Congestion Charges to be effective 3/1/2018.

*Filed Date:* 10/23/17.

*Accession Number:* 20171023-5484.

*Comments Due:* 5 p.m. ET 11/13/17.

*Docket Numbers:* ER18-138-000.

*Applicants:* First Solar Development, LLC.

*Description:* Petition for Limited Waiver of Tariff Submission Deadline of First Solar Development, LLC.

*Filed Date:* 10/23/17.

*Accession Number:* 20171023-5628.

*Comments Due:* 5 p.m. ET 11/6/17.

*Docket Numbers:* ER18-139-000.

*Applicants:* PJM Interconnection,

L.L.C.

*Description:* § 205(d) Rate Filing: Amendment to ISA No. 3198 and CSA Nos. 2642 and 2643; Queue No. T157/W4-037 to be effective 9/1/2010.

*Filed Date:* 10/24/17.

*Accession Number:* 20171024-5072.

*Comments Due:* 5 p.m. ET 11/14/17.

*Docket Numbers:* ER18-140-000.

*Applicants:* Lackawanna Energy Center LLC.

*Description:* Baseline eTariff Filing: Application for Market-Based Rate Authorization to be effective 12/24/2017.

*Filed Date:* 10/24/17.

*Accession Number:* 20171024-5079.

*Comments Due:* 5 p.m. ET 11/14/17.

*Docket Numbers:* ER18-141-000.

*Applicants:* Southern California Edison Company.

*Description:* § 205(d) Rate Filing: LGIA Alamitos Energy Center Project SA No 197 to be effective 10/25/2017.

*Filed Date:* 10/24/17.

*Accession Number:* 20171024-5080.

*Comments Due:* 5 p.m. ET 11/14/17.

*Docket Numbers:* ER18-142-000.

*Applicants:* Southern California Edison Company.

*Description:* § 205(d) Rate Filing: LGIA Huntington Beach Energy Project SA No 196 to be effective 10/25/2017.

*Filed Date:* 10/24/17.

*Accession Number:* 20171024-5081.

*Comments Due:* 5 p.m. ET 11/14/17.

*Docket Numbers:* ER18-143-000.

*Applicants:* PJM Interconnection, L.L.C.

*Description:* § 205(d) Rate Filing: Revisions to OATT 10.4 and OA 15.6 RE: Limitation on Claims to be effective 12/23/2017.

*Filed Date:* 10/24/17.

*Accession Number:* 20171024-5084.

*Comments Due:* 5 p.m. ET 11/14/17.

*Docket Numbers:* ER18-144-000.

*Applicants:* Southern California Edison Company.

*Description:* § 205(d) Rate Filing: Interconnection Agreement Bob Switch-Eldorado 220-kV Transmission Line to be effective 10/25/2017.

*Filed Date:* 10/24/17.

*Accession Number:* 20171024-5112.

*Comments Due:* 5 p.m. ET 11/14/17.

*Docket Numbers:* ER18-145-000.

*Applicants:* Midcontinent Independent System Operator, Inc.

*Description:* § 205(d) Rate Filing: 2017-10-24\_SA 2637 Border Winds-NSP E&P (J290) Termination to be effective 10/25/2017.

*Filed Date:* 10/24/17.

*Accession Number:* 20171024-5127.

*Comments Due:* 5 p.m. ET 11/14/17.

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: October 24, 2017.

**Nathaniel J. Davis, Sr.,**  
Deputy Secretary.

[FR Doc. 2017-23553 Filed 10-27-17; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER18-128-000]

#### 54KR 8ME LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of 54KR 8ME 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 November 13, 2017.

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](mailto:FERCOnlineSupport@ferc.gov) or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: October 24, 2017.

**Nathaniel J. Davis, Sr.,**  
Deputy Secretary.

[FR Doc. 2017-23555 Filed 10-27-17; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER18-126-000]

#### AL Solar A, LLC; Supplemental Notice That Initial Market-Based Rate Filing Includes Request for Blanket Section 204 Authorization

This is a supplemental notice in the above-referenced proceeding of AL Solar A, 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 November 13, 2017.

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](mailto:FERCOnlineSupport@ferc.gov) or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Dated: October 24, 2017.

**Nathaniel J. Davis, Sr.,**  
Deputy Secretary.

[FR Doc. 2017-23554 Filed 10-27-17; 8:45 am]

BILLING CODE 6717-01-P

## FEDERAL DEPOSIT INSURANCE CORPORATION

[OMB No. 3064-0198]

### Agency Information Collection Activities: Submission for OMB Review; Comment Request

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Notice and request for comment.

**SUMMARY:** The FDIC, 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 the renewal of the existing information collection, as required by the Paperwork Reduction Act of 1995. On August 18, 2017, the FDIC requested comment for 60 days on a proposal to renew the information collection described below. No comments were received. The FDIC hereby gives notice of its plan to submit to OMB a request to approve the renewal of this collection, and again invites comment on this renewal.

**DATES:** Comments must be submitted on or before November 29, 2017.

**ADDRESSES:** Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- <http://www.FDIC.gov/regulations/laws/federal/notices.html>.
- *Email:* [comments@fdic.gov](mailto:comments@fdic.gov). Include the name and number of the collection in the subject line of the message.
- *Mail:* Jennifer Jones (202-898-6768), Counsel, MB-3105, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building

(located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

**FOR FURTHER INFORMATION CONTACT:** Jennifer Jones, at the FDIC address above.

**SUPPLEMENTARY INFORMATION:** On August 18, 2017, (82 FR 39430), the FDIC requested comment for 60 days on a proposal to renew the information

collection described below. No comments were received. The FDIC hereby gives notice of its plan to submit to OMB a request to approve the renewal of this collection, and again invites comment on this renewal.

**Proposal To Renew the Following Currently Approved Collections of Information**

1. *Title:* Information Collection for Qualitative Research.

*OMB Number:* 3064-0198.

*Form Number:* None.

*Affected Public:* Consumers and financial services providers.

*Burden Estimate:*

**2017 SUMMARY OF ANNUAL BURDEN (3064-0198)**

	Number of sessions	Participants/ session	Hours/session (incl. intake form)	Travel time	Burden hours/year
<b>Method:</b>					
In-Person Focus Groups .....	50	10	1.75	1.50	1,625
In-Person Interviews .....	50	1	1	1.50	125
Phone Interviews .....	60	1	1	0	60
Virtual Collection .....	1	50	1.50	0	75
Cognitive Testing .....	4	25	2.00	1.50	350
<b>Total Hourly Burden .....</b>					<b>2,235</b>

*General Description of Collection:* The FDIC plans to collect information from consumers and financial services providers through qualitative research methods such as focus groups, in-depth interviews, and/or qualitative virtual methods. The information collected will be used to deepen the FDIC's understanding of the knowledge, experiences, behaviors, capabilities, and preferences of consumers of financial services. These qualitative research methods will also contribute to the FDIC's understanding of how consumers, including those who are financially underserved, use a range of different types of bank and non-bank financial services. Interviews of financial services providers are intended to provide greater insight into the providers' perceptions of the opportunities and challenges of providing an array of financial services and products. These qualitative methods will also provide an opportunity to test and improve other survey efforts conducted by the FDIC. The FDIC does not intend to use qualitative research to measure or quantify results.

Participation in this information collection will be voluntary and conducted in-person, by phone, or using other methods, such as virtual technology. The FDIC plans to retain an

experienced contractor(s) to recommend the most appropriate collection method based on the objectives of each qualitative research effort. The FDIC will consult with OMB regarding each specific information collection during the approval period.

**Request for Comment**

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 24th day of October 2017.

Federal Deposit Insurance Corporation.

**Valerie J. Best,**  
*Assistant Executive Secretary.*

[FR Doc. 2017-23509 Filed 10-27-17; 8:45 am]

**BILLING CODE 6714-01-P**

**FEDERAL DEPOSIT INSURANCE CORPORATION**

**Update to Notice of Financial Institutions for Which the Federal Deposit Insurance Corporation Has Been Appointed Either Receiver, Liquidator, or Manager**

**AGENCY:** Federal Deposit Insurance Corporation.

**ACTION:** Update Listing of Financial Institutions in Liquidation.

**SUMMARY:** Notice is hereby given that the Federal Deposit Insurance Corporation (Corporation) has been appointed the sole receiver for the following financial institutions effective as of the Date Closed as indicated in the listing. This list (as updated from time to time in the **Federal Register**) may be relied upon as "of record" notice that the Corporation has been appointed receiver for purposes of the statement of policy published in the July 2, 1992, issue of the **Federal Register** (57 FR 29491). For further information concerning the identification of any institutions which have been placed in liquidation, please visit the Corporation Web site at [www.fdic.gov/bank/individual/failed/banklist.html](http://www.fdic.gov/bank/individual/failed/banklist.html) or contact the Manager of Receivership Oversight in the appropriate service center.

Dated: October 24, 2017.  
Federal Deposit Insurance Corporation.  
**Valerie J. Best,**  
*Assistant Executive Secretary.*

Federal Deposit Insurance Corporation.  
**Valerie J. Best,**  
*Assistant Executive Secretary.*

INSTITUTIONS IN LIQUIDATION  
[In alphabetical order]

FDIC ref. No.	Bank name	City	State	Date closed
10529 .....	The Farmers and Merchants State Bank of Argonia .....	Argonia .....	KS ...	10/13/2017

[FR Doc. 2017-23510 Filed 10-27-17; 8:45 am]  
**BILLING CODE 6714-01-P**

**FEDERAL FINANCIAL INSTITUTIONS  
EXAMINATION COUNCIL**

[Docket No. AS17-08]

**Appraisal Subcommittee Notice of  
Meeting**

**AGENCY:** Appraisal Subcommittee of the  
Federal Financial Institutions  
Examination Council.

**ACTION:** Notice of Meeting.

*Description:* In accordance with  
Section 1104 (b) of Title XI of the  
Financial Institutions Reform, Recovery,  
and Enforcement Act of 1989, as  
amended, notice is hereby given that the  
Appraisal Subcommittee (ASC) will  
meet in open session for its regular  
meeting:

*Location:* Federal Reserve Board—  
International Square location, 1850 K  
Street NW., Washington, DC 20006.

*Date:* November 8, 2017.

*Time:* 10:00 a.m.

*Status:* Open.

**Reports**

Chairman  
Executive Director  
Delegated State Compliance Reviews  
Financial Report

**Action and Discussion Items**

September 13, 2017 Open Session  
Minutes  
“Reporting Requirements” Proposed  
Information Collection: OMB  
Clearance pursuant to Paperwork  
Reduction Act  
Bulletin on AMC Registry Fees  
Bulletin on 12-month extension of  
Implementation Period for AMC  
Programs  
ASC Rules of Operation—Meeting  
Schedule

**How To Attend and Observe an ASC  
Meeting**

If you plan to attend the ASC Meeting  
in person, we ask that you send an  
email to [meetings@asc.gov](mailto:meetings@asc.gov). You may

register until close of business four  
business days before the meeting date.  
You will be contacted by the Federal  
Reserve Law Enforcement Unit on  
security requirements. You will also be  
asked to provide a valid government-  
issued ID before being admitted to the  
Meeting. The meeting space is intended  
to accommodate public attendees.  
However, if the space will not  
accommodate all requests, the ASC may  
refuse attendance on that reasonable  
basis. The use of any video or audio  
tape recording device, photographing  
device, or any other electronic or  
mechanical device designed for similar  
purposes is prohibited at ASC meetings.

Dated: October 25, 2017.

**James R. Park,**

*Executive Director.*

[FR Doc. 2017-23533 Filed 10-27-17; 8:45 am]

**BILLING CODE 6700-01-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 November 22,  
2017.

*A. Federal Reserve Bank of  
Minneapolis* (Brendan S. Murrin,  
Assistant Vice President) 90 Hennepin  
Avenue, Minneapolis, Minnesota  
55480-0291:

1. *NATCOM Bancshares, Inc.,  
Superior, Wisconsin*; to acquire 49  
percent of the voting shares of Republic  
Bancshares, Inc., Duluth, Minnesota,  
and thereby indirectly acquire shares of  
Republic Bank, Inc., Duluth, Minnesota.

Board of Governors of the Federal Reserve  
System, October 24, 2017.

**Ann E. Misback,**

*Secretary of the Board.*

[FR Doc. 2017-23501 Filed 10-27-17; 8:45 am]

**BILLING CODE 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 November 17, 2017.

*A. Federal Reserve Bank of Dallas* (Robert L. Triplett III, Senior Vice President) 2200 North Pearl Street, Dallas, Texas 75201-2272:

1. *A.N.B. Holding Company, Ltd., Terrell, Texas, and The ANB Corporation, Terrell, Texas*; to merge with G-6 Corporation, Mesquite, Texas, and thereby indirectly acquire First State Bank, Mesquite, Texas.

Board of Governors of the Federal Reserve System, October 19, 2017.

**Ann Misback,**

*Secretary of the Board.*

[FR Doc. 2017-23472 Filed 10-27-17; 8:45 am]

**BILLING CODE P**

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than November 7, 2017.

*A. Federal Reserve Bank of Atlanta* (Kathryn Haney, Director of Applications) 1000 Peachtree Street NE., Atlanta, Georgia 30309. Comments can also be sent electronically to [Applications.Comments@atl.frb.org](mailto:Applications.Comments@atl.frb.org):

1. *Gregory W. Griffith, Silver Spring, Maryland; Beverly Franklin Hales, Peachtree City, Georgia; Ethel Stephanie Stuckey Benfield, Atlanta, Georgia; Russell D. Franklin, Tallahassee, Florida; Jay Gould Stuckey, Los Angeles, California; Scott M. Stuckey, Los Angeles, California; Marietta Bryson Stuckey, Augusta, Georgia; W. S. Stuckey IV, Augusta, Georgia; James Austin Putnam, Eastman, Georgia; Williamson Elliott Putnam, Eastman, Georgia; Christine, S. Boland, Washington, DC; Michelle S. Stuckey, Atlanta, Georgia; Andrew Stuckey, Brookline, Massachusetts; Todd Giddens as Trustee of the LSF Family Trust, Dublin, Georgia, and Gregory W. Griffith as Trustee of the WSS Family Trust, Silver Spring, Maryland*; to retain voting shares of Citizens Corporation, and thereby indirectly retain voting shares of Citizens Bank & Trust Company, both of Eastman, Georgia.

*B. Federal Reserve Bank of Chicago* (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. *Linda Sue Baier, individually and together with James Alan Bair, both of Fort Madison, Iowa as a group acting in concert*; to retain voting shares of Fort Madison Financial Company and thereby indirectly acquire voting shares of Connection Bank, both of Fort Madison, Iowa.

*C. Federal Reserve Bank of Kansas City* (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198-0001:

1. *Susan Schardt, Kearney, Nebraska, individually, and as co-trustee of the following trusts: Brian Schardt Trust No. 2; the Christina Nokelby Trust No. 2; the Kimberly Schardt Porter Trust No. 2; and the Rebecca Rathjen Trust No. 2*, to acquire voting shares of Exchange Company, Kearney, Nebraska, and thereby indirectly acquire voting shares of Exchange Bank, Gibbon, Nebraska.

In addition, Patricia Schardt, Deshler, Nebraska, has applied individually and as trustee of the Ronald P. Schardt Marital Trust and Ronald P. Schardt GS Exempt Marital Trust, to retain voting shares of Exchange Company, and for approval to join as a member of the Schardt Family Group acting in concert, which controls Exchange Company.

Board of Governors of the Federal Reserve System, October 19, 2017.

**Ann Misback,**

*Secretary of the Board.*

[FR Doc. 2017-23477 Filed 10-27-17; 8:45 am]

**BILLING CODE P**

## FEDERAL RETIREMENT THRIFT INVESTMENT BOARD

### Sunshine Act Meetings

#### EMPLOYEE THRIFT ADVISORY COUNCIL MEETING

**AGENDA:** Employee Thrift Advisory Council, November 8, 2017, 10:00 a.m. (In-Person), 77 K Street NE., Washington, DC 20002.

1. Approval of the minutes of the May 31, 2017 Joint Board/ETAC meeting
2. Thrift Savings Plan Statistics
3. FY18 Budget
5. Blended Retirement Update
6. Participant Survey
7. Withdrawal Project Overview
9. New Business

**CONTACT PERSON FOR MORE INFORMATION:** Kimberly Weaver, Director, Office of External Affairs, (202) 942-1640.

Dated: October 25, 2017.

**Megan Grumbine,**

*General Counsel, Federal Retirement Thrift Investment Board.*

[FR Doc. 2017-23619 Filed 10-26-17; 11:15 am]

**BILLING CODE 6760-01-P**

## FEDERAL TRADE COMMISSION

[File No. 162 3210]

### Victory Media, Inc.; Analysis To Aid Public Comment

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed Consent Agreement.

**SUMMARY:** The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis to Aid Public Comment describes both the allegations in the complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

**DATES:** Comments must be received on or before November 20, 2017.

**ADDRESSES:** Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write: "In the Matter of Victory Media, Inc., File No. 1623210" on your comment, and file your comment online at <https://ftcpublish.commentworks.com/ftc/victorymediaconsent/> by following the instructions on the web-based form. If you prefer to file your comment on paper, write "In the Matter of Victory Media, Inc., File No. 1623210" on your comment and on the envelope, and mail your comment to the following address:

Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW., Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW., 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

**FOR FURTHER INFORMATION CONTACT:**

Nikhil Singhvi (202-326-3480) and Stephanie Cox (202-326-2908), Bureau of Consumer Protection, 600 Pennsylvania Avenue NW., Washington, DC 20580.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for October 19, 2017), on the World Wide Web, at <https://www.ftc.gov/news-events/commission-actions>.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before November 20, 2017. Write "In the Matter of Victory Media, Inc., File No. 1623210" on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at <https://www.ftc.gov/policy/public-comments>.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://ftcpolicy.commentworks.com/ftc/victorymediacconsent/> by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov/#/home>, you also may file a comment through that Web site.

If you prefer to file your comment on paper, write "In the Matter of Victory Media, Inc., LLC, File No. 1623210" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600

Pennsylvania Avenue NW., Suite CC-5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street, SW., 5th Floor, Suite 5610 (Annex D), Washington, DC. 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible FTC Web site at <https://www.ftc.gov>, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not include any sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the public FTC Web site—as legally required by FTC Rule 4.9(b)—we cannot redact or remove your comment from the FTC Web site, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Web site at <http://www.ftc.gov> to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before November 20, 2017. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

**Analysis of Proposed Consent Order To Aid Public Comment**

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from Victory Media, Inc. The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the FTC will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final agreement's proposed order.

The respondent publishes print and online magazines and guides for servicemembers transitioning from military service to the civilian workforce. The respondent does business under the names G.I. Jobs and Military Friendly. Its Web sites include [gijobs.com](http://gijobs.com), [militaryfriendly.com](http://militaryfriendly.com), and [militaryspouse.com](http://militaryspouse.com). Victory Media also maintains active social media accounts, including on Twitter, Facebook, YouTube, and LinkedIn, under handles such as "Military Friendly" or "G.I. Jobs" that attract military consumers.

The respondent operates a search tool, School Matchmaker, at [gijobs.com](http://gijobs.com) to help servicemembers find educational institutions in their fields of interest. The proposed complaint in this matter alleges that the respondent made claims that its Matchmaker tool searched schools that met respondent's "military friendly" criteria. In fact, the tool searches only schools that pay to be included, whether respondent has designated them as "military friendly" or not. Thus, several schools not designated by the respondent as "military friendly" are included in the Matchmaker search results. The proposed complaint alleges that the respondent's misrepresentations regarding the scope of the Matchmaker search tool constitute a deceptive act or practice under Section 5 of the FTC Act.

Additionally, the FTC complaint alleges that the respondent, in certain of its articles, emails, and social media posts, misrepresented that its endorsements were independent and not paid advertising, and failed to adequately disclose that the content recommended schools that paid the respondent specifically to be promoted therein. The proposed complaint alleges that those misrepresentations and undisclosed paid recommendations constitute deceptive acts or practices under Section 5 of the FTC Act.

The proposed order is designed to prevent the respondent from engaging in similar deceptive practices in the future.

Part I prohibits the respondent from making any misrepresentations regarding the scope of any search tool, including whether the tool only searches “military friendly” schools. Part I further prohibits the respondent from making any misrepresentations about material connections between it and any schools, and from making any misrepresentations that paid commercial advertising is independent content.

Part II requires the respondent, when endorsing schools (or preparing third-party endorsements of schools), to clearly and conspicuously disclose, in close proximity to the endorsement, any payments or other material connections between the respondent or the other endorser and the school. This disclosure requirement applies where consumers are likely to believe that such endorsements reflect the beliefs of the respondent or other endorser (and not the schools themselves).

Parts III through VII of the proposed order are reporting and compliance provisions.

Part III is an order distribution provision. Part IV requires the respondent to submit a compliance report one year after the issuance of the order, and to notify the Commission of corporate changes that may affect compliance obligations. Part V requires the respondent to create, for 10 years, accounting, personnel, complaint, and advertising records, and to maintain each of those records for 5 years. Part VI requires the respondent to submit additional compliance reports within 10 business days of a written request by the Commission, and to permit voluntary interviews with persons affiliated with the respondent. Part VII “sunsets” the order after twenty years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint

or proposed order, or to modify in any way the proposed order’s terms.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 2017–23514 Filed 10–27–17; 8:45 am]

**BILLING CODE 6750–01–P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Centers for Disease Control and Prevention

**[60Day–18–0932; Docket No. CDC–2018–0094]**

#### Proposed Data Collection Submitted for Public Comment and Recommendations

**AGENCY:** Centers for Disease Control and Prevention (CDC), Department of Health and Human Services (HHS).

**ACTION:** Notice with comment period.

**SUMMARY:** The Centers for Disease Control and Prevention (CDC), as part of its continuing effort to reduce public burden and maximize the utility of government information, invites the general public and other Federal agencies the opportunity to comment on a proposed and/or continuing information collection, as required by the Paperwork Reduction Act of 1995. This notice invites comment on a proposed information collection project titled *Information Collection for Evaluation of Education, Communication, and Training Activities for Mobile Populations*. This data collection will enable to evaluate its mobile populations and stakeholders communication, training, and education material’s effectiveness.

**DATES:** CDC must receive written comments on or before December 29, 2017.

**ADDRESSES:** You may submit comments, identified by Docket No. CDC–2018–0094 by any of the following methods:

- *Federal eRulemaking Portal:* *Regulations.gov*. Follow the instructions for submitting comments.

- *Mail:* Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329.

*Instructions:* All submissions received must include the agency name and Docket Number. CDC will post, without change, all relevant comments to *Regulations.gov*.

*Please note:* Submit all Federal comments through the Federal

eRulemaking portal (*regulations.gov*) or by U.S. mail to the address listed above.

**FOR FURTHER INFORMATION CONTACT:** To request more information on the proposed project or to obtain a copy of the information collection plan and instruments, contact Leroy A. Richardson, Information Collection Review Office, Centers for Disease Control and Prevention, 1600 Clifton Road NE., MS–D74, Atlanta, Georgia 30329; phone: 404–639–7570; Email: *omb@cdc.gov*.

**SUPPLEMENTARY INFORMATION:** Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. In addition, the PRA also requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each new proposed collection, each proposed extension of existing collection of information, and each reinstatement of previously approved information collection before submitting the collection to the OMB for approval. To comply with this requirement, we are publishing this notice of a proposed data collection as described below.

The OMB is particularly interested in comments that will help:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.
5. Assess information collection costs.

#### Proposed Project

Information Collection for Evaluation of Education, Communication, and Training Activities for Mobile Populations (OMB Control Number 0920–0932, Expires 7/31/2018)—Extension—National Center for Emerging and Zoonotic Infectious



Diseases (NCEZID), Centers for Disease Control and Prevention (CDC).

**Background and Brief Description**

The CDC’s Division of Global Migration and Quarantine (DGMQ) seeks to request a three-year extension of a currently approved generic information collection plan to conduct evaluation research. Information gathered from this plan’s associated data collections will help CDC plan and implement health communication, education, and training activities to improve health and prevent the spread of disease. These activities include communicating, educating, and training with international travelers and other mobile populations, training healthcare providers, and educating public health departments, federal partners, and other stakeholders.

CDC proposes to change the current title of this generic plan from “Information Collection for Evaluation of Education, Communication, and Training Activities for the Division of Global Migration and Quarantine” to “Information Collection for Evaluation of Education, Communication, and Training Activities for Mobile Populations.”

In the past three years, OMB approved two individual information collections under this generic plan, where both resulted in collaborations between multiple divisions within the NCEZID.

DGMQ proposes a less exclusive project title because multiple divisions across NCEZID frequently collaborate on various activities. DGMQ does not propose any other changes for this extension request.

DGMQ has aligned the proposed information collections with DGMQ’s mission to reduce morbidity and mortality among immigrants, refugees, travelers, expatriates, and other globally mobile populations, and to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the United States. This mission is supported by delegated legal authorities outlined in the Public Health Service (PHS) Act (42 U.S.C. 264) and in regulations that are codified in 42 Code of Federal Regulations (CFR) parts 70 and 71, and 34.

Approval of this extension request will enable DGMQ to continue collecting information in an expedited manner. To help improve and inform activities during both routine and emergency public health events, DGMQ seeks to collect the following information types: Knowledge, attitudes, and behaviors of key audiences (such as refugees, immigrants, migrants, international travelers, travel industry partners, healthcare providers, non-profit agencies, customs brokers and forwarders, schools, state and local health departments). This generic

information collection plan will help DGMQ continue to refine efforts prove valuable for communication activities that must occur quickly in response to public health emergencies.

DGMQ staff will use a variety of data collection methods for this proposed project: Interviews, focus groups, surveys, and pre/post-tests. Depending on the research questions and audiences involved, data may be gathered in-person, by telephone, online, or using some combination of these formats. CDC may collect data in quantitative and/or qualitative forms. CDC will assess numerous audience variables under the auspices of this generic information collection plan. These include, but are not limited to, knowledge, attitudes, beliefs, behavioral intentions, practices, behaviors, skills, self-efficacy, and information needs and sources. Insights gained from evaluation research will assist in the development, refinement, implementation, and demonstration of outcomes and impact of communication, education, and training activities.

DGMQ estimates that 17,500 respondents and 7,982 hours of burden will be involved in evaluation research activities each year. The collected information will not impose a cost burden on the respondents beyond that associated with their time to provide the required data.

**ESTIMATED ANNUALIZED BURDEN HOURS**

Type of respondents	Form name	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total burden (in hours)
General Public .....	Focus Groups Screening form .....	1,050	1	10/60	175
Healthcare Professionals .....	Focus Groups Screening form .....	450	1	10/60	75
General Public .....	Focus Groups .....	525	1	90/60	788
Healthcare Professionals .....	Focus Groups .....	225	1	90/60	338
General Public .....	Interview Screening Form .....	700	1	10/60	117
Healthcare Professionals .....	Interview Screening Form .....	300	1	10/60	50
General Public .....	Interviews .....	350	1	1	350
Healthcare Professionals Interviews	Interviews .....	150	1	1	150
General Public .....	Survey Screening Forms .....	5,250	1	10/60	875
Healthcare Professionals .....	Survey Screening Forms .....	2,250	1	10/60	375
General Public .....	Surveys .....	2,625	1	45/60	1,969
Healthcare Professionals .....	Surveys .....	1,125	1	45/60	844
General Public .....	Pre/Post Tests .....	1,750	1	45/60	1,313
Healthcare Professionals .....	Pre/Post Tests .....	750	1	45/60	563
<b>Total .....</b>	.....	.....	.....	.....	<b>7,982</b>

**Leroy A. Richardson,**  
*Chief, Information Collection Review Office,  
 Office of Scientific Integrity, Office of the  
 Associate Director for Science, Office of the  
 Director, Centers for Disease Control and  
 Prevention.*

[FR Doc. 2017-23561 Filed 10-27-17; 8:45 am]

**BILLING CODE 4163-18-P**

**DEPARTMENT OF HEALTH AND  
 HUMAN SERVICES**

**Administration for Children and  
 Families**

**Submission for OMB Review;  
 Comment Request**

**Proposed Projects**

*Title:* Multistate Financial Institution Data Match and Federally Assisted State Transmitted Levy (MSFIDM/FAST Levy).

*OMB No.:* 0970-0196.

*Description:* Section 466(a)(17) of the Social Security Act (the Act) requires states to establish procedures for their child support agencies to enter into agreements with financial institutions doing business in their state for the purpose of securing information leading to the enforcement of child support orders. Under 452(m) and 466(a)(17)(A)(i) of the Act, the Secretary may aid state agencies conducting data matches with financial institutions doing business in two or more states by establishing a centralized and standardized matching program through the Federal Parent Locator Service.

To further assist states collect child support, the federal Office of Child Support Enforcement (OCSE) worked with child support agencies and financial institutions to develop the Federally Assisted State Transmitted (FAST) Levy system.

FAST Levy is a central, standardized, and secure electronic process for child support agencies and financial institutions to exchange information about levying financial accounts to collect past-due support. OCSE picks up files created by child support agencies that contain FAST Levy requests and distributes them to financial institutions that use the FAST Levy system. Those financial institutions create response files that OCSE picks up and distributes to the child support agencies.

The MSFIDM/FAST-Levy information collection activities are authorized by: 42 U.S.C. 652(m), which authorizes OCSE, through the Federal Parent Locator Service, to aid state child support agencies and financial institutions doing business in two or more states reach agreements regarding the receipt from financial institutions, and the transfer to the state child support agencies, of information pertaining to the location of accounts held by obligors who owe past-due support; 42 U.S.C. 666(a)(2) and (c)(1)(G)(ii), which require state child support agencies in cases in which there is an arrearage to establish procedures to secure assets to satisfy any current support obligation and the arrearage by attaching and seizing assets of the

obligor held in financial institutions; 42 U.S.C. 666(a)(17)(A), which requires state child support agencies to establish procedures under which the state child support agencies shall enter into agreements with financial institutions doing business in the State to develop and operate, in coordination with financial institutions, and the Federal Parent Locator Service (in the case of financial institutions doing business in two or more States), a data match system, using automated data exchanges to the maximum extent feasible, in which a financial institution is required to quarterly provide information pertaining to a noncustodial parent owing past-due support who maintains an account at the institution and, in response to a notice of lien or levy, encumber or surrender, assets held; 42 U.S.C. 652(a)(7), which requires OCSE to provide technical assistance to state child support enforcement agencies to help them establish effective systems for collecting child and spousal support; and, 45 CFR 303.7(a)(5), which requires state child support agencies to transmit requests for information and provide requested information electronically to the greatest extent possible. To facilitate this requirement for states, OCSE developed the FAST Levy system that supports the electronic exchange of lien and levy information between child support agencies and financial institutions.

*Respondents:* Multistate Financial Institutions and State Child Support Agencies.

**ANNUAL BURDEN ESTIMATES**

Instrument	Number of respondents	Number of responses per respondent	Average burden hours per response	Total burden hours
Financial Data Match Result File-Portal .....	192	4	5 minutes <sup>1</sup>	64
Election Form .....	30	1	0.5	15
FAST-Levy Record Specifications: Current Financial Institutions Users to Program New Codes .....	1	1	65 <sup>2</sup>	65
FAST-Levy Record Specifications: Current State Child Support Agencies to Program New Codes .....	3	1	65	195
FAST-Levy Response Withhold Record Specifications: Financial Institutions	1	1	1,716	1,716
FAST-Levy Request Withhold Record Specifications: State Child Support Agencies .....	2	1	1,610	3,220

<sup>1</sup> Estimate is approximately 5 minutes per response. For calculation, use 5/60.

<sup>2</sup> Estimate is an average based on input from OCSE's matching partners.

*Estimated Total Annual Burden Hours:* 5,275.

*Additional Information:* Copies of the proposed collection may be obtained by writing to the Administration for Children and Families, Office of Planning, Research and Evaluation, 330 C Street SW., Washington, DC 20201, Attention Reports Clearance Officer. All requests should be identified by the

information collection. Email address: [infocollection@acf.hhs.gov](mailto:infocollection@acf.hhs.gov)

*OMB Comment:* OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication. Written

comments and recommendations for the proposed information collection should be sent directly to the following: Office of Management and Budget, Paperwork Reduction Project, Email: [OIRA\\_SUBMISSION@OMB.EOP.GOV](mailto:OIRA_SUBMISSION@OMB.EOP.GOV), Attn:

Desk Officer for the Administration for Children and Families.

**Bob Sargis,**

*Reports Clearance Officer.*

[FR Doc. 2017-23467 Filed 10-27-17; 8:45 am]

**BILLING CODE 4184-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2016-D-1264]

#### Manufacturers Sharing Patient-Specific Information From Medical Devices With Patients Upon Request; Guidance for Industry and Food and Drug Administration Staff; Availability

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

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing the availability of the guidance entitled “Manufacturers Sharing Patient-Specific Information from Medical Devices with Patients Upon Request.” FDA developed this guidance to clarify our position regarding manufacturers appropriately and responsibly sharing “patient-specific information”—information unique to an individual patient or unique to that patient’s treatment or diagnosis that has been recorded, stored, processed, retrieved, and/or derived from a legally marketed medical device—with that patient at that patient’s request. This guidance provides information and recommendations to industry, health care providers, and FDA staff about the mechanisms and considerations for device manufacturers sharing such information with individual patients when they request it.

**DATES:** The announcement of the guidance is published in the **Federal Register** on October 30, 2017.

**ADDRESSES:** You may submit either electronic or written comments on Agency guidances at any time as follows:

#### *Electronic Submissions*

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are

solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

#### *Written/Paper Submissions*

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

*Instructions:* All submissions received must include the Docket No. FDA-2016-D-1264 for “Manufacturers Sharing Patient-Specific Information from Medical Devices with Patients Upon Request.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- *Confidential Submissions—*To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management

Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the

**SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled “Manufacturers Sharing Patient-Specific Information from Medical Devices with Patients Upon Request” to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your request.

**FOR FURTHER INFORMATION CONTACT:** Esther Bleicher, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5424, Silver Spring, MD 20993-0002, 301-796-8547.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

Increasingly, patients seek to play an active role in their own health care. FDA believes that sharing “patient-specific information” with patients upon their request may assist them in being more engaged with their health care providers in making sound medical decisions. For purposes of this guidance, “patient-specific information” is information unique to an individual

patient or unique to that patient's treatment or diagnosis that has been recorded, stored, processed, retrieved, and/or derived from a legally marketed medical device. This information may include, but is not limited to, recorded patient data, device usage/output statistics, health care provider inputs, incidence of alarms, and/or records of device malfunctions or failures.

FDA developed this guidance to convey FDA's position regarding manufacturers appropriately and responsibly sharing patient-specific information with that patient at that patient's request. In general, manufacturers may do so without undergoing additional premarket review in advance. FDA generally would not consider patient-specific information to be "labeling," as defined in section 201(m) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 321(m)). FDA is aware that when manufacturers share patient-specific information with patients, manufacturers also may provide them with supplemental information or other materials (e.g., descriptions of intended use, benefit and risk information, instructions for use) that may be considered labeling. Any labeling is subject to applicable requirements in the FD&C Act and FDA regulations.

In the **Federal Register** of June 10, 2016 (81 FR 37603), FDA announced the availability of the draft guidance formerly entitled "Dissemination of Patient-Specific Information from Devices by Device Manufacturers" and interested parties were invited to comment by August 9, 2016. FDA has considered all of the public comments received prior to finalizing this guidance.

## II. Significance of Guidance

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on "Manufacturers Sharing Patient-Specific Information from Medical Devices with Patients Upon Request." It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

## III. Electronic Access

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available

at <https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm>.

Guidance documents are also available at <https://www.regulations.gov>. Persons unable to download an electronic copy of "Manufacturers Sharing Patient-Specific Information from Medical Devices with Patients Upon Request" may send an email request to [CDRH-Guidance@fda.hhs.gov](mailto:CDRH-Guidance@fda.hhs.gov) to receive an electronic copy of the document. Please use the document number 1500067 to identify the guidance you are requesting.

Dated: October 24, 2017.

**Lauren Silvis,**  
Chief of Staff.

[FR Doc. 2017-23517 Filed 10-27-17; 8:45 am]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2017-D-6069]

#### Acceptance Review for De Novo Classification Requests; Draft Guidance for Industry and Food and Drug Administration Staff; Availability

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

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing the availability of the draft guidance entitled "Acceptance Review for De Novo Classification Requests." The purpose of this draft guidance is to explain the procedures and criteria FDA intends to use in assessing whether a request for an evaluation of automatic class III designation (De Novo classification request or De Novo request) meets a minimum threshold of acceptability and should be accepted for substantive review. This draft guidance discusses De Novo acceptance review policies and procedures, "Refuse to Accept" principles, and the elements of the De Novo Acceptance Checklist and the Recommended Content Checklist and is being issued to be responsive to an explicit deliverable identified in the Medical Device User Fee Amendments of 2017 (MDUFA IV). This draft guidance is not final nor is it in effect at this time.

**DATES:** Submit either electronic or written comments on the draft guidance by December 29, 2017 to ensure that the Agency considers your comment on this draft guidance before it begins work on the final version of the guidance.

**ADDRESSES:** You may submit comments on any guidance at any time as follows:

#### Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

#### Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

**Instructions:** All submissions received must include the Docket No. FDA-2017-D-6069 for "Acceptance Review for De Novo Classification Requests; Draft Guidance for Industry and Food and Drug Administration Staff; Availability." Received comments will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper

submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the draft guidance document entitled "Acceptance Review for De Novo Classification Requests" to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health (CDRH), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993-0002 or the Office of Communication, Outreach, and Development, Center for Biologics Evaluation and Research (CBER), Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to

assist that office in processing your request.

**FOR FURTHER INFORMATION CONTACT:**

Sergio de del Castillo, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1538, Silver Spring, MD 20993-0002, 301-796-6419; or Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993-0002, 240-402-7911.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The automatic class III designation for devices of a new type occurs by operation of law and without any action by FDA, regardless of the level of risk posed by the device. Any device that is of a new type that was not in commercial distribution before May 28, 1976, is automatically classified as, and remains within, class III and requires premarket approval unless and until FDA takes an action to classify or reclassify the device section 513(f)(1) of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 360c(f)(1)). We refer to these devices as "postamendments devices" because they were not in commercial distribution prior to the date of enactment of the Medical Device Amendments of 1976.

FDA may classify a device through the De Novo classification process, which is the pathway authorized under section 513(f)(2) of the FD&C Act. A person may submit a De Novo request after submitting a premarket notification under section 510(k) of the FD&C Act (21 U.S.C. 360(k)) and receiving a not substantially equivalent (NSE) determination (section 513(f)(2)(A)(i) of the FD&C Act). A person may also submit a De Novo request without first submitting a premarket notification under section 510(k), if the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence (section 513(f)(2)(A)(ii) of the FD&C Act).

Upon receipt of a De Novo request, FDA is required to classify the device by written order (section 513(f)(2)(A)(iii) of the FD&C Act). The classification will be according to the criteria under section 513(a)(1) of the FD&C Act. Per section 513(f)(2)(B)(i) of the FD&C Act, the classification is the initial classification of the device for the purposes of section 513(f)(1) of the FD&C Act.

We believe De Novo classification enhances patients' access to beneficial innovation, in part by reducing regulatory burdens. When FDA classifies a device into class I or II via the De Novo classification process, the device can serve as a predicate for future devices of that type, including for 510(k)s (section 513(f)(2)(B)(i)). As a result, after a De Novo request is granted, other device sponsors do not have to submit a De Novo request or premarket application under section 515 of the FD&C Act (21 U.S.C. 360e) in order to market a substantially equivalent device (see 21 U.S.C. 360c(i), defining "substantial equivalence"). Instead, other device sponsors can use the less-burdensome 510(k) process, when applicable, as a pathway to market their device.

FDA is issuing this draft guidance to provide clarity regarding the Agency's expectations for information to be submitted in a De Novo request and ensure predictability and consistency for sponsors. Focusing the Agency's review resources on complete De Novo requests will provide a more efficient approach to ensuring that safe and effective medical devices reach patients as quickly as possible. Moreover, with the enactment of MDUFA IV, FDA agreed to issuance of draft (and final) guidance which includes a submission checklist to facilitate a more efficient and timely review process to assist with new performance goals. Acceptance review therefore takes on additional importance in both encouraging quality applications from De Novo requesters and allowing the Agency to appropriately concentrate resources on complete applications.

FDA anticipates that the Agency and industry may need a period of time to operationalize the policies within this guidance, when finalized. Therefore, if all criteria necessary to meet a minimum threshold of acceptability for De Novo requests as outlined in this guidance, when finalized, are not included in a De Novo request received by FDA before or up to 60 days after the publication of this guidance, when finalized, CDRH staff does not generally intend to refuse to accept.

**II. Significance of Guidance**

This draft guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The draft guidance, when finalized, will represent the current thinking of FDA on "Acceptance Review for De Novo Classification Requests." It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if

it satisfies the requirements of the applicable statutes and regulations. This draft guidance is not subject to Executive Order 12866.

**III. Electronic Access**

Persons interested in obtaining a copy of the draft guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at <https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm>. Guidance documents are also available at <https://www.fda.gov/BiologicsBloodVaccines/GuidanceComplianceRegulatoryInformation/default.htm> or <https://www.regulations.gov>. Persons unable to download an electronic copy of “Acceptance Review for De Novo Classification Requests” may send an email request to [CDRH-Guidance@fda.hhs.gov](mailto:CDRH-Guidance@fda.hhs.gov) to receive an electronic copy of the document. Please use the document number 16055 to identify the guidance you are requesting.

**IV. Paperwork Reduction Act of 1995**

Under the Paperwork Reduction Act (44 U.S.C. 3501–3502), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. “Collection of information” is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c) (2)(A) of the PRA (44 U.S.C. 3506 (c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of an existing collection of information, before submitting the

collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA’s functions, including whether the information will have practical utility; (2) the accuracy of FDA’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**De Novo Classification Process (Evaluation of Automatic Class III Designation)**

*OMB Control Number 0910–0844—Revision*

To aid in the acceptance review, the guidance recommends that requesters complete and submit with their De Novo request an Acceptance Checklist that identifies the location of supporting information for each acceptance element and a Recommended Content Checklist that identifies the location of supporting information for each recommended content element. Therefore, we request revision of OMB control number 0910–0844, “De Novo Classification Process (Evaluation of Automatic Class III Designation)” to include the Acceptance Checklist and the Recommended Content Checklist in the hourly burden estimate for De Novo requests.

We previously estimated the average burden per response for a De Novo request under 21 U.S.C. 513(f)(2)(i) to be 100 hours and under 21 U.S.C. 513(f)(2)(ii) to be 180 hours. We estimate that it will take approximately 1 hour to prepare an Acceptance Checklist and 1 hour to prepare a Recommended Content Checklist. Our estimate assumes that each De Novo request will include both checklists. Therefore, we estimate the revised average burden per response for a De Novo request under 21 U.S.C. 513(f)(2)(i) to be 102 hours and under 21 U.S.C. 513(f)(2)(ii) to be 182 hours. The revision results in a 104-hour increase in the total burden estimate. The average burden per response is based on estimates by FDA administrative and technical staff that are familiar with the requirements for submission of a De Novo request (and related materials), have consulted and advised manufacturers on submissions, and have reviewed the documentation submitted.

Approved operating and maintenance costs for a De Novo request include printing, shipping, and eCopy costs. We believe any increase of the operating and maintenance cost resulting from the addition of the Acceptance Checklist and Recommended Content Checklist to be de minimis. Therefore, we are not requesting revision of the operating and maintenance cost estimate for OMB control number 0910–0844.

Respondents to the information collection are medical device manufacturers seeking to market medical device products through submission of a De Novo classification request under section 513(f)(2) of the FD&C Act.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN <sup>1</sup>

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours	Total operating and maintenance costs <sup>2</sup>
<b>De Novo Request Under 21 U.S.C. 513(f)(2)(i)</b>						
CDRH .....	25	1	25	102	2,550	.....
CBER .....	1	1	1	102	102	.....
<b>De Novo Request Under 21 U.S.C. 513(f)(2)(ii)</b>						
CDRH .....	25	1	25	182	4,550	.....
CBER .....	1	1	1	182	182	.....
Total De Novo requests .....	.....	.....	52	.....	7,384	\$6,308
Request for withdrawal <sup>2</sup> .....	5	1	5	10	50	\$5

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN<sup>1</sup>—Continued

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours	Total operating and maintenance costs <sup>2</sup>
Total .....	.....	.....	.....	.....	7,434	\$6,313

<sup>1</sup> There are no capital costs associated with this collection of information.

<sup>2</sup> No change from approved information collection. This information is retained for the convenience of the reader.

Dated: October 24, 2017.

**Anna K. Abram,**

*Deputy Commissioner for Policy, Planning, Legislation, and Analysis.*

[FR Doc. 2017–23500 Filed 10–27–17; 8:45 am]

**BILLING CODE 4164–01–P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. FDA–2016–D–3275]

**Product Labeling for Certain Ultrasonic Surgical Aspirator Devices; Guidance for Industry and Food and Drug Administration Staff; Availability**

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

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing the availability of the guidance entitled “Product Labeling for Certain Ultrasonic Surgical Aspirator Devices.” FDA is providing a specific labeling recommendation in this guidance to promote the safe and effective use of ultrasonic surgical aspirator devices. The labeling recommendation is being made in light of the risk of tissue dissemination and relates to use of these devices in the removal of uterine fibroids.

**DATES:** The announcement of the guidance is published in the **Federal Register** on October 30, 2017.

**ADDRESSES:** You may submit either electronic or written comments on Agency guidances at any time as follows:

*Electronic Submissions*

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your

comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

*Written/Paper Submissions*

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

*Instructions:* All submissions received must include the Docket No. FDA–2016–D–3275 for “Product Labeling for Certain Ultrasonic Surgical Aspirator Devices; Guidance for Industry and Food and Drug Administration Staff.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states

“THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled “Product Labeling for Certain Ultrasonic Surgical Aspirator Devices” to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993–0002. Send one self-

addressed adhesive label to assist that office in processing your request.

**FOR FURTHER INFORMATION CONTACT:**

Trisha Eustaquio, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1529, Silver Spring, MD 20993-0002, 301-796-5214.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

FDA is issuing this guidance to recommend the addition of a specific safety statement to the product labeling of certain ultrasonic surgical aspirator devices. This guidance applies to ultrasonic surgical aspirator devices with indications for use in laparoscopic surgery, open surgery, or gynecologic surgery, as such surgeries can include gynecologic procedures. Ultrasonic surgical aspirator devices are surgical tools intended to fragment, emulsify, and aspirate hard and soft tissue. However, the mechanism of action of ultrasonic surgical aspirator devices creates the potential for tissue dissemination. In light of this risk, FDA is providing a specific labeling recommendation in this guidance regarding use of these devices in the removal of uterine fibroids.

FDA is aware that ultrasonic surgical aspirator devices are sometimes used to treat advanced malignancy through cytoreduction (also known as debulking). When used in advanced cancers, the risk of adverse clinical effects from tissue dissemination may be small compared to the device's potential benefits. In certain clinical circumstances, however, the unintended dissemination of cancerous cells may have a significant adverse effect that outweighs any demonstrated benefits. Specifically, use of an ultrasonic surgical aspirator device during treatment for symptomatic uterine fibroids on a woman with an occult uterine sarcoma could result in dissemination of this cancer. Therefore, FDA recommends that manufacturers of ultrasonic surgical aspirator devices with indications for use in laparoscopic surgery, open surgery, or gynecologic surgery prominently include a specific contraindication in their product labeling that the device is not indicated for and should not be used for the fragmentation, emulsification, and aspiration of uterine fibroids.

In the **Federal Register** on November 10, 2016 (81 FR 79028), FDA announced the availability of the draft guidance and interested parties were invited to comment by January 9, 2017. FDA has considered all of the public comments

received prior to finalizing this guidance.

**II. Significance of Guidance**

This guidance is being issued consistent with FDA's good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on "Product Labeling for Certain Ultrasonic Surgical Aspirator Devices." It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

**III. Electronic Access**

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the internet. A search capability for all Center for Devices and Radiological Health guidance documents is available at <https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm>. Guidance documents are also available at <https://www.regulations.gov>. Persons unable to download an electronic copy of "Product Labeling for Certain Ultrasonic Surgical Aspirator Devices; Guidance for Industry and Food and Drug Administration Staff" may send an email request to [CDRH-Guidance@fda.hhs.gov](mailto:CDRH-Guidance@fda.hhs.gov) to receive an electronic copy of the document. Please use the document number 1500072 to identify the guidance you are requesting.

**IV. Paperwork Reduction Act of 1995**

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). The collections of information in 21 CFR part 807, subpart E have been approved under OMB control number 0910-0120 and the collections of information in 21 CFR part 801 have been approved under OMB control number 0910-0485.

Dated: October 25, 2017.

**Lauren Silvis,**  
*Chief of Staff.*

[FR Doc. 2017-23520 Filed 10-27-17; 8:45 am]

**BILLING CODE 4164-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. FDA-2017-N-5925]

**Standard Development Organizations Whose Susceptibility Test Interpretive Criteria Standards May Be Recognized by the Food and Drug Administration; Request for Information**

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

**ACTION:** Request for information.

**SUMMARY:** The Food and Drug Administration (FDA, the Agency, or we) is requesting information to assist in identifying standard development organizations (SDOs) that meet the requirements in the Federal Food, Drug, and Cosmetic Act (FD&C Act), of the 21st Century Cures Act (Cures Act), which was signed into law on December 13, 2016.

**DATES:** Submit either electronic or written comments on the notice by November 29, 2017.

**ADDRESSES:** You may submit comments and information as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before November 29, 2017. The <https://www.regulations.gov> electronic filing system will accept comments until midnight Eastern Time at the end of November 29, 2017. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

*Electronic Submissions*

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your



comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

#### Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

*Instructions:* All submissions received must include the Docket No. FDA-2017-N-5925 for “Standard Development Organizations Whose Susceptibility Test Interpretive Criteria Standards May Be Recognized by FDA; Request for Information.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions**—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed

except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Katherine Schumann, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 22, Rm. 6242, Silver Spring, MD 20993-0002, 301-796-1182 or [Katherine.Schumann@fda.hhs.gov](mailto:Katherine.Schumann@fda.hhs.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

Antimicrobial susceptibility testing is used to determine if certain microorganisms that are isolated from a patient with an infection are likely to be killed or inhibited by a particular antimicrobial drug at the concentrations of the drug that are attainable at the site of infection. Historically, susceptibility test interpretive criteria has been contained in the Microbiology subsection of antimicrobial drug labeling, and there have been significant challenges associated with ensuring that this information is up-to-date for individual antimicrobial drug labels. For some time, FDA and other stakeholders have recognized that susceptibility test interpretive criteria standards established by nationally or internationally recognized SDOs can be useful sources of information to identify and update susceptibility test interpretive criteria.

Section 511A of the FD&C Act (21 U.S.C. 360a) was added by section 3044 of the Cures Act (Pub. L. 114-255), which was signed into law on December 13, 2016. This provision clarifies FDA’s authority to identify and efficiently update susceptibility test interpretive criteria, including through the recognition by FDA of standards established by SDOs. It also clarifies that sponsors of antimicrobial susceptibility testing devices may rely upon listed susceptibility test interpretive criteria to support premarket authorization of their

devices, provided they meet certain conditions, which provides for a more streamlined process for incorporating up-to-date information into such devices.

Section 511A of the FD&C Act requires FDA to establish within 1 year after the date of enactment of the Cures Act an interpretive criteria Web site containing a list of FDA-recognized susceptibility test interpretive criteria standards, as well as other susceptibility test interpretive criteria identified by FDA. The list of standards consists of new or updated susceptibility test interpretive criteria standards with respect to legally marketed antimicrobial drugs that have been: (1) Established by nationally or internationally recognized SDOs that meet the requirements under section 511A(b)(2)(A)(i) of the FD&C Act and (2) recognized, in whole or in part, by FDA, pursuant to section 511A(c) of the FD&C Act.

Section 511A(b)(2)(A)(i) of the FD&C Act requires that in order for FDA to recognize, in whole or in part, new or updated susceptibility test interpretive criteria standards established by an SDO, the SDO must: (1) Be a nationally or internationally recognized SDO that establishes and maintains procedures to address potential conflicts of interest and ensure transparent decision making; (2) hold meetings to ensure that there is an opportunity for public input by interested parties, and establishes and maintains processes to ensure that such input is considered in decision making; and (3) permit its standards to be made publicly available, through the National Library of Medicine or a similar source acceptable to the Secretary of Health and Human Services.

##### II. Issues for Consideration and Request for Information

FDA is currently identifying SDOs that meet the requirements under section 511A(b)(2)(A)(i) of the FD&C Act and invites submission of information relevant to this task. FDA is particularly interested in publicly available information illustrating how an SDO has national or international recognition, information illustrating an SDO’s established and maintained procedures on how the SDO addresses potential conflicts of interest and ensures transparent decision-making, information illustrating that an SDO holds open meetings and has established and maintained processes to ensure that public input by interested parties is considered in decision-making, and information illustrating that an SDO’s standards are made publicly available through the National

Institutes of Health/National Library of Medicine or a similar source. When providing this information, please provide weblinks to where this information is publicly available. This information may assist in FDA's determination of which SDOs may fulfill the statutory requirements.

Dated: October 25, 2017.

**Lauren Silvis,**

*Chief of Staff.*

[FR Doc. 2017-23519 Filed 10-27-17; 8:45 am]

BILLING CODE 4164-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2008-N-0334]

#### Agency Information Collection Activities; Proposed Collection; Comment Request; Postmarketing Safety Reports for Human Drug and Biological Products: Electronic Submission Requirements

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, and to allow 60 days for public comment in response to the notice. This notice solicits comments on the requirements for electronic submission of postmarketing safety reports for human drug and biological products.

**DATES:** Submit either electronic or written comments on the collection of information by December 29, 2017.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before December 29, 2017. The <https://www.regulations.gov> electronic filing system will accept comments until midnight Eastern Time at the end of December 29, 2017. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

#### Electronic Submissions

Submit electronic comments in the following way:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

#### Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

**Instructions:** All submissions received must include the Docket No. FDA-2008-N-0334 for "Agency Information Collection Activities; Proposed Collection; Comment Request; Postmarketing Safety Reports for Human Drug and Biological Products: Electronic Submission Requirements." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your

comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A-12M, 11601 Landsdown St., North Bethesda, MD 20852, 301-796-5733, [PRStaff@fda.hhs.gov](mailto:PRStaff@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501-3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an

existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA’s functions, including whether the information will have practical utility; (2) the accuracy of FDA’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Postmarketing Safety Reports for Human Drug and Biological Products: Waivers From Electronic Submission Requirements—OMB Control Number 0910-0770—Extension**

This information collection supports FDA regulations. In the **Federal Register** of June 10, 2014 (79 FR 33072), FDA published a final rule entitled “Postmarketing Safety Reports for Human Drug and Biological Products: Electronic Submission Requirements.” The final rule amended FDA’s postmarketing safety reporting regulations for human drug and biological products under 21 CFR parts 310, 314, and 600 and added part 329 to require that persons subject to mandatory reporting requirements submit safety reports in an electronic format that FDA can process, review, and archive. Specifically, this includes:

- manufacturers; packers; distributors; applicants with approved new drug applications, abbreviated new drug applications, and biologics licensing applications (BLAs); and those that market prescription drugs for human use without an approved application must submit postmarketing

safety reports to the Agency (§§ 310.305, 314.80, 314.98, and 600.80);

- manufacturers, packers, or distributors whose name appears on the label of nonprescription human drug products marketed without an approved application must report serious adverse events associated with their products (section 760 of the Federal Food, Drug, and Cosmetic Act (the FD&C Act) (21 U.S.C. 379aa)); and

- applicants with approved BLAs must submit biological lot distribution reports to the Agency (§ 600.81).

Under §§ 310.305(e)(2), 314.80(g)(2), 329.100(c)(2), 600.80(h)(2), and 600.81(b)(2), those who are subject to these postmarketing safety reporting requirements may request a waiver from the electronic format requirement. While FDA currently has OMB approval for the collection of postmarketing safety reports,<sup>1</sup> this information collection supports respondents seeking waivers from submitting those reports in electronic format as required by the regulations.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN <sup>1</sup>

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
310.305(e)(2) .....	1	1	1	1	1
314.80(g)(2) .....	5	1	5	1	5
329.100(c)(2) .....	1	1	1	1	1
600.80(h)(2) .....	5	1	5	1	5
600.81(b)(2) .....	1	1	1	1	1
<b>Total</b> .....					<b>13</b>

<sup>1</sup> There are no capital or operating and maintenance costs associated with this collection of information.

In table 1 of this document, we estimate the burden associated with the submission of waiver requests for postmarketing safety reports in electronic format under §§ 310.305(e)(2), 314.80(g)(2), 329.100(c)(2), 600.80(h)(2), and 600.81(b)(2). We expect few waiver requests. We estimate that approximately one manufacturer will request a waiver annually under §§ 310.305(e)(2), 329.100(c)(2), and 600.81(b)(2), and approximately five manufacturers will request a waiver annually under §§ 314.80(g)(2) and 600.80(h)(2). We estimate that each waiver request will take approximately 1 hour to prepare and submit.

Dated: October 24, 2017.  
**Lauren Silvis,**  
*Chief of Staff.*  
 [FR Doc. 2017-23518 Filed 10-27-17; 8:45 am]  
**BILLING CODE 4164-01-P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. FDA-2012-D-0880]

**Assessing User Fees Under the Generic Drug User Fee Amendments of 2017; Draft Guidance 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 a draft

<sup>1</sup> FDA currently has OMB approval for submission of postmarketing safety reports under parts 310, 314, and 600. The information collection for parts 310 and 314 is approved under OMB

control numbers 0910-0291 and 0910-0230. The information collection for part 600 is approved under OMB control numbers 0910-0291 and 0910-0308. Submissions required by section 760 of the

FD&C Act have been approved under OMB control number 0910-0636.

guidance for industry entitled “Assessing User Fees Under the Generic Drug User Fee Amendments of 2017.” This draft guidance provides stakeholders information regarding the implementation of the Generic Drug User Fee Amendments of 2017 (GDUFA II) and policies and procedures surrounding its application.

**DATES:** Submit either electronic or written comments on the guidance December 29, 2017 to ensure that the Agency considers your comment on this draft guidance.

**ADDRESSES:** You may submit comments on any guidance at any time as follows:

#### *Electronic Submissions*

Submit electronic comments in the following way:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

#### *Written/Paper Submissions*

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

*Instructions:* All submissions received must include the Docket No. FDA-2012-D-0880 for “Assessing User Fees Under the Generic Drug User Fee

Amendments of 2017.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the 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 <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

Submit written requests for single copies of the draft guidance to the Division of Drug Information, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Hillandale Building, 4th Floor, Silver Spring, MD 20993-0002. Send one self-addressed adhesive label to assist that office in processing your requests. See the **SUPPLEMENTARY**

**INFORMATION** section for electronic access to the draft guidance document.

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

Mehrban Iranshad, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., Rm. 4145, Silver Spring, MD 20993, 301-796-7900, [CDERCollections@fda.hhs.gov](mailto:CDERCollections@fda.hhs.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

FDA is announcing the availability of a draft guidance for industry entitled “Assessing User Fees Under the Generic Drug User Fee Amendments of 2017.” GDUFA II (Pub. L. 115-52, Title III) was signed into law by the President on August 18, 2017. GDUFA II continues FDA’s and industry’s goal to improve the public’s access to safe and effective generic drugs and to improve upon the predictability of the review process. GDUFA II extends FDA’s authority to collect user fees from fiscal year (FY) 2018 to FY 2022 and introduces a number of technical revisions that affect what fees are collected and how some fees are collected. GDUFA II authorizes fees for abbreviated new drug applications (ANDAs), drug master files (DMFs), annual facility fees, a one-time fee for original ANDAs pending with FDA on October 1, 2012 (backlog fees), and the Generic Drug Applicant Program Fee (GDUFA Program Fee).

The draft guidance announced in this notice addresses changes in user fee assessments from GDUFA I, user fees incurred by industry under GDUFA II, payment procedures, reconsideration and appeals, and other additional information to assist industry in complying with GDUFA II. FDA will issue separate guidance documents regarding GDUFA II non-user fee requirements and processes.

This guidance is being issued consistent with FDA’s good guidance practices regulation (21 CFR 10.115). The guidance, when finalized, will represent the Agency’s current thinking on “Assessing User Fees Under the Generic Drug User Fee Amendments of 2017.” It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

##### **II. Paperwork Reduction Act of 1995**

This guidance contains information collection provisions that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–

3520). The guidance refers to collections of information for filling out and submitting Form FDA 3913 (User Fee Payment Refund Request), previously approved under OMB control number 0910-0805, and Form FDA 3914 (User Fee Payment Transfer Request), previously approved under OMB control number 0910-0805.

### III. Electronic Access

Persons with access to the internet may obtain the guidance at either <https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm> or <https://www.regulations.gov>.

Dated: October 25, 2017.

**Anna K. Abram,**

*Deputy Commissioner for Policy, Planning, Legislation, and Analysis.*

[FR Doc. 2017-23526 Filed 10-27-17; 8:45 am]

BILLING CODE 4164-01-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

[Docket No. FDA-2011-D-0689]

#### De Novo Classification Process (Evaluation of Automatic Class III Designation); Guidance for Industry and Food and Drug Administration Staff; Availability

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

**ACTION:** Notice of availability.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing the availability of the guidance entitled “De Novo Classification Process (Evaluation of Automatic Class III Designation).” The purpose of this document is to provide guidance on the process for the submission and review of a De Novo classification request (hereafter a “De Novo request”) under the Federal Food, Drug, and Cosmetic Act (the FD&C Act), also known as the De Novo classification process. FDA is issuing this guidance to also provide updated recommendations for interactions with FDA related to the De Novo classification process, including what information to submit when seeking a path to market via the De Novo classification process. This guidance replaces “New Section 513(f)(2)—Evaluation of Automatic Class III Designation, Guidance for Industry and CDRH Staff,” dated February 19, 1998.

**DATES:** The announcement of the guidance is published in the **Federal Register** on October 30, 2017.

**ADDRESSES:** You may submit either electronic or written comments on Agency guidances at any time as follows:

#### Electronic Submissions

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

#### Written/Paper Submissions

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

**Instructions:** All submissions received must include the Docket No. FDA-2011-D-0689 for “De Novo Classification Process (Evaluation of Automatic Class III Designation); Guidance for Industry and Food and Drug Administration Staff; Availability.” Received comments will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential

information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

**Docket:** For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

You may submit comments on any guidance at any time (see 21 CFR 10.115(g)(5)).

An electronic copy of the guidance document is available for download from the internet. See the **SUPPLEMENTARY INFORMATION** section for information on electronic access to the guidance. Submit written requests for a single hard copy of the guidance document entitled “De Novo Classification Process (Evaluation of Automatic Class III Designation)” to the Office of the Center Director, Guidance and Policy Development, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5431, Silver Spring, MD 20993-0002 or the Office of Communication, Outreach, and Development, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 3128,

Silver Spring, MD 20993–0002. Send one self-addressed adhesive label to assist that office in processing your request.

**FOR FURTHER INFORMATION CONTACT:**

Sergio de del Castillo, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 1538, Silver Spring, MD 20993–0002, 301–796–6419; and Stephen Ripley, Center for Biologics Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 71, Rm. 7301, Silver Spring, MD 20993–0002, 301–240–402–7911.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The automatic class III designation for devices of a new type occurs by operation of law and without any action by FDA, regardless of the level of risk posed. Any device that is of a new type that was not in commercial distribution before May 28, 1976, is automatically classified as, and remains within, class III and requires premarket approval unless and until FDA takes an action to classify or reclassify the device section 513(f)(1) of the FD&C Act (21 U.S.C. 360c(f)(1)). We refer to these devices as “postamendments devices” because they were not in commercial distribution prior to the date of enactment of the Medical Device Amendments of 1976.

FDA may classify a device through the De Novo classification process, which is the pathway authorized under section 513(f)(2) of the FD&C Act (21 U.S.C. 360c(f)(2)). A person may submit a De Novo request after submitting a premarket notification under section 510(k) of the FD&C Act and receiving a not substantially equivalent (NSE) determination (section 513(f)(2)(A)(i) of the FD&C Act). A person may also submit a De Novo request without first submitting a premarket notification under section 510(k), if the person determines that there is no legally marketed device upon which to base a determination of substantial equivalence (section 513(f)(2)(A)(ii) of the FD&C Act).

Upon receipt of a De Novo request, FDA is required to classify the device by written order (section 513(f)(2)(A)(iii) of the FD&C Act). The classification will be according to the criteria under section 513(a)(1) of the FD&C Act (21 U.S.C. 360c(a)(1)). Per section 513(f)(2)(B)(i) of the FD&C Act, the classification is the initial classification of the device for the purposes of section 513(f)(1) of the FD&C Act.

We believe De Novo classification will enhance patients’ access to beneficial innovation, in part by reducing regulatory burdens. When FDA classifies a device into class I or II via the De Novo classification process, the device can serve as a predicate for future devices of that type, including for 510(k)s (section 513(f)(2)(B)(i)). As a result, other device sponsors do not have to submit a De Novo request or PMA in order to market a substantially equivalent device (see 21 U.S.C. 360c(i), defining “substantial equivalence”). Instead, sponsors can use the less-burdensome 510(k) process, when applicable, as a pathway to market their device.

FDA is issuing this document to provide guidance on the process for the submission and review of a De Novo request under section 513(f)(2) of the FD&C Act, also known as the De Novo classification process. This guidance also provides updated recommendations for interactions with FDA related to the De Novo classification process, including what information to submit when seeking a path to market via the De Novo classification process. This guidance will provide clarity regarding the Agency’s review process and expectations for information to be submitted in a De Novo request and ensures predictability and consistency for sponsors.

FDA considered comments received on the draft guidance that appeared in the **Federal Register** (79 FR 47651) of August 14, 2014. FDA revised the guidance as appropriate in response to the comments. This document supersedes “New Section 513(f)(2)—Evaluation of Automatic Class III Designation, Guidance for Industry and CDRH Staff” dated February 19, 1998.

**II. Significance of Guidance**

This guidance is being issued consistent with FDA’s good guidance practices regulation (21 CFR 10.115). The guidance represents the current thinking of FDA on the De Novo Classification Process (Evaluation of Automatic Class III Designation). It does not establish any rights for any person and is not binding on FDA or the public. You can use an alternative approach if it satisfies the requirements of the applicable statutes and regulations. This guidance is not subject to Executive Order 12866.

**III. Electronic Access**

Persons interested in obtaining a copy of the guidance may do so by downloading an electronic copy from the Internet. A search capability for all Center for Devices and Radiological

Health guidance documents is available at <https://www.fda.gov/MedicalDevices/DeviceRegulationandGuidance/GuidanceDocuments/default.htm>. Guidance documents are also available at <https://www.regulations.gov>. Persons unable to download an electronic copy of “De Novo Classification Process (Evaluation of Automatic Class III Designation)” may send an email request to [CDRH-Guidance@fda.hhs.gov](mailto:CDRH-Guidance@fda.hhs.gov) to receive an electronic copy of the document. Please use the document number 1760 to identify the guidance you are requesting.

**IV. Paperwork Reduction Act of 1995**

This guidance refers to previously approved collections of information found in FDA regulations. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520). The collections of information in the guidance “De Novo Classification Process (Evaluation of Automatic Class III Designation)” have been approved under OMB control number 0910–0844. The collections of information in the guidance document “Requests for Feedback on Medical Device Submissions: The Pre-Submission Program and Meetings with Food and Drug Administration Staff” have been approved under OMB control number 0910–0756. The collections of information in 21 CFR part 807, subpart E have been approved under OMB control number 0910–0120; the collections of information in 21 CFR part 814 have been approved under OMB control number 0910–0231; and the collections of information in 21 CFR part 801 have been approved under OMB control number 0910–0485.

Dated: October 24, 2017.

**Anna K. Abram,**

*Deputy Commissioner for Policy, Planning, Legislation, and Analysis.*

[FR Doc. 2017–23492 Filed 10–27–17; 8:45 am]

**BILLING CODE 4164–01–P**

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. FDA–2017–N–5975]

**Agency Information Collection Activities; Proposed Collection; Comment Request; Survey of Alumni Commissioner’s Fellowship Program Fellows**

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

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA or Agency) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on the Survey of Alumni Commissioner's Fellowship Program Fellows.

**DATES:** Submit either electronic or written comments on the collection of information by December 29, 2017.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before December 29, 2017. The <https://www.regulations.gov> electronic filing system will accept comments until midnight Eastern Time at the end of December 29, 2017. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

*Electronic Submissions*

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see "Written/Paper Submissions" and "Instructions").

*Written/Paper Submissions*

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA-305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in "Instructions."

**Instructions:** All submissions received must include the Docket No. FDA-2017-N-5975 for "Agency Information Collection Activities; Proposed Collection; Comment Request; Survey of Alumni Commissioner's Fellowship Program Fellows." Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as "Confidential Submissions," publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states "THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION." The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

**Docket:** For access to the docket to read background documents or the

electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Amber Sanford, Office of Operations, Food and Drug Administration, Three White Flint North, 10A-12M, 11601 Landsdown St., North Bethesda, MD 20852, 301-796-8867, [PRAStaff@fda.hhs.gov](mailto:PRAStaff@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** Under the PRA (44 U.S.C. 3501-3520), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. "Collection of information" is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

**Survey of Alumni Commissioner's Fellowship Program Fellows—OMB Control Number 0910—NEW**

FDA is requesting approval from OMB to gather information from Alumni Commissioner's Fellowship Program (CFP) Fellows. The information from Alumni CFP Fellows will allow FDA's Office of the Commissioner (OC) to

easily and efficiently elicit and review program feedback. The online voluntary survey will assist the Agency in promoting and protecting the public health by encouraging outside persons to share their experience with the FDA while a Commissioner's Fellow. The process will reduce the time and cost of submitting written documentation to the Agency and lessen the likelihood of

surveys being misrouted within the Agency mail system. The information gathered by the survey will be used to gain insights into, and to document, impacts that the CFP has had and is having on former CFP fellows and contributions and impacts that the former fellows are making in their current work. The voluntary surveys include questions to assess the

following measures: Post-fellowship employment (e.g., employment type); number of awards; number of contributions while a CFP fellow (e.g., number of publications, guidance documents authored or co-authored); and contributions in their field (e.g., list of publications).

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN <sup>1</sup>

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Fellowship Program Survey .....	35	1	35	* 0.50	17.5

<sup>1</sup> There are no capital costs or operating maintenance costs associated with this collection of information.

\* 30 minutes.

FDA based these estimates on the number of fellows who have graduated and left the Agency over the past 5 years.

Dated: October 24, 2017.

**Anna K. Abram,**

*Deputy Commissioner for Policy, Planning, Legislation, and Analysis.*

[FR Doc. 2017–23515 Filed 10–27–17; 8:45 am]

BILLING CODE 4164–01–P

**DEPARTMENT OF HEALTH AND HUMAN SERVICES**

**Food and Drug Administration**

[Docket No. FDA–2017–N–4180]

**Voluntary Medical Device Manufacturing and Product Quality Program; Public Workshop; Request for Comments; Reopening of Comment Period**

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

**ACTION:** Notice; reopening of the comment period.

**SUMMARY:** The Food and Drug Administration (FDA or the Agency) is reopening the comment period provided in the notice entitled “Voluntary Medical Device Manufacturing and Product Quality Program; Public Workshop; Request for Comments,” published in the **Federal Register** of July 25, 2017 (82 FR 34531). That notice announced the public workshop to be held on October 10, 2017, and requested comments by October 18, 2017. The Agency is taking this action to allow interested parties additional time to submit comments.

**DATES:** FDA is reopening the comment period for the public workshop “Voluntary Medical Device

Manufacturing and Product Quality Program; Public Workshop; Request for Comments” published on July 25, 2017 (82 FR 34531). Submit either electronic or written comments on this public workshop by December 14, 2017.

**ADDRESSES:** You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before December 14, 2017. The <https://www.regulations.gov> electronic filing system will accept comments until midnight Eastern Time at the end of December 14, 2017. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

*Electronic Submissions*

Submit electronic comments in the following way:

- **Federal eRulemaking Portal:** <https://www.regulations.gov>. Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to <https://www.regulations.gov> will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else’s Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on <https://www.regulations.gov>.

- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see “Written/Paper Submissions” and “Instructions”).

*Written/Paper Submissions*

Submit written/paper submissions as follows:

- **Mail/Hand delivery/Courier (for written/paper submissions):** Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in “Instructions.”

**Instructions:** All submissions received must include the Docket No. FDA–2017–N–4180 for “Voluntary Medical Device Manufacturing and Product Quality Program; Public Workshop; Request for Comments; Reopening of Comment Period.” Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as “Confidential Submissions,” publicly viewable at <https://www.regulations.gov> or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday.

- **Confidential Submissions—**To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS



CONFIDENTIAL INFORMATION". The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as "confidential." Any information marked as "confidential" will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

*Docket:* For access to the docket to read background documents or the electronic and written/paper comments received, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

**FOR FURTHER INFORMATION CONTACT:** Francisco Vicenty, Food and Drug Administration, Center for Devices and Radiological Health, 10903 New Hampshire Ave., Bldg. 66, Rm. 3426, Silver Spring, MD 20993, 301-796-5577, email: [Francisco.Vicenty@fda.hhs.gov](mailto:Francisco.Vicenty@fda.hhs.gov).

**SUPPLEMENTARY INFORMATION:** In the *Federal Register* of July 25, 2017 (82 FR 34531), FDA published a notice announcing the public workshop entitled "Voluntary Medical Device Manufacturing and Product Quality Program; Public Workshop; Request for Comments" with an 85-day comment period to request comments. The public workshop was held on October 10, 2017. FDA is reopening the comment period for the public workshop until December 14, 2017. The Agency believes that this will allow adequate time for interested persons to submit comments without significantly delaying the action by the Agency.

Dated: October 24, 2017.

**Anna K. Abram,**

*Deputy Commissioner for Policy, Planning, Legislation, and Analysis.*

[FR Doc. 2017-23498 Filed 10-27-17; 8:45 am]

**BILLING CODE 4164-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### National Vaccine Injury Compensation Program; List of Petitions Received

**AGENCY:** Health Resources and Services Administration (HRSA), Department of Health and Human Services (HHS).

**ACTION:** Notice.

**SUMMARY:** HRSA is publishing this notice of petitions received under the National Vaccine Injury Compensation Program (the program), as required by the Public Health Service (PHS) Act, as amended. While the Secretary of HHS is named as the respondent in all proceedings brought by the filing of petitions for compensation under the Program, the United States Court of Federal Claims is charged by statute with responsibility for considering and acting upon the petitions.

**FOR FURTHER INFORMATION CONTACT:** For information about requirements for filing petitions, and the Program in general, contact Lisa L. Reyes, Acting Clerk, United States Court of Federal Claims, 717 Madison Place NW., Washington, DC 20005, (202) 357-6400. For information on HRSA's role in the Program, contact the Director, National Vaccine Injury Compensation Program, 5600 Fishers Lane, Room 08N146B, Rockville, MD 20857; (301) 443-6593, or visit our Web site at: <http://www.hrsa.gov/vaccinecompensation/index.html>.

**SUPPLEMENTARY INFORMATION:** The program provides a system of no-fault compensation for certain individuals who have been injured by specified childhood vaccines. Subtitle 2 of Title XXI of the PHS Act, 42 U.S.C. 300aa-10 *et seq.*, provides that those seeking compensation are to file a petition with the U.S. Court of Federal Claims and to serve a copy of the petition on the Secretary of HHS, who is named as the respondent in each proceeding. The Secretary has delegated this responsibility under the Program to HRSA. The Court is directed by statute to appoint special masters who take evidence, conduct hearings as appropriate, and make initial decisions

as to eligibility for, and amount of, compensation.

A petition may be filed with respect to injuries, disabilities, illnesses, conditions, and deaths resulting from vaccines described in the Vaccine Injury Table (the table) set forth at 42 CFR 100.3. This table lists for each covered childhood vaccine the conditions that may lead to compensation and, for each condition, the time period for occurrence of the first symptom or manifestation of onset or of significant aggravation after vaccine administration. Compensation may also be awarded for conditions not listed in the table and for conditions that are manifested outside the time periods specified in the Table, but only if the petitioner shows that the condition was caused by one of the listed vaccines.

Section 2112(b)(2) of the PHS Act, 42 U.S.C. 300aa-12(b)(2), requires that "[w]ithin 30 days after the Secretary receives service of any petition filed under section 2111 the Secretary shall publish notice of such petition in the *Federal Register*." Set forth below is a list of petitions received by HRSA on September 1, 2017, through September 30, 2017. This list provides the name of petitioner, city and state of vaccination (if unknown then city and state of person or attorney filing claim), and case number. In cases where the Court has redacted the name of a petitioner and/or the case number, the list reflects such redaction.

Section 2112(b)(2) also provides that the special master "shall afford all interested persons an opportunity to submit relevant, written information" relating to the following:

1. The existence of evidence "that there is not a preponderance of the evidence that the illness, disability, injury, condition, or death described in the petition is due to factors unrelated to the administration of the vaccine described in the petition," and

2. Any allegation in a petition that the petitioner either:

a. "[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition not set forth in the Vaccine Injury Table but which was caused by" one of the vaccines referred to in the Table, or

b. "[S]ustained, or had significantly aggravated, any illness, disability, injury, or condition set forth in the Vaccine Injury Table the first symptom or manifestation of the onset or significant aggravation of which did not occur within the time period set forth in the Table but which was caused by a vaccine" referred to in the Table.

In accordance with Section 2112(b)(2), all interested persons may

submit written information relevant to the issues described above in the case of the petitions listed below. Any person choosing to do so should file an original and three (3) copies of the information with the Clerk of the U.S. Court of Federal Claims at the address listed above (under the heading **FOR FURTHER INFORMATION CONTACT**), with a copy to HRSA addressed to Director, Division of Injury Compensation Programs, Healthcare Systems Bureau, 5600 Fishers Lane, 08N146B, Rockville, MD 20857. The Court's caption (*Petitioner's Name v. Secretary of HHS*) and the docket number assigned to the petition should be used as the caption for the written submission. Chapter 35 of title 44, United States Code, related to paperwork reduction, does not apply to information required for purposes of carrying out the program.

Dated: October 24, 2017.

**George Sigounas,**  
Administrator.

#### List of Petitions Filed

1. Jeffery Rowe, Grand Rapids, Michigan, Court of Federal Claims No: 17-1182V.
2. Clifford Reed, Dallas, Texas, Court of Federal Claims No: 17-1183V.
3. Robin Croce, Corona, California, Court of Federal Claims No: 17-1184V.
4. Matthew Jiminez, Boca Raton, Florida, Court of Federal Claims No: 17-1190V.
5. Laura Carson, Washington, District of Columbia, Court of Federal Claims No: 17-1193V.
6. Kristin Leara, Honolulu, Hawaii, Court of Federal Claims No: 17-1197V.
7. Scott Swailes, Holly Springs, North Carolina, Court of Federal Claims No: 17-1198V.
8. Ann Fly, Seattle, Washington, Court of Federal Claims No: 17-1200V.
9. Brenda Booker, Los Angeles, California, Court of Federal Claims No: 17-1201V.
10. Edwin M. Laird, Spokane, Washington, Court of Federal Claims No: 17-1203V.
11. Daniel Silver, Austin, Texas, Court of Federal Claims No: 17-1204V.
12. Kathleen Doherty-Peck, Norwich, Connecticut, Court of Federal Claims No: 17-1205V.
13. Barbara Perry, Arden, North Carolina, Court of Federal Claims No: 17-1207V.
14. Michael Napolitano, New Hyde Park, New York, Court of Federal Claims No: 17-1208V.
15. Laurence Kratzer, Walnut Creek, California, Court of Federal Claims No: 17-1209V.
16. Elizabeth McCrabb, Charleston, South Carolina, Court of Federal Claims No: 17-1210V.
17. Breanna White, Tallahassee, Florida, Court of Federal Claims No: 17-1211V.
18. Jodilyn Druery, Phoenix, Arizona, Court of Federal Claims No: 17-1213V.
19. Cherie J. Sullivan, Minneapolis, Minnesota, Court of Federal Claims No: 17-1214V.
20. Steven Ford, Chicago, Illinois, Court of Federal Claims No: 17-1217V.
21. Kelli Stricklin, Nixa, Missouri, Court of Federal Claims No: 17-1218V.
22. Ronald Brown, Naperville, Illinois, Court of Federal Claims No: 17-1219V.
23. Marlo K. Mayle, Fremont, Ohio, Court of Federal Claims No: 17-1221V.
24. Leslie K. Thompson, Murray, Utah, Court of Federal Claims No: 17-1223V.
25. Kevin Foxx, Newport News, Virginia, Court of Federal Claims No: 17-1224V.
26. Ava Cleaves, Indianapolis, Indiana, Court of Federal Claims No: 17-1225V.
27. Milan Sedlacek, Boston, Massachusetts, Court of Federal Claims No: 17-1226V.
28. James Daniel Parlette, Frankfort, Michigan, Court of Federal Claims No: 17-1227V.
29. Misti Fraser, Evansville, Indiana, Court of Federal Claims No: 17-1229V.
30. Ai Cordero, Torrance, California, Court of Federal Claims No: 17-1230V.
31. Azieb Kidane, Roseville, Minnesota, Court of Federal Claims No: 17-1231V.
32. Ofilia Arechiga, Santa Maria, California, Court of Federal Claims No: 17-1234V.
33. Elenita Alvarez-Tompkins, Washington, District of Columbia, Court of Federal Claims No: 17-1236V.
34. Theresa Cusolito, San Pedro, California, Court of Federal Claims No: 17-1237V.
35. Belinda Dawson-Savard, Salem, Oregon, Court of Federal Claims No: 17-1238V.
36. Sean Kelleher, Windsor, Connecticut, Court of Federal Claims No: 17-1239V.
37. Nick Koropatny, Washington, District of Columbia, Court of Federal Claims No: 17-1240V.
38. Carrie Schmatz, Manitowoc, Wisconsin, Court of Federal Claims No: 17-1241V.
39. Andrea Dixon on behalf of J. D., Farmington Hills, Michigan, Court of Federal Claims No: 17-1244V.
40. Correne Johnson, Blaine, Minnesota, Court of Federal Claims No: 17-1249V.
41. Stuart Weaver, Luray, Virginia, Court of Federal Claims No: 17-1251V.
42. Kehkahan Khatoon, Farmington Hills, Michigan, Court of Federal Claims No: 17-1253V.
43. William Bartoszek, Hamburg, New York, Court of Federal Claims No: 17-1254V.
44. Breana Porcello, Medford, Massachusetts, Court of Federal Claims No: 17-1255V.
45. Lynn Johnson, Belgrade, Montana, Court of Federal Claims No: 17-1256V.
46. Glenn Reinhardt, San Antonio, Texas, Court of Federal Claims No: 17-1257V.
47. Michael O'Conner, Akron, Ohio, Court of Federal Claims No: 17-1259V.
48. Joan Smith, St. Louis, Missouri, Court of Federal Claims No: 17-1262V.
49. Judith Wilson, Madison, Wisconsin, Court of Federal Claims No: 17-1264V.
50. Sarah Stone, New York, New York, Court of Federal Claims No: 17-1265V.
51. Christine Ann Birch, Port Angeles, Washington, Court of Federal Claims No: 17-1266V.
52. Laurie Bloyer, Albuquerque, New Mexico, Court of Federal Claims No: 17-1267V.
53. Sara D'Angelo, Albuquerque, New Mexico, Court of Federal Claims No: 17-1268V.
54. Margaret DeLorenzo, Syracuse, New York, Court of Federal Claims No: 17-1269V.
55. Frances Lee, Graham, North Carolina, Court of Federal Claims No: 17-1270V.
56. Sandra Loydpierson, Charlotte, North Carolina, Court of Federal Claims No: 17-1271V.
57. Nicole Marshall, Exeter, New Hampshire, Court of Federal Claims No: 17-1272V.
58. Naomi Miller, Washington, District of Columbia, Court of Federal Claims No: 17-1273V.
59. Dolores Millican, Houston, Texas, Court of Federal Claims No: 17-1274V.
60. Jennifer Richey, North Kansas City, Missouri, Court of Federal Claims No: 17-1276V.
61. Ronald Beckman, Minneapolis, Minnesota, Court of Federal Claims No: 17-1279V.
62. Erika Hicks on behalf of A. C., Aurora, Colorado, Court of Federal Claims No: 17-1282V.
63. Larry Edge, Tavares, Florida, Court of Federal Claims No: 17-1283V.
64. Angela M. Andricks, Fostoria, Ohio, Court of Federal Claims No: 17-1284V.
65. Ralph Putnam, Putnam, Connecticut, Court of Federal Claims No: 17-1285V.
66. Marie Altema, Jersey City, New Jersey, Court of Federal Claims No: 17-1286V.
67. Barbara M. McDaniel, Washington, District of Columbia, Court of Federal Claims No: 17-1287V.
68. Larry Moranda, Eureka, California, Court of Federal Claims No: 17-1288V.
69. Caroline DiFrancesco, Reno, Nevada, Court of Federal Claims No: 17-1289V.
70. William Bartman on behalf of Angeline Bartman, Deceased, Pittsburgh, Pennsylvania, Court of Federal Claims No: 17-1290V.
71. Jon Flaig, Waverly, Iowa, Court of Federal Claims No: 17-1291V.
72. Patricia Feight, Mount Pleasant, Michigan, Court of Federal Claims No: 17-1292V.
73. Marc Barnet, Miramar, Florida, Court of Federal Claims No: 17-1293V.
74. Janet H. Stuchal, Lansdale, Pennsylvania, Court of Federal Claims No: 17-1294V.
75. Pamela M. Shaffer, Troy, Ohio, Court of Federal Claims No: 17-1295V.
76. Joan M. Douglass, Puyallup, Washington, Court of Federal Claims No: 17-1296V.
77. Cathy Mullen, Farmington Hills, Michigan, Court of Federal Claims No: 17-1297V.
78. Carrie Sadowski Ferguson, Arnold, Maryland, Court of Federal Claims No: 17-1299V.
79. Joyce Popwell, Pamona, New Jersey, Court of Federal Claims No: 17-1301V.
80. Gail Tomashefski, Indianapolis, Indiana, Court of Federal Claims No: 17-1302V.
81. Selwyn Hervey and Marylou Catee Hervey on behalf of T. H., Rancho Santa Margarita, California, Court of Federal Claims No: 17-1305V.
82. Kristen Holmes, Houston, Texas, Court of Federal Claims No: 17-1306V.
83. Erika Colpaert on behalf of R. C., Farmington Hills, Michigan, Court of Federal Claims No: 17-1307V.
84. Elisabeth Link, Haddon Heights, New Jersey, Court of Federal Claims No: 17-

- 1309V.
85. Rodolfo Monterroso, Inglewood, California, Court of Federal Claims No: 17-1310V.
86. Julia Wade, Lafayette, Louisiana, Court of Federal Claims No: 17-1311V.
87. Sally Jo Delpha, Liverpool, New York, Court of Federal Claims No: 17-1313V.
88. Joan Fram, Attleboro, Massachusetts, Court of Federal Claims No: 17-1314V.
89. Mindy Puckett, South Fargo, North Dakota, Court of Federal Claims No: 17-1316V.
90. Ralph Mueller, Boston, Massachusetts, Court of Federal Claims No: 17-1318V.
91. Richard Brandell, Springfield, Missouri, Court of Federal Claims No: 17-1319V.
92. Robert Malwitz, Grand Rapids, Minnesota, Court of Federal Claims No: 17-1320V.
93. David T. McDaniel, North Bend, Washington, Court of Federal Claims No: 17-1322V.
94. James Struck, Evanston, Illinois, Court of Federal Claims No: 17-1326V.
95. Angela Tavolacci on behalf of L. T., Washington, District of Columbia, Court of Federal Claims No: 17-1327V.
96. Jonathan McDougald, Fayetteville, North Carolina, Court of Federal Claims No: 17-1328V.
97. Richard Kadry, South Fargo, North Dakota, Court of Federal Claims No: 17-1330V.
98. Harry Cobb, Virginia Beach, Virginia, Court of Federal Claims No: 17-1331V.
99. Dave W. Highland, Louisville, Colorado, Court of Federal Claims No: 17-1333V.
100. Kay B. Harvey, Roanoke, Virginia, Court of Federal Claims No: 17-1334V.
101. Lindsey Denwiddie, Manchester, New Hampshire, Court of Federal Claims No: 17-1335V.
102. Barbara Kern, Gladwyne, Pennsylvania, Court of Federal Claims No: 17-1337V.
103. Cris D. Salazar, Santa Fe, New Mexico, Court of Federal Claims No: 17-1338V.
104. Geraldine Abel, Bridgeville, Delaware, Court of Federal Claims No: 17-1339V.
105. Mark Palmore, Frankfort, Indiana, Court of Federal Claims No: 17-1340V.
106. Stefanie Hoffman, Eugene, Oregon, Court of Federal Claims No: 17-1341V.
107. Timothy Flaig, Seattle, Washington, Court of Federal Claims No: 17-1342V.
108. Kathleen Purvis, Phenix City, Alabama, Court of Federal Claims No: 17-1343V.
109. Heather Russell-Lang, Naples, Florida, Court of Federal Claims No: 17-1344V.
110. Rosanna Massucci, Morristown, New Jersey, Court of Federal Claims No: 17-1345V.
111. Cristina K. Biesold on behalf of C. P. B., New York, New York, Court of Federal Claims No: 17-1346V.
112. Amber Wilson on behalf of A. W., Washington, District of Columbia, Court of Federal Claims No: 17-1349V.
113. Yukiko Boquet, Washington, District of Columbia, Court of Federal Claims No: 17-1351V.
114. Caprice Britt, Washington, District of Columbia, Court of Federal Claims No: 17-1352V.
115. Amy Dunlap, Washington, District of Columbia, Court of Federal Claims No: 17-1353V.
116. Barbara Easter, Washington, District of Columbia, Court of Federal Claims No: 17-1354V.
117. Herbert Geller, Washington, District of Columbia, Court of Federal Claims No: 17-1355V.
118. Nickol Marta, San Francisco, California, Court of Federal Claims No: 17-1356V.
119. Tracy Murray, Washington, District of Columbia, Court of Federal Claims No: 17-1357V.
120. Monika Nuon, Washington, District of Columbia, Court of Federal Claims No: 17-1358V.
121. Mary Perry, Washington, District of Columbia, Court of Federal Claims No: 17-1359V.
122. Amber Quintal, Washington, District of Columbia, Court of Federal Claims No: 17-1360V.
123. Wilma Rivers, Washington, District of Columbia, Court of Federal Claims No: 17-1361V.
124. Andrew J. Kaltenmark on behalf of Addison Judith Kaltenmark, Valdosta, Georgia, Court of Federal Claims No: 17-1362V.
125. Prentissa Rodrigue, Chalmette, Louisiana, Court of Federal Claims No: 17-1364V.
126. Robert J. Schaefer, St. Louis, Missouri, Court of Federal Claims No: 17-1365V.
127. Gayle Foshee-Naughton, Clearwater, Florida, Court of Federal Claims No: 17-1366V.
128. Benjamin S. Maxwell, Spokane, Washington, Court of Federal Claims No: 17-1367V.
129. Mechelle Head, Dresher, Pennsylvania, Court of Federal Claims No: 17-1368V.
130. Charles Gensmer, Coon Rapids, Minnesota, Court of Federal Claims No: 17-1369V.
131. Lauren Rettig, Memphis, Tennessee, Court of Federal Claims No: 17-1370V.
132. Laura Weishaar on behalf of Loretta Nordtvedt, Deceased, Seattle, Washington, Court of Federal Claims No: 17-1372V.
133. Emily Conger, Fort Worth, Texas, Court of Federal Claims No: 17-1373V.
134. Nathan Coulter, Garden City, New York, Court of Federal Claims No: 17-1376V.
135. Maria Swicki, Warwick, Rhode Island, Court of Federal Claims No: 17-1377V.
136. Jodi Fiske, Delray Beach, Florida, Court of Federal Claims No: 17-1378V.
137. John Alves and Virginia Alves on behalf of B. A., Gloucester, Massachusetts, Court of Federal Claims No: 17-1379V.
138. Jennifer Martindale, Glen Falls, New York, Court of Federal Claims No: 17-1380V.
139. James Blute, Lowell, Massachusetts, Court of Federal Claims No: 17-1381V.
140. Naomi Delgado, West Palm Beach, Florida, Court of Federal Claims No: 17-1382V.
141. John Mason, Merced, California, Court of Federal Claims No: 17-1383V.
142. Lisa Spencer, Buffalo, New York, Court of Federal Claims No: 17-1384V.
143. Toni Ragusa, White Plains, New York, Court of Federal Claims No: 17-1385V.
144. Becky Wiethorn, Independence, Kentucky, Court of Federal Claims No: 17-1386V.
145. Nichole Wagner, Boston, Massachusetts, Court of Federal Claims No: 17-1388V.
146. Teresa Stine, South Mountain, Pennsylvania, Court of Federal Claims No: 17-1389V.

[FR Doc. 2017-23558 Filed 10-27-17; 8:45 am]

BILLING CODE 4165-15-P

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### National Vaccine Injury Compensation Program: Revised Amount of the Average Cost of a Health Insurance Policy

**AGENCY:** Health Resources and Services Administration, Department of Health and Human Services (HHS).

**ACTION:** Notice.

The Health Resources and Services Administration (HRSA) is publishing an updated monetary amount of the average cost of a health insurance policy as it relates to the National Vaccine Injury Compensation Program (VICP).

Section 100.2 of the VICP's implementing regulation (42 CFR part 100) states that the revised amount of an average cost of a health insurance policy, as determined by the Secretary, is effective upon its delivery by the Secretary to the United States Court of Federal Claims (the Court), and will be published periodically in a notice in the **Federal Register**. This figure is calculated using the most recent Medical Expenditure Panel Survey-Insurance Component (MEPS-IC) data available as the baseline for the average monthly cost of a health insurance policy. This baseline is adjusted by the annual percentage increase/decrease obtained from the most recent annual Kaiser Family Foundation and Health Research and Educational Trust (KFF/HRET) Employer Health Benefits survey or other authoritative source that may be more accurate or appropriate.

In 2017, MEPS-IC, available at [www.meps.ahrq.gov](http://www.meps.ahrq.gov), published the annual 2016 average total single premium per enrolled employee at private-sector establishments that provide health insurance. The figure published was \$6,101. This figure is divided by 12-months to determine the cost per month of \$508.42. The \$508.42 is increased or decreased by the percentage change reported by the most recent KFF/HRET Employer Health Benefits Survey, available at [www.kff.org](http://www.kff.org). The percentage increase

from 2016 to 2017 was 4.0 percent. By adding this percentage increase, the calculated average monthly cost of a health insurance policy for a 12-month period is \$528.76.

Therefore, the Secretary announces that the revised average cost of a health insurance policy under the VICP is \$528.76 per month. In accordance with § 100.2, the revised amount was effective upon its delivery by the Secretary to the Court. Such notice was delivered to the Court on October 24, 2017.

Dated: October 24, 2017.

**George Sigounas,**  
Administrator.

[FR Doc. 2017-23557 Filed 10-27-17; 8:45 am]

**BILLING CODE 4165-15-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### Advisory Committee on Infant Mortality; Notice of Charter Renewal

**SUMMARY:** The Department of Health and Human Services (HHS) is hereby giving notice that the Advisory Committee on Infant Mortality (ACIM) has been rechartered. The effective date of the renewed ACIM charter is September 30, 2017.

**FOR FURTHER INFORMATION CONTACT:** David S. de la Cruz, Ph.D., M.P.H., CAPTAIN, United States Public Health Service, Designated Federal Officer, ACIM, Health Resources and Services Administration (HRSA), HHS, Room 18N25, 5600 Fishers Lane, Rockville, MD 20857. Phone: (301) 443-0543; [David.delaCruz@hrsa.gov](mailto:David.delaCruz@hrsa.gov).

**SUPPLEMENTARY INFORMATION:** ACIM was established under provisions of 42 U.S.C. 217a, section 222 of the Public Health Service Act, as amended. The Committee is governed by provisions of Public Law 92-463, as amended (5 U.S.C. App.), which sets forth standards for the formation and use of Advisory Committees. ACIM advises the Secretary on Department activities and programs that are directed at reducing infant mortality and improving the health status of pregnant women and infants. The Committee represents a public and private partnership at the highest level to provide guidance and focus attention on the policies and resources required to address the reduction of infant mortality. The Committee also provides advice on how best to coordinate the myriad of federal, state, local, and private programs and efforts that are designed to deal with the health and

social problems impacting infant mortality, including the Healthy Start program.

On September 30, 2017, the ACIM charter was renewed. Renewal of the ACIM charter authorizes the Committee to operate until September 30, 2019. A copy of the ACIM charter is available on the Committee's Web site: <http://www.hrsa.gov/advisorycommittees/mchbadvisory/InfantMortality/Index.html>. A copy of the charter can also be obtained by accessing the Federal Advisory Committee Act (FACA) database that is maintained by the Committee Management Secretariat under the General Services Administration. The Web site address for the FACA database is <http://www.facadatabase.gov/>.

**Amy McNulty,**

Acting Director, Division of the Executive Secretariat.

[FR Doc. 2017-23528 Filed 10-27-17; 8:45 am]

**BILLING CODE 4165-15-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Center for Complementary & Integrative Health; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the ZAT1 VS (07).

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Center for Complementary and Integrative Health Special Emphasis Panel; Research Resource for Systematic Reviews of Complementary and Integrative Health (R24).

*Date:* December 5, 2017.

*Time:* 1:00 p.m. to 2:30 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

*Contact Person:* Viatcheslav A. Soldatenkov, MD, Ph.D., Scientific Review Officer Office of Scientific Review, Division of Extramural Activities NCCIH/NIH, 6707 Democracy Boulevard, Suite 401, Bethesda, MD 20892, [soldatenkovv@mail.nih.gov](mailto:soldatenkovv@mail.nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: October 24, 2017.

**Michelle Trout,**

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-23459 Filed 10-27-17; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### National Institutes of Health

#### National Center for Complementary and Integrative Health; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the ZAT1 AJT (05) Exploratory Clinical Trials of Mind and Body Interventions.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

*Name of Committee:* National Center for Complementary and Integrative Health Special Emphasis Panel; Exploratory Clinical Trials of Mind and Body Interventions Review Panel.

*Date:* December 1, 2017.

*Time:* 8:00 a.m. to 5:00 p.m.

*Agenda:* To review and evaluate grant applications.

*Place:* Bethesda North Marriott Hotel & Conference Center, 5701 Marinelli Road, Bethesda, MD 20852.

*Contact Person:* Ashlee Tipton, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Center for Complementary, and Integrative Health, 6707 Democracy Boulevard, Room 401, Bethesda, MD 20892, 301-451-3849, [Ashlee.Tipton@nih.gov](mailto:Ashlee.Tipton@nih.gov).

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: October 24, 2017.

**Michelle Trout,**

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2017-23458 Filed 10-27-17; 8:45 am]

**BILLING CODE 4140-01-P**

## DEPARTMENT OF HOMELAND SECURITY

[Docket ID DHS-2017-0062]

### The President's National Security Telecommunications Advisory Committee

**AGENCY:** National Protection and Programs Directorate, Department of Homeland Security (DHS).

**ACTION:** Committee Management; Notice of Federal Advisory Committee Meeting.

**SUMMARY:** The President's National Security Telecommunications Advisory Committee (NSTAC) will meet via teleconference on Thursday, November 16, 2017. The meeting will be open to the public.

**DATES:** The NSTAC will meet on November 16, 2017 from 3:30 p.m. to 4:00 p.m. Eastern Standard Time (EST). Please note that the meeting may close early if the committee has completed its business.

**ADDRESSES:** The meeting will be held via conference call. For access to the conference call bridge, information on services for individuals with disabilities, or to request special assistance to participate, please email [NSTAC@hq.dhs.gov](mailto:NSTAC@hq.dhs.gov) by 5:00 p.m. EST on Wednesday, November 15, 2017.

Members of the public are invited to provide comment on the issues that will be considered by the committee as listed in the **SUPPLEMENTARY INFORMATION** section below. The report that participants will deliberate and vote on during the meeting is available at [www.dhs.gov/nstac](http://www.dhs.gov/nstac) for review as of Friday, October 6, 2017. Comments may be submitted at any time and must be identified by docket number DHS-2017-0062. Comments may be submitted by one of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Please follow the instructions for submitting written comments.

- **Email:** [NSTAC@hq.dhs.gov](mailto:NSTAC@hq.dhs.gov). Include the docket number DHS-2017-0062 in the subject line of the email.

- **Fax:** (703) 705-6190, ATTN: Sandy Benevides.

- **Mail:** Helen Jackson, Designated Federal Officer, Stakeholder Engagement and Cyber Infrastructure Resilience Division, National Protection and Programs Directorate, Department of Homeland Security, 245 Murray Lane, Mail Stop 0612, Arlington, VA 20598-0612.

**Instructions:** All submissions received must include the words "Department of Homeland Security" and the docket

number for this action. Comments received will be posted without alteration at [www.regulations.gov](http://www.regulations.gov), including any personal information provided.

**Docket:** For access to the docket and comments received by the NSTAC, please go to [www.regulations.gov](http://www.regulations.gov) and enter docket number DHS-2017-0062.

A public comment period will be held during the teleconference on Thursday, November 16, 2017, from 3:35 p.m. EST to 3:45 p.m. Speakers who wish to participate in the public comment period must register in advance by no later than Monday, November 13, 2017, at 5:00 p.m. EST by emailing [NSTAC@hq.dhs.gov](mailto:NSTAC@hq.dhs.gov). Speakers are requested to limit their comments to three minutes and will speak in order of registration. Please note that the public comment period may end before the time indicated, following the last request for comments.

**FOR FURTHER INFORMATION CONTACT:**

Helen Jackson, NSTAC Designated Federal Officer, Department of Homeland Security, (703) 705-6276 (telephone) or [helen.jackson@hq.dhs.gov](mailto:helen.jackson@hq.dhs.gov) (email).

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under *the Federal Advisory Committee Act*, 5 U.S.C. Appendix (Pub. L. 92-463). The NSTAC advises the President on matters related to national security and emergency preparedness (NS/EP) telecommunications and cybersecurity policy.

**Agenda:** The NSTAC will hold a conference call on Thursday, November 16, 2017, to deliberate and vote on the final draft of the *NSTAC Report to the President on Internet and Communications Resilience* which addresses ways in which the private sector and Government, together, can improve the resilience of the Internet and communications ecosystem (e.g., against botnets). In May 2017, the National Security Council (NSC), on behalf of the President, and as part of Executive Order 13800, *Strengthening the Cybersecurity of Federal Networks and Critical Infrastructure*, Section 2 (d), requested that the President's NSTAC examine how the private sector and Government could improve the resilience of the Internet and communications ecosystem. The report examines threats within the Internet ecosystem and possible solutions, ranging from short-term remedies to long-term solutions. The NSTAC's goal is to inform the Administration's efforts to set cybersecurity priorities and develop policies to deepen Government and private industry cooperation. The

report provides specific recommendations for the private sector and the Government. The draft *NSTAC Report to the President on Internet and Communications Resilience* can be found at <https://www.dhs.gov/publication/2017-nstac-publications>.

Dated: October 25, 2017.

**Helen Jackson,**

*Designated Federal Officer for the NSTAC.*

[FR Doc. 2017-23544 Filed 10-27-17; 8:45 am]

**BILLING CODE 9110-9P-P**

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

[FWS-R8-ES-2017-N131; FXES 11130800000-178-FF08E00000]

### Endangered Species Recovery Permit Applications

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of receipt of permit applications; request for comment.

**SUMMARY:** We, the U.S. Fish and Wildlife Service, invite the public to comment on the following applications to conduct certain activities with endangered species. With some exceptions, the Endangered Species Act (Act) prohibits activities with endangered and threatened species unless a Federal permit allows such activity. The Act also requires that we invite public comment before issuing recovery permits to conduct certain activities with endangered species.

**DATES:** Comments on these permit applications must be received on or before November 29, 2017.

**ADDRESSES:** Written data or comments should be submitted to the Endangered Species Program Manager, U.S. Fish and Wildlife Service, Region 8, 2800 Cottage Way, Room W-2606, Sacramento, CA 95825 (telephone: 916-414-6464; fax: 916-414-6486). Please refer to the respective permit number for each application when submitting comments.

**FOR FURTHER INFORMATION CONTACT:** Daniel Marquez, Fish and Wildlife Biologist; see **ADDRESSES** (telephone: 760-431-9440; fax: 760-431-9624; email: [daniel\\_marquez@fws.gov](mailto:daniel_marquez@fws.gov)).

**SUPPLEMENTARY INFORMATION:** The following applicants have applied for scientific research permits to conduct certain activities with endangered species under section 10(a)(1)(A) of the Act (16 U.S.C. 1531 *et seq.*). We seek review and comment from local, State, and Federal agencies and the public on the following permit requests:

**Applicants**

Permit No. TE-212445

Applicant: Robert Schell, San Rafael, California

The applicant requests a permit renewal and amendment to take (capture, handle, release, collect vouchers, and collect branchiopod cysts) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), Riverside fairy shrimp (*Streptocephalus woottoni*), and vernal pool tadpole shrimp (*Lepidurus packardii*); and take (capture, handle, take tissue samples, and release) the California tiger salamander (Santa Barbara County and Sonoma County Distinct Population Segments (DPS)) (*Ambystoma californiense*) in conjunction with survey and research activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-040553

Applicant: Daniel A. Marschalek, San Diego, California

The applicant requests a permit renewal to take the Quino checkerspot butterfly (*Euphydryas editha quino*) and Laguna Mountains skipper (*Pyrgus ruralis lagunae*) in conjunction with survey activities throughout the range of each species in California for the purpose of enhancing the species' survival.

Permit No. TE-34126C

Applicant: Francesca A. Cannizzo, Fresno, California

The applicant requests a new permit to take (capture, handle, and release) the California tiger salamander (central California DPS (*Ambystoma californiense*)) and take (capture, handle, release, collect vouchers, and collect branchiopod cysts) the Conservancy fairy shrimp (*Branchinecta conservatio*) and vernal pool tadpole shrimp (*Lepidurus packardii*) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-64144A

Applicant: Emily M. Mastrelli, San Diego, California

The applicant requests a permit amendment to take the Quino checkerspot butterfly (*Euphydryas editha quino*) in conjunction with survey activities throughout the range of

the species in California for the purpose of enhancing the species' survival.

Permit No. TE-74377B

Applicant: Shannon E. Mindeman, San Diego, California

The applicant requests a permit amendment to take the Quino checkerspot butterfly (*Euphydryas editha quino*) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-021929

Applicant: Sacramento Splash, Mather, California

The applicant requests a permit renewal to take (capture, handle, release, collect vouchers, and collect branchiopod cysts) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), and vernal pool tadpole shrimp (*Lepidurus packardii*) in conjunction with survey activities in Sacramento County, California, for the purpose of enhancing the species' survival.

Permit No. TE-34132C

Applicant: U.S. Forest Service, Vallejo, California

The applicant requests a new permit to take (capture, handle, measure, take skin swabs, clip toes, insert PIT (Passive Integrated Transponder) tags, mark with VIE (Visual Implant Elastomer), transport, translocate, emergency salvage, and release) the Sierra Nevada yellow-legged frog (*Rana sierrae*) and mountain yellow-legged frog (northern California DPS (*Rana muscosa*)) in conjunction with survey and research activities throughout the range of each species in California for the purpose of enhancing the species' survival.

Permit No. TE-24603A

Applicant: Karen J. Carter, Running Springs, California

The applicant requests a permit renewal to take the Yuma Clapper rail (Yuma Ridgway's r.) (*Rallus longirostris yumanensis*) (*R. obsoletus y.*) in conjunction with survey activities throughout the range of the species in California and Nevada for the purpose of enhancing the species' survival.

Permit No. TE-082233

Applicant: Marcus C. England, Los Angeles, California

The applicant requests a permit renewal to take (locate and monitor nests; and remove brown-headed cowbird (*Molothrus ater*) eggs and chicks from parasitized nests) the least

Bell's vireo (*Vireo bellii pusillus*) and take (survey for, locate and monitor nests, and remove brown-headed cowbird (*Molothrus ater*) eggs and chicks from parasitized nests) the southwestern willow flycatcher (*Empidonax traillii extimus*) in conjunction with survey and population monitoring activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-179036

Applicant: Cullen Wilkerson, Richmond, California

The applicant requests a permit amendment to take the California Clapper rail (California Ridgway's r.) (*Rallus longirostris obsoletus*) (*R. obsoletus o.*) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-233373

Applicant: Mary Anne Flett, Point Reyes Station, California

The applicant requests a permit amendment to take the California Clapper rail (California Ridgway's r.) (*Rallus longirostris obsoletus*) (*R. obsoletus o.*) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-798003

Applicant: North State Resources, Inc., Redding, California

The applicant requests a permit renewal to take (capture, handle, release, collect vouchers, and collect branchiopod cysts) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), Riverside fairy shrimp (*Streptocephalus woottoni*), and vernal pool tadpole shrimp (*Lepidurus packardii*); take (by survey activities) the southwestern willow flycatcher (*Empidonax traillii extimus*); and take (capture, handle, and release) the California tiger salamander (Santa Barbara County and Sonoma County DPSs (*Ambystoma californiense*)) in conjunction with survey activities throughout the range of the species in California and Oregon for the purpose of enhancing the species' survival.

Permit No. TE-59592B

Applicant: Angela M. Johnson, Wauconda, Illinois

The applicant requests a permit amendment and renewal to take (survey

for, locate and monitor nests, and remove brown-headed cowbird (*Molothrus ater*) eggs and chicks from parasitized nests) the southwestern willow flycatcher (*Empidonax traillii extimus*) and take (locate and monitor nests, and remove brown-headed cowbird (*Molothrus ater*) eggs and chicks from parasitized nests) the least Bell's vireo (*Vireo bellii pusillus*) in conjunction with survey and population monitoring activities throughout the range of the species in California, Nevada, and Arizona, for the purpose of enhancing the species' survival.

Permit No. TE-837574

Applicant: Eremico Biological Services, Weldon, California

The applicant requests a permit renewal to take (capture, band, collect blood samples, and release) the southwestern willow flycatcher (*Empidonax traillii extimus*) in conjunction with survey, population monitoring, and research activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-60149A

Applicant: California Department of Fish and Wildlife, Arcata, California

The applicant requests a permit renewal to take (capture, handle, and release) the tidewater goby (*Eucyclogobius newberryi*) in Humboldt County, Del Norte County, and Mendocino County, California, in conjunction with survey activities for the purpose of enhancing the species' survival.

Permit No. TE-36221C

Applicant: Jason R. Peters, Sacramento, California

The applicant requests a new permit to take (capture, handle, and release) the California tiger salamander (Santa Barbara County and Sonoma County Distinct Population Segment DPSs (*Ambystoma californiense*)) and take (capture, handle, release, collect vouchers, and collect branchiopod cysts) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), Riverside fairy shrimp (*Streptocephalus woottoni*), and vernal pool tadpole shrimp (*Lepidurus packardii*) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-190303

Applicant: Daniel W.H. Shaw, Tahoma, California

The applicant requests a permit renewal and amendment to take (capture, handle, and release) the Sierra Nevada yellow-legged frog (*Rana sierrae*) and California tiger salamander (Santa Barbara County and Sonoma County DPSs (*Ambystoma californiense*)) in conjunction with survey activities throughout the range of the species for the purpose of enhancing the species' survival.

Permit No. TE-86811A

Applicant: Southwest Resource Management Association, Riverside, California

The applicant requests a permit amendment to take (capture, handle, release, and emergency salvage) the unarmored threespine stickleback (*Gasterosteus aculeatus williamsoni*) in conjunction with survey and salvage activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-797315

Applicant: Michael Morrison, College Station, Texas

The applicant requests a permit renewal to take (capture, handle, mark, and release) the Fresno kangaroo rat (*Dipodomys nitratooides exilis*) and take (capture, handle, measure, mark, collect fur samples, and release) the salt marsh harvest mouse (*Reithrodontomys raviventris*) in conjunction with survey and research activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-190302

Applicant: Mitch Siemens, Arroyo Grande, California

The applicant requests a permit renewal to take (capture, handle, and release) the California tiger salamander (Santa Barbara County and Sonoma County DPSs (*Ambystoma californiense*)) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-053379

Applicant: Christine Tischer, Orange, California

The applicant requests a permit renewal to take the Quino checkerspot butterfly (*Euphydryas editha quino*) and take (capture, handle, release, collect adult vouchers, and collect branchiopod cysts) the Conservancy fairy shrimp

(*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), Riverside fairy shrimp (*Streptocephalus woottoni*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), and vernal pool tadpole shrimp (*Lepidurus packardii*) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-003269

Applicant: Robert James, San Diego, California

The applicant requests a permit renewal to take (capture, handle, and release) the Stephens' kangaroo rat (*Dipodomys stephensi*) and Pacific pocket mouse (*Perognathus longimembris pacificus*); take (capture, handle, release, collect vouchers, and collect branchiopod cysts) the San Diego fairy shrimp (*Branchinecta sandiegonensis*) and Riverside fairy shrimp (*Streptocephalus woottoni*); and take the Quino checkerspot butterfly (*Euphydryas editha quino*) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-811615

Applicant: Cynthia Daverin, San Diego, California

The applicant requests a permit renewal to take (survey for, locate and monitor nests, and remove brown-headed cowbird (*Molothrus ater*) eggs and chicks from parasitized nests) the southwestern willow flycatcher (*Empidonax traillii extimus*); take (locate and monitor nests, and remove brown-headed cowbird (*Molothrus ater*) eggs and chicks from parasitized nests) the least Bell's vireo (*Vireo bellii pusillus*); and take the Quino checkerspot butterfly (*Euphydryas editha quino*) in conjunction with survey and population monitoring activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-074955

Applicant: Susan Scatolini, San Diego, California

The applicant requests a permit renewal to take (capture, handle, release, collect vouchers, and collect branchiopod cysts) the San Diego fairy shrimp (*Branchinecta sandiegonensis*) and Riverside fairy shrimp (*Streptocephalus woottoni*) in conjunction with survey activities within San Diego County and Imperial

County, California, for the purpose of enhancing the species' survival.

Permit No. TE-74785A

Applicant: Barry Nerhus, Costa Mesa, California

The applicant requests a permit renewal and amendment to take (survey for and locate and monitor nests) the Light-Footed Clapper rail (light-footed Ridgway's r.) (*Rallus longirostris levipes*) (*R. obsoletus* l.) in conjunction with survey and population monitoring activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-45250C

Applicant: Griffin Brungraber, Bend, Oregon

The applicant requests a new permit to take the Quino checkerspot butterfly (*Euphydryas editha quino*) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-45251C

Applicant: Emily Moffitt, Campbell, California

The applicant requests a new permit to take (capture, handle, and release) the California tiger salamander (Santa Barbara County and Sonoma County DPSs (*Ambystoma californiense*)) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-195305

Applicant: Andres Aguilar, Los Angeles, California

The applicant requests a permit renewal to take (capture, handle, release, collect vouchers, and collect branchiopod cysts) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), and vernal pool tadpole shrimp (*Lepidurus packardii*) in conjunction with survey and research activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-025732

Applicant: Samuel Sweet, Santa Barbara, California

The applicant requests a permit renewal to take (capture, handle, measure, mark, relocate, release, attach radio tags, collect tail tissue, swab for chytrid fungus testing, collect specimens, conduct restoration activities, and remove and euthanize hybrids) the California tiger salamander

(Santa Barbara County DPS (*Ambystoma californiense*)) and take (capture, handle, swab for chytrid fungus testing, maintain in enclosures in-stream, release, relocate, and collect dead individuals) the arroyo toad (arroyo southwestern) (*Anaxyrus californicus*) in conjunction with survey and scientific research activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-54614A

Applicant: California Department of Fish and Wildlife, Rancho Cordova, California

The applicant requests a permit amendment and renewal to take (capture, handle, collect, photograph, tag, attach radio transmitters and radio track, mark, collect morphological data, collect parasites and tissue, conduct veterinary testing (assess reproductive condition, conduct health assessments, quarantine, test for disease and parasites), administer veterinary care, obtain genetic samples, euthanize, remove from the wild, transport, hold in captivity, captive-rear, captive-breed, release to the wild, translocate, use remote cameras, and monitor populations) the Amargosa vole (*Microtus californicus scirpensis*) in conjunction with survey, research, and behavior studies throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-018111

Applicant: Tenera Environmental, San Luis Obispo, California

The applicant requests a permit renewal to take (capture, handle, and release) the tidewater goby (*Eucyclogobius newberryi*) in conjunction with survey activities throughout the range of the species in California for the purpose of enhancing the species' survival.

Permit No. TE-787037

Applicant: University of San Diego, San Diego, California

The applicant requests a permit renewal to take (capture, handle, release, collect adult vouchers, collect resting eggs, conduct genetic analysis, process vernal pool soil samples for egg identification, and culturing and hatching out of branchiopod eggs) the Conservancy fairy shrimp (*Branchinecta conservatio*), longhorn fairy shrimp (*Branchinecta longiantenna*), San Diego fairy shrimp (*Branchinecta sandiegonensis*), Riverside fairy shrimp (*Streptocephalus woottoni*), and vernal

pool tadpole shrimp (*Lepidurus packardii*) in conjunction with survey and genetic research activities throughout the range of the species in California for the purpose of enhancing the species' survival.

### Public Comments

We invite public review and comment on each of these recovery permit applications. Comments and materials we receive will be available for public inspection, by appointment, during normal business hours at the address listed in the **ADDRESSES** section of this notice.

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.

Angela Picco,

Acting Regional Director, Pacific Southwest Region, Sacramento, California.

[FR Doc. 2017-23502 Filed 10-27-17; 8:45 am]

**BILLING CODE 4333-15-P**

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[17X LLAQ980600.L1820000.XX0000. LXSIARAC0000]

### Notice of Public Meeting, BLM Alaska Resource Advisory Council

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of public meeting.

**SUMMARY:** In accordance with the Federal Land Policy and Management Act of 1976 as amended and the Federal Advisory Committee Act of 1972, the Bureau of Land Management (BLM) Alaska Resource Advisory Council (RAC) will meet as indicated below.

**DATES:** The RAC will hold a public meeting on Thursday, November 16, 2017, from 8 a.m. until 5 p.m. and Friday, November 17, 2017, from 8 a.m. until noon. A public comment period will be held during Thursday's meeting from 4 to 5 p.m.

**ADDRESSES:** The meeting will take place in the Executive Dining Room at the Federal Building, 222 W. 7th Ave., Anchorage, Alaska. The agenda will be posted online by Oct. 17, 2017, at <https://www.blm.gov/site-page/get>



*involved-resource-advisory-council/near-you/alaska/rac.*

**FOR FURTHER INFORMATION CONTACT:**

Dave Doucet, RAC Coordinator, BLM Alaska State Office, 222 W. 7th Avenue #13, Anchorage, AK 99513; *ddoucet@blm.gov*; 907-271-4405. People who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1-800-877-8339 to contact the above individual during normal business hours. The FRS 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:** The 15-member BLM Alaska RAC was chartered to provide advice to the BLM and the Secretary of the Interior on a variety of planning and management issues associated with public land management in Alaska. All RAC meetings are open to the public. If you have written comments to distribute to the RAC, please do so prior to the start of the meeting.

Agenda items for the meeting include updates on BLM Alaska planning efforts such as the Bering Sea-Western Interior and Central Yukon Resource Management Plans, the Road to Ambler Mining District Environmental Impact Statement, the Donlin Gold Mine Right of Way, and the Alaska Stand Alone Pipeline/Alaska LNG project. In addition, the BLM will present updates on the status of Public Land Orders withdrawing land from selection or development, activities in the National Petroleum Reserve in Alaska, including the Greater Mooses Tooth Unit 2 project, and the upcoming Oil and Gas Lease Sale. The Placer Mining Subcommittee will present reports on the 2017 placer mining field season and preparations for the 2018 field season, and the Alaska Native Claims Settlement Act Subcommittee will discuss access and subsistence issues. The BLM will also encourage the RAC to provide the BLM with input on recreation, access and transportation issues including the proposed Trans-Alaska Trail along the Trans-Alaska Pipeline System corridor; the Transportation Management Plans for the Steese National Conservation Area and the White Mountains National Recreation Area; the possibilities of partnerships with the State and other agencies for access, recreation, and transportation issues; and the possibility of adjusting recreation site fees. The State of Alaska will also make a presentation on the Arctic Strategic Transportation and Resources Project. The BLM Alaska will post the meeting

agenda by Oct. 17, 2017, to the BLM Alaska Web site at <https://www.blm.gov/get-involved/resource-advisory-council/near-you/alaska/rac>. During the public comment period, depending upon the number of people wishing to comment, time for individual oral comments may be limited. Please be prepared to submit written comments. Written comments can be submitted by email to *BLM\_AK\_Communications@blm.gov*.

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.

**Authority:** 42 U.S.C. 15906; 43 CFR 1784.4-2.

**Karen E. Mouritsen,**  
*Acting State Director, Alaska.*

[FR Doc. 2017-23532 Filed 10-27-17; 8:45 am]

**BILLING CODE 4310-JA-P**

**INTERNATIONAL TRADE COMMISSION**

[Investigation No. 337-TA-1078]

**Certain Amorphous Metal and Products Containing Same; Institution of Investigation**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on September 19, 2017, under section 337 of the Tariff Act of 1930, as amended, on behalf of Metglas, Inc. of Conway, South Carolina and Hitachi Metals, Ltd. of Japan. Supplements were filed on September 20, 2017, and October 6, 2017. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, or in the sale of certain amorphous metal and products containing same by reason of misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure a domestic industry in the United States.

The complainants request that the Commission institute an investigation and, after the investigation, issue a general exclusion order, or in the alternative a limited exclusion order, and cease and desist orders.

**ADDRESSES:** The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone (202) 205-2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205-2000. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Pathenia M. Proctor, The Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205-2560.

**SUPPLEMENTARY INFORMATION:**

**Authority:** The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2017).

*Scope of Investigation:* Having considered the complaint, the U.S. International Trade Commission, on October 24, 2017, *ordered that—*

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(A) of section 337 in the importation into the United States, or in the sale of certain amorphous metal and products containing same by reason of misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure a domestic industry in the United States;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant are:  
Metglas, Inc., 440 Allied Drive, Conway, SC 29526.

Hitachi Metals, Ltd., Shinagawa Season Terrace, 1-2-70 Konan, Minato-ku, Tokyo 108-8224, Japan.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served:

Advanced Technology & Materials, No. 76 Xueyuan Nanlu, Haidian, Beijing 100081, China.

AT&M International Trading Co., Ltd., No. 76 Xueyuan Nanlu, Haidian, Beijing 100081, China.

CISRI International Trading Co., Ltd., No. 13 Gaoliangqiaoxiejie, Haidian District, Beijing 100081, China.

Beijing ZLJG Amorphous Technology Co., Ltd., No. 9 Huanyu Road, Majuqiao, Tongzhou District, Beijing, 101102, China.

Qingdao Yunlu Energy Technology Co., Ltd., No. 97 Yanyang Road, Chengyang District, Qingdao, China.

(c) The Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street SW., Suite 401, Washington, DC 20436; and

(3) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Issued: October 25, 2017.

**Lisa R. Barton,**

Secretary to the Commission.

[FR Doc. 2017-23541 Filed 10-27-17; 8:45 am]

BILLING CODE 7020-02-P

## INTERNATIONAL TRADE COMMISSION

### Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has received a complaint entitled *Certain Mounting Apparatuses for Holding Portable Electronic Devices and Components Thereof, DN 3268*; the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

**FOR FURTHER INFORMATION CONTACT:** Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at <https://edis.usitc.gov>, and will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436, telephone (202) 205-2000.

General information concerning the Commission may also be obtained by accessing its Internet server at United States International Trade Commission (USITC) at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

**SUPPLEMENTARY INFORMATION:** The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of National Products, Inc. ("NPI") on October 24, 2017. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain mounting apparatuses for holding portable electronic devices and components thereof. The complaint names as respondents Shenzhen Chengshuo Technology Co., Ltd. d/b/a

WUPP of China; Foshan City Qishi Sporting Goods Technology Co., Ltd. d/b/a N-Star of China; Chengdu MWUPP Technology Co., Ltd. of China; Shenzhen Yingxue Technology Co., Ltd. d/b/a Yingxue Tech of China; Shenzhen Shunsihang Technology Co., Ltd. d/b/a BlueFire of China; Guangzhou Kean Products Co., Ltd. of China; Prolech Electronics Limited of China; Gangzhou Kaicheng Metal Produce Co., Ltd. d/b/a ZJMOTO of China; Shenzhen Smilin Electronic Technology Co., Ltd. of China; and Shenzhen New Dream Intelligent Plastic Co., Ltd. of China. The complainant requests that the Commission issue a general exclusion order, or in the alternative, a limited exclusion order, cease and desist orders, and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments, not to exceed five (5) pages in length, inclusive of attachments, on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions must be filed no later than by close of business, eight

calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to § 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the docket number ("Docket No. 3268") in a prominent place on the cover page and/or the first page. (See Handbook for Electronic Filing Procedures, Electronic Filing Procedures<sup>1</sup>). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,<sup>2</sup> solely for cybersecurity purposes. All nonconfidential written submissions will be available for public

inspection at the Office of the Secretary and on EDIS.<sup>3</sup>

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: October 25, 2017.

**Lisa R. Barton,**

*Secretary to the Commission.*

[FR Doc. 2017–23543 Filed 10–27–17; 8:45 am]

**BILLING CODE 7020–02–P**

## INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1079]

### Certain Shaving Cartridges, Components Thereof and Products Containing Same Institution of Investigation

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on September 25, 2017, under section 337 of the Tariff Act of 1930, as amended, on behalf of The Gillette Company LLC of Boston, Massachusetts. A supplement to the complaint was filed on September 28, 2017. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain shaving cartridges, components thereof and products containing same by reason of infringement of U.S. Patent No. 9,193,077 ("the '077 patent"). The complaint further alleges that an industry in the United States exists as required by the applicable Federal Statute.

The complainant requests that the Commission institute an investigation and, after the investigation, issue a limited exclusion order and cease and desist orders.

**ADDRESSES:** The complaint, except for any confidential information contained therein, is available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW., Room 112, Washington, DC 20436, telephone (202) 205–2000. Hearing impaired

individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at (202) 205–2000. General information concerning the Commission may also be obtained by accessing its internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

**FOR FURTHER INFORMATION CONTACT:** The Office of Docket Services, U.S. International Trade Commission, telephone (202) 205–1802.

#### SUPPLEMENTARY INFORMATION:

**Authority:** The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 CFR 210.10 (2017).

**Scope of Investigation:** Having considered the complaint, the U.S. International Trade Commission, on October 24, 2017, ordered that—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain shaving cartridges, components thereof and products containing same by reason of infringement of one or more of claims 1–4, 11–14, and 18–20 of the '077 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337;

(2) For the purpose of the investigation so instituted, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is: The Gillette Company LLC, 1 Gillette Park, Boston, MA 02127.

(b) The respondents are the following entities alleged to be in violation of section 337, and are the parties upon which the complaint is to be served: Edgewell Personal Care Company, 1350 Timberlake Manor Parkway, Chesterfield, MO 63017; Edgewell Personal Care Brands, LLC, 6 Research Drive, Shelton, CT 06484; Edgewell Personal Care, LLC, 6 Research Drive, Shelton, CT 06484; Schick Manufacturing, Inc., 6 Research Drive, Shelton, CT 06484; Schick (Guangzhou)

<sup>1</sup> Handbook for Electronic Filing Procedures: [https://www.usitc.gov/documents/handbook\\_on\\_filing\\_procedures.pdf](https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf).

<sup>2</sup> All contract personnel will sign appropriate nondisclosure agreements.

<sup>3</sup> Electronic Document Information System (EDIS): <https://edis.usitc.gov>.

Co., Limited, No. 3 Xia Yuan Road, Dong Ji, Industrial District, Getdd, Guangzhou 510730, China.

(3) For the investigation so instituted, the Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

The Office of Unfair Import Investigations will not participate as a party in the investigation.

The Commission notes that issues regarding whether the importation requirement of section 337 is met may be present here. In instituting this investigation, the Commission has not made any determination as to whether Complainant has satisfied this requirement. Accordingly, the presiding Administrative Law Judge may wish to consider this issue at an early date. Notwithstanding any Commission Rules to the contrary, which are hereby waived, any such decision should be issued in the form of an initial determination (ID) under Rule 210.42(c), 19 CFR 210.42(c). The ID will become the Commission's final determination 45 days after the date of service of the ID unless the Commission determines to review the ID. Any such review will be conducted in accordance with Commission Rules 210.43, 210.44, and 210.45, 19 CFR 210.43, 210.44, and 210.45.

Responses to the complaint and the notice of investigation must be submitted by the named respondents in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 CFR 210.13. Pursuant to 19 CFR 201.16(e) and 210.13(a), such responses will be considered by the

Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting responses to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.  
Issued: October 25, 2017.

**Lisa R. Barton,**

*Secretary to the Commission.*

[FR Doc. 2017-23542 Filed 10-27-17; 8:45 am]

**BILLING CODE 7020-02-P**

**DEPARTMENT OF JUSTICE**

**Drug Enforcement Administration**

[Docket No. DEA-392]

**Bulk Manufacturer of Controlled Substances Application: Euticals Inc.**

**ACTION:** Notice of application.

**DATES:** Registered bulk manufacturers of the affected basic classes, and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before December 29, 2017.

**ADDRESSES:** Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DRW, 8701 Morrisette Drive, Springfield, Virginia 22152. Comments and requests for hearings on applications to import raw material are not appropriate. 72 FR 3417 (January 25, 2007).

**SUPPLEMENTARY INFORMATION:** The Attorney General has delegated his authority under the Controlled Substances Act to the Administrator of the Drug Enforcement Administration (DEA), 28 CFR 0.100(b). Authority to exercise all necessary functions with respect to the promulgation and implementation of 21 CFR part 1301, incident to the registration of manufacturers, distributors, dispensers, importers, and exporters of controlled substances (other than final orders in connection with suspension, denial, or revocation of registration) has been redelegated to the Assistant Administrator of the DEA Diversion Control Division ("Assistant Administrator") pursuant to section 7 of 28 CFR part 0, appendix to subpart R.

In accordance with 21 CFR 1301.33(a), this is notice that on June 20, 2017, Euticals, Inc., 2460 W. Bennett Street, Springfield, Missouri 65807-1229 applied to be registered as a bulk manufacturer the following basic classes of controlled substances:

Controlled substance	Drug code	Schedule
Gamma Hydroxybutyric Acid .....	2010	I
Amphetamine .....	1100	II
Lisdexamfetamine .....	1205	II
Methylphenidate .....	1724	II
Phenylacetone .....	8501	II
Methadone .....	9250	II
Methadone intermediate .....	9254	II
Tapentadol .....	9780	II

The company plans to manufacture the listed controlled substances in bulk for distribution and sale to its customers.

Dated: October 17, 2017.

**Demetra Ashley,**

*Acting Assistant Administrator.*

[FR Doc. 2017-23556 Filed 10-27-17; 8:45 am]

**BILLING CODE 4410-09-P**

**DEPARTMENT OF JUSTICE**

[OMB Number 1110-0049]

**Agency Information Collection Activities; Proposed eCollection; eComments Requested InfraGard Membership Application and Profile**

**AGENCY:** Federal Bureau of Investigation, Department of Justice.

**ACTION:** 30-day notice.

**SUMMARY:** Department of Justice (DOJ), Federal Bureau of Investigation (FBI), Training Division's Curriculum Management Section (CMS) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995. This proposed information collection was previously published in the **Federal Register**, on August 3, 2017 allowing for a 60 day comment period.

**DATES:** Comments are encouraged and will be accepted for an additional 30 days until November 29, 2017.

**FOR FURTHER INFORMATION CONTACT:** Written comments and/or suggestions regarding the items contained in this notice, especially the estimated public burden and associated response time, should be directed to Lisa Avery, Management and Program Analyst, Strategic Initiatives Unit, Federal Bureau of Investigation, Intelligence Branch, Office of Private Sector, FBIHQ, 1075 F Street SW., Washington DC 20024 or via email at [LFavery@fbi.gov](mailto:LFavery@fbi.gov). Written comments and/or suggestions can also be sent to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention Department of Justice Desk Officer, Washington, DC 20503 or sent to [OIRA\\_submissions@omb.eop.gov](mailto:OIRA_submissions@omb.eop.gov).

**SUPPLEMENTARY INFORMATION:** Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### Overview of This Information Collection

(1) *Type of Information Collection:* Personally identifiable information for vetting purposes.

(2) *Title of the Form/Collection:* InfraGard Membership Application and Profile

(3) *Agency form number, if any, and the applicable component of the Department sponsoring the collection:* Agency form number: Unnumbered Sponsoring component: Strategic Initiatives Unit (SIU) Office of Private Sector of the Federal Bureau of

Investigation (FBI), Department of Justice (DOJ).

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Members of the public and private-sector with a nexus to critical infrastructure protection interested in being a member of the FBI's National InfraGard Program. Personal information is collected by the FBI for vetting and background information to obtain membership to the program and access to its secure portal. InfraGard is a two-way information sharing exchange between the FBI and members of the public and private sector focused on intrusion and vulnerabilities affecting 16 critical infrastructures. Members are provided access to law enforcement sensitive analytical products pertain to their area of expertise.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply: It is estimated that InfraGard has approximately 50,000 members and receives approximately 7,200 new applications for membership per year. The average response time for reading and responding to membership application and profile is estimated to be 30 minutes.

(6) An estimate of the total public burden (in hours) associated with the collection: The total hour burden for completing the application and profile is 3,600 hours.

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., Suite 3E.405B, Washington, DC 20530.

Dated: October 25, 2017.

**Melody Braswell,**

*Department Clearance Officer, PRA, U.S. Department of Justice.*

[FR Doc. 2017-23511 Filed 10-27-17; 8:45 am]

**BILLING CODE 4410-02-P**

#### DEPARTMENT OF JUSTICE

[OMB Number 1117-0051]

#### Agency Information Collection Activities; Proposed eCollection eComments Requested; Extension of a Previously Approved Collection: Red Ribbon Week Patch

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

**ACTION:** 60-Day notice.

**SUMMARY:** The Department of Justice (DOJ), Drug Enforcement

Administration, will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995.

**DATES:** Comments are encouraged and will be accepted for 60 days until December 29, 2017.

#### FOR FURTHER INFORMATION CONTACT:

If you have additional comments especially on the estimated public burden or associated response time, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Gary R. Owen, Chief, Office of Congressional & Public Affairs, Drug Enforcement Administration, 8701 Morrisette Drive, Springfield, VA 22152.

**SUPPLEMENTARY INFORMATION:** Written comments and suggestions from the public and affected agencies concerning the proposed collection of information are encouraged. Your comments should address one or more of the following four points:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Evaluate whether and if so how the quality, utility, and clarity of the information to be collected can be enhanced; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

#### Overview of This Information Collection

1. *Type of Information Collection:* Proposed collection.

2. *The Title of the Form/Collection:* DEA Red Ribbon Week Patch.

3. *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* The agency form number is DEA-316a. The applicable component within the Department of Justice is the Drug Enforcement Administration.

4. *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Boy Scout and Girl Scout Troop Leaders.

5. *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* It is estimated that 450 respondents will complete the application in approximately 10 minutes.

6. *An estimate of the total public burden (in hours) associated with the collection:* The estimated public burden associated with this collection is 75 hours. It is estimated that applicants will take 10 minutes to complete the DEA-316a. The burden hours for collecting respondent data sum to 75 hours (450 respondents × 10 minutes = 4,500 minutes. 4500/60 seconds = 75).

If additional information is required contact: Melody Braswell, Department Clearance Officer, United States Department of Justice, Justice Management Division, Policy and Planning Staff, Two Constitution Square, 145 N Street NE., 3E.405B, Washington, DC 20530.

Dated: October 25, 2017.

**Melody Braswell,**

*Department Clearance Officer for PRA, U.S. Department of Justice.*

[FR Doc. 2017-23524 Filed 10-27-17; 8:45 am]

**BILLING CODE 4410-09-P**

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## DEPARTMENT OF LABOR

### President's Committee on the International Labor Organization Charter Renewal

**AGENCY:** Bureau of International Labor Affairs, Labor.

**ACTION:** Notice of charter renewal.

**SUMMARY:** On September 29, 2017, President Trump continued the President's Committee on the International Labor Organization (ILO) for two years through September 30, 2019. In response, and pursuant to the Federal Advisory Committee Act (FACA), the Secretary of Labor renewed the committee's charter on October 23, 2017.

*Purpose:* The President's Committee on the International Labor Organization was established in 1980 by Executive Order 12216 to monitor and assess the work of the ILO and make recommendations to the President regarding United States policy towards the ILO. The committee is chaired by the Secretary of Labor and the Department of Labor's Bureau of International Labor Affairs is

responsible for providing the necessary support for the committee.

The committee is composed of seven members: The Secretary of Labor (chair), the Secretary of State, the Secretary of Commerce, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and one representative each from organized labor and the business community, designated by the Secretary. The labor and business members are the presidents of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the United States Council for International Business (USCIB), respectively, as the most representative organizations of U.S. workers and employers engaged in ILO matters.

**Authority:** The authority for this notice is granted by the Federal Advisory Committee Act (5 U.S.C. App. 2) and Executive Order No. 13811 of September 29, 2017.

**FOR FURTHER INFORMATION CONTACT:** Robert B. Shepard, Director, Office of International Relations, Bureau of International Labor Affairs, U.S. Department of Labor, telephone (202) 693-4808.

Signed at Washington, DC.

**Martha E. Newton,**

*Deputy Undersecretary, Bureau of International Labor Affairs.*

[FR Doc. 2017-23550 Filed 10-27-17; 8:45 am]

**BILLING CODE 4510-28-P**

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## DEPARTMENT OF LABOR

### Office of the Secretary

#### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Examinations and Testing of Electrical Equipment, Including Examination, Testing, and Maintenance of High Voltage Longwalls

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, "Examinations and Testing of Electrical Equipment, Including Examination, Testing, and Maintenance of High Voltage Longwalls," to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before November 29, 2017.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* Web site at [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201708-1219-002](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201708-1219-002) (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-MSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor—OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**FOR FURTHER INFORMATION CONTACT:** Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** This ICR seeks to extend PRA authority for the Examinations and Testing of Electrical Equipment, Including Examination, Testing, and Maintenance of High Voltage Longwalls information collection. MSHA regulations require records to be kept on the examination, testing, calibration, and maintenance of covered atmospheric monitoring systems, electric equipment, grounding off-track direct-current machines and enclosures of related detached components, circuit breakers, electrical work, and devices for overcurrent protection. The records are intended to verify that examinations and tests were conducted and give insight into the hazardous conditions that have been encountered and those that may be encountered. These records greatly assist those who use them in making decisions during accident investigations to establish root causes and to prevent

similar occurrences. These decisions will ultimately affect the safety and health of miners. Federal Mine Safety and Health Act of 1977 sections 101(a) and 103(h) authorize this information collection. See 30 U.S.C. 811(a), 813(h).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1219-0116.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on October 31, 2017. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 16, 2017 (82 FR 27728).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1219-0116. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the

use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* DOL-MSHA.

*Title of Collection:* Examinations and Testing of Electrical Equipment, Including Examination, Testing, and Maintenance of High Voltage Longwalls.

*OMB Control Number:* 1219-0116.

*Affected Public:* Private Sector—businesses or other for-profits.

*Total Estimated Number of Respondents:* 843.

*Total Estimated Number of Responses:* 405,606.

*Total Estimated Annual Time Burden:* 73,784 hours.

*Total Estimated Annual Other Costs Burden:* \$0.

Dated: October 23, 2017.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2017-23552 Filed 10-27-17; 8:45 am]

**BILLING CODE 4510-43-P**

## DEPARTMENT OF LABOR

### Office of the Secretary

#### **Agency Information Collection Activities; Submission for OMB Review; Comment Request; DOL-Only Performance Accountability, Information, and Reporting System**

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting the Employment and Training Administration (ETA) sponsored information collection request (ICR) revision titled, "DOL-Only Performance Accountability, Information, and Reporting System," to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995. Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before November 29, 2017.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* Web site at [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201710-1205-004](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201710-1205-004) (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by

telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or sending an email to [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-ETA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**FOR FURTHER INFORMATION CONTACT:** Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or sending an email to [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**SUPPLEMENTARY INFORMATION:** This ICR seeks approval under the PRA for revisions to the DOL-Only Performance Accountability, Information, and Reporting System. The following programs will be required to report through this system: Workforce Innovation and Opportunity Act (WIOA) Adult, Dislocated Worker and Youth, Wagner Peyser Employment Service, National Farmworker Jobs, Trade Adjustment Assistance, YouthBuild, Indian and Native American, Job Corps, and Jobs for Veterans' State Grants. Requiring these programs to use a standard set of data elements, definitions, and specifications at all levels of the workforce system helps improve the quality of the performance information that is received by the DOL. While H1-B grants, the Reintegration of Ex-Offenders program, and the Trade Adjustment Assistance program are not authorized under the WIOA, these programs will be utilizing the data element definitions and reporting templates proposed in this ICR. The accuracy, reliability, and comparability of program reports submitted by states and grantees using Federal funds are fundamental elements of good public administration, and are necessary tools for maintaining and demonstrating system integrity. This ICR includes several information collection instruments—Program Performance Report, WIOA Pay-for-Performance Report, Participant Individual Record Layout, WIOA Data Element Specifications, and Job

Openings Report. This ICR has been classified as a revision, because specified data elements, sub-populations, barriers to employment, and reporting templates have changed as some reporting requirements or data element definitions have been revised in an attempt to better align definitions across DOL programs, in a larger effort to reduce overall reporting burden. WIOA section 416(d) authorizes this information collection. See 29 U.S.C. 3141(d).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1205-0521. The current approval is scheduled to expire on August 31, 2019; however, the DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on May 23, 2017 (82 FR 23604).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205-0521. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and

- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* DOL-ETA.

*Title of Collection:* DOL-Only Performance Accountability, Information, and Reporting System.

*OMB Control Number:* 1205-0521.

*Affected Public:* State, Local, and Tribal Governments.

*Total Estimated Number of Respondents:* 17,532,542.

*Total Estimated Number of Responses:* 35,064,970.

*Total Estimated Annual Time Burden:* 8,938,029 hours.

*Total Estimated Annual Other Costs Burden:* \$6,791,395.

*Authority:* 44 U.S.C. 3507(a)(1)(D).

Dated: October 25, 2017.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2017-23569 Filed 10-27-17; 8:45 am]

**BILLING CODE 4510-FN-P**

## DEPARTMENT OF LABOR

### Office of the Secretary

#### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Rehabilitation Plan and Award

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting the Office of Workers' Compensation Programs (OWCP) sponsored information collection request (ICR) revision titled, "Rehabilitation Plan and Award," to the Office of Management and Budget (OMB) for review and approval for use in accordance with the Paperwork Reduction Act (PRA) of 1995. Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before November 29, 2017.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201706-1240-002](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201706-1240-002) (this link will only become active on the day

following publication of this notice) or by contacting Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or sending an email to [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-OWCP, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202-395-5806 (this is not a toll-free number); or by email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

#### FOR FURTHER INFORMATION CONTACT:

Michel Smyth by telephone at 202-693-4129, TTY 202-693-8064, (these are not toll-free numbers) or sending an email to [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**SUPPLEMENTARY INFORMATION:** This ICR seeks approval under the PRA for revisions to the Rehabilitation Plan and Award (Form OWCP-16) information collection. Vocational rehabilitation counselors use Form OWCP-16 to submit an agreed upon rehabilitation plan for OWCP approval. The form also documents any OWCP payment award for approved services. This information collection has been classified as a revision, because the agency has clarified several questions and disclosures. The agency also made formatting changes intended to make the form more user friendly. The Federal Employees' Compensation Act and Longshore and Harbor Workers' Compensation Act authorizes this information collection. See 5 U.S.C. 8103, 8193; 33 U.S.C. 907.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control



Number 1240–0045. The current approval is scheduled to expire on October 31, 2017; however, the DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. New requirements would only take effect upon OMB approval. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on August 8, 2017 (82 FR 37121).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1240–0045. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

*Agency:* DOL–OWCP.

*Title of Collection:* Rehabilitation Plan and Award.

*OMB Control Number:* 1240–0045.

*Affected Public:* Private Sector—businesses or other for-profits and not-for-profit institutions.

*Total Estimated Number of Respondents:* 3,913.

*Total Estimated Number of Responses:* 3,913.

*Total Estimated Annual Time Burden:* 1,957 hours.

*Total Estimated Annual Other Costs Burden:* \$0.

**Authority:** 44 U.S.C. 3507(a)(1)(D).

Dated: October 24, 2017.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2017–23546 Filed 10–27–17; 8:45 am]

**BILLING CODE 4510–CR–P**

## DEPARTMENT OF LABOR

### Office of the Secretary

#### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Sealing of Abandoned Areas Standard

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting the Mine Safety and Health Administration (MSHA) sponsored information collection request (ICR) titled, “Sealing of Abandoned Areas Standard,” to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before November 29, 2017.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation; including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the *RegInfo.gov* Web site at [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201708-1219-002](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201708-1219-002) (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–MSHA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor–OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

#### FOR FURTHER INFORMATION CONTACT:

Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

**Authority:** 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** This ICR seeks to extend PRA authority for the Sealing of Abandoned Areas Standard information collection. The Standard includes reporting and recordkeeping requirements to help ensure the construction and maintenance of seals are done correctly; certified persons conducting sampling in sealed areas are adequately trained, and problems can be found and corrected. Federal Mine Safety and Health Act of 1977 sections 101(a) and 103(h) authorize this information collection. See 30 U.S.C. 811(a) and 813(h).

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1219–0116.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on October 31, 2017. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on June 16, 2017 (82 FR 26952).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1219–0142. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the

proposed collection of information, including the validity of the methodology and assumptions used;

- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–MSHA.

Title of Collection: Sealing of Abandoned Areas Standard.

OMB Control Number: 1219–0142.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 242.

Total Estimated Number of Responses: 15,800.

Total Estimated Annual Time Burden: 3,525 hours.

Total Estimated Annual Other Costs Burden: \$1,068,083.

Dated: October 23, 2017.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2017–23548 Filed 10–27–17; 8:45 am]

BILLING CODE 4510–43–P

## DEPARTMENT OF LABOR

### Office of the Secretary

#### Agency Information Collection Activities; Submission for OMB Review; Comment Request; Request for Assistance From the Department of Labor, Employee Benefits Security Administration

**ACTION:** Notice of availability; request for comments.

**SUMMARY:** The Department of Labor (DOL) is submitting the Employee Benefits Security Administration (EBSA) sponsored information collection request (ICR) titled, “Request for Assistance from the Department of Labor, Employee Benefits Security Administration,” to the Office of Management and Budget (OMB) for review and approval for continued use, without change, in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

**DATES:** The OMB will consider all written comments that agency receives on or before November 29, 2017.

**ADDRESSES:** A copy of this ICR with applicable supporting documentation;

including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201708-1210-002](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201708-1210-002) (this link will only become active on the day following publication of this notice) or by contacting Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

Submit comments about this request by mail to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL–EBSA, Office of Management and Budget, Room 10235, 725 17th Street NW., Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: [OIRA\\_submission@omb.eop.gov](mailto:OIRA_submission@omb.eop.gov). Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor—OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW., Washington, DC 20210; or by email: [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

#### FOR FURTHER INFORMATION CONTACT:

Michel Smyth by telephone at 202–693–4129, TTY 202–693–8064, (these are not toll-free numbers) or by email at [DOL\\_PRA\\_PUBLIC@dol.gov](mailto:DOL_PRA_PUBLIC@dol.gov).

Authority: 44 U.S.C. 3507(a)(1)(D).

**SUPPLEMENTARY INFORMATION:** This ICR seeks to extend PRA authority for the Request for Assistance from Department of Labor, Employee Benefits Security Administration information collection. The EBSA assists employee benefit plan participants in understanding their rights, responsibilities, and benefits under employee benefit law and intervenes informally on behalf of beneficiaries with plan sponsors in order to assist participants in obtaining the health and retirement benefits that may have been inappropriately denied. Such informal intervention can avert the necessity for a formal investigation or a civil action. The EBSA maintains a toll-free telephone number through which inquirers can reach Benefits Advisors in ten Regional Offices. The EBSA has also made a request for assistance form available on its Web site for those wishing to obtain assistance in this manner. Employee Retirement Income Security Act of 1974 (ERISA) sections 504 and 513 authorize this information collection. See 29 U.S.C. 1134, 1143.

This information collection is subject to the PRA. A Federal agency generally

cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. See 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1210–0146.

OMB authorization for an ICR cannot be for more than three (3) years without renewal, and the current approval for this collection is scheduled to expire on October 31, 2017. The DOL seeks to extend PRA authorization for this information collection for three (3) more years, without any change to existing requirements. The DOL notes that existing information collection requirements submitted to the OMB receive a month-to-month extension while they undergo review. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on May 22, 2017 (82 FR 23303).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1210–0146. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Agency: DOL–EBSA.

*Title of Collection:* Request for Assistance from the Department of Labor, Employee Benefits Security Administration.

*OMB Control Number:* 1210-0146.

*Affected Public:* Individuals or Households.

*Total Estimated Number of Respondents:* 7,618.

*Total Estimated Number of Responses:* 7,618.

*Total Estimated Annual Time Burden:* 3,809 hours.

*Total Estimated Annual Other Costs Burden:* \$0.

Dated: October 23, 2017.

**Michel Smyth,**

*Departmental Clearance Officer.*

[FR Doc. 2017-23547 Filed 10-27-17; 8:45 am]

**BILLING CODE 4510-29-P**

## DEPARTMENT OF LABOR

### Office of Workers' Compensation Programs

#### Proposed Collection of Information; Comment Request

**AGENCY:** Division of Coal Mine Workers' Compensation, Office of Workers' Compensation Programs, Department of Labor.

**ACTION:** Notice.

**SUMMARY:** The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995. 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 (OWCP) is soliciting comments concerning the proposed collection: Application For Self-Insurance Under The Black Lung Benefits Act, 1240-ONEW (CM-2017; CM-2017a; CM-2017b). 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 received by the office listed in the addresses section below by December 29, 2017.

**ADDRESSES:** You may submit comments by mail, delivery service, or by hand to Ms. Yoon Ferguson, U.S. Department of Labor, 200 Constitution Ave. NW., Room S-3323, Washington, DC 20210; by fax to (202) 354-9647; or by Email to [ferguson.yoon@dol.gov](mailto:ferguson.yoon@dol.gov). Please use only one method of transmission for comments (mail/delivery, fax, or Email). Please note that comments submitted after the comment period will not be considered.

#### SUPPLEMENTARY INFORMATION:

*I. Background:* The Department of Labor is requesting an approval of a new information collection. This information collection is essential to the mission of OWCP's Division of Coal Mine Workers' Compensation, which administers the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.* The statute grants the Department authority to authorize and regulate coal mine operators who wish to self-insure their BLBA liabilities. 30 U.S.C. 933. This information collection would provide OWCP with sufficient information to determine whether a coal mine operator should be (or continue to be) authorized to self-insure. The information would also allow OWCP to determine the security amount a coal mine operator must deposit to guarantee that it will be able to meet its BLBA liabilities.

*II. Review Focus:* The Department is particularly interested in comments that will help it to:

- \* Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

- \* evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the 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 seeks the approval of this new information collection to carry out its responsibility to administer the BLBA.

*Agency:* Office of Workers' Compensation Programs.

*Type of Review:* New Collection (Request for New OMB Control Number).

*Title:* Application For Self-Insurance Under the Black Lung Benefits Act, 1240-ONEW (CM-2017; CM-2017a; CM-2017b).

*OMB Number:* 1240-ONEW.

*Agency Number:* CM-2017; CM-2017a; CM-2017b.

*Affected Public:* Business entities or other for-profit institutions.

*Total Respondents:* 53.

*Total Annual Responses:* 318.

*Average Time per Response:* 20 minutes-2 hours.

*Estimated Total Burden Hours:* 283.

*Frequency:* Annually and quarterly.

*Total Burden Cost (operating/maintenance):* \$137.47.

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: October 24, 2017.

**Yoon Ferguson,**

*Agency Clearance Officer, Office of Workers' Compensation Programs, U.S. Department of Labor.*

[FR Doc. 2017-23551 Filed 10-27-17; 8:45 am]

**BILLING CODE 4510-CK-P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 17-079]

### NASA Advisory Council; Aeronautics Committee; Meeting

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, as amended, the National Aeronautics and Space Administration (NASA) announces a meeting of the Aeronautics Committee of the NASA Advisory Council (NAC). The meeting will be held for the purpose of soliciting, from the aeronautics community and other persons, research and technical information relevant to program planning. This Committee reports to the NAC.

**DATES:** Wednesday, November 15, 2017, 12:30-5:15 p.m.; and Thursday, November 16, 2017, 8:00-11:30 a.m., Local Time.

**ADDRESSES:** The AERO Institute, 38256 Sierra Highway, Palmdale, CA 93550.

**FOR FURTHER INFORMATION CONTACT:** Ms. Irma Rodriguez, Designated Federal Officer, NAC Aeronautics Committee, NASA Headquarters, Washington, DC 20546, (202) 358-0984, or [irma.c.rodriguez@nasa.gov](mailto:irma.c.rodriguez@nasa.gov).

**SUPPLEMENTARY INFORMATION:** The meeting will be open to the public up to the capacity of the room. This meeting is also available telephonically and WebEx. You must use a touch-tone telephone to participate in this meeting. Any interested person may dial the USA toll-free conference number 1-844-467-6272, passcode 317924, to participate in this meeting by telephone. The WebEx link is <https://nasa.webex.com/>, the meeting number for 11/15/17 is 998 190 104, and the password is NACAero@1; and for 11/16/17 the meeting number is 999 027 064, and the password is NACAero@2. The agenda for the meeting includes the following topics:

- Low Boom Flight Demonstrator (LFBFD)
- System Wide Safety Assurance Project Objectives and Content
- Hypersonics Project

Attendees will be requested to sign a register to document attendance. It is imperative that the meeting be held on these dates to accommodate the scheduling priorities of the key participants. For questions, please call Ms. Irma Rodriguez at (202) 358-0984.

**Patricia D. Rausch,**

*Advisory Committee Management Officer,  
National Aeronautics and Space  
Administration.*

[FR Doc. 2017-23409 Filed 10-27-17; 8:45 am]

**BILLING CODE 7510-13-P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 17-078]

### NASA Advisory Council; Charter Renewal

**AGENCY:** National Aeronautics and Space Administration (NASA).

**ACTION:** Notice of renewal of the charter of the NASA Advisory Council.

Pursuant to sections 14(b)(1) and 9(c) of the Federal Advisory Committee Act, as amended (Pub. L. 92-463, 5 U.S.C. App.), and after consultation with the Committee Management Secretariat, General Services Administration, the NASA Acting Administrator has determined that renewal of the charter of the NASA Advisory Council is necessary and in the public interest. The renewed charter is for a two-year period ending October 20, 2019.

**FOR FURTHER INFORMATION CONTACT:** Ms. Marla K. King, NASA Headquarters, 300 E Street SW., Washington, DC 20546,

phone: (202) 358-1148; email: [marla.k.king@nasa.gov](mailto:marla.k.king@nasa.gov).

**Patricia D. Rausch,**

*Advisory Committee Management Officer,  
National Aeronautics and Space  
Administration.*

[FR Doc. 2017-23408 Filed 10-27-17; 8:45 am]

**BILLING CODE 7510-13-P**

## NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice: 17-080]

### NASA Advisory Council; Ad Hoc Task Force on STEM Education; Meeting

**AGENCY:** National Aeronautics and Space Administration.

**ACTION:** Notice of meeting.

**SUMMARY:** In accordance with the Federal Advisory Committee Act, Public Law 92-463, as amended, the National Aeronautics and Space Administration announces a meeting of the Ad Hoc Task Force on Science, Technology, Engineering and Mathematics (STEM) of the NASA Advisory Council (NAC). This Task Force reports to the NAC.

**DATES:** Monday, November 13, 2017, 11:30 a.m.-3:30 p.m., Eastern Standard Time (EST).

**FOR FURTHER INFORMATION CONTACT:** Dr. Beverly Girten, Designated Federal Officer, NAC Ad Hoc Task Force on STEM Education, NASA Headquarters, Washington, DC 20546, (202) 358-0212, or [beverly.e.girten@nasa.gov](mailto:beverly.e.girten@nasa.gov).

**SUPPLEMENTARY INFORMATION:** This meeting will be virtual and will be available telephonically and by WebEx only. You must use a touch tone phone to participate in this meeting. Any interested person may dial the toll free access number 844-467-6272 or toll access number 720-259-6462, and then the numeric participant passcode: 634012 followed by the # sign. To join via WebEx, the link is <https://nasa.webex.com/>, the meeting number is 999 557 944 and the password is Education1! (Password is case sensitive.) NOTE: If dialing in, please "mute" your telephone. The agenda for the meeting will include the following:

- Opening Remarks by Chair
- Transition Update
- Business Service Assessment Update
- Formulation of Recommendations and Findings
- Other Related Topics

It is imperative that the meeting be held on this date to accommodate the

scheduling priorities of the key participants.

**Patricia D. Rausch,**

*Advisory Committee Management Officer,  
National Aeronautics and Space  
Administration.*

[FR Doc. 2017-23455 Filed 10-27-17; 8:45 am]

**BILLING CODE 7510-13-P**

## NATIONAL SCIENCE FOUNDATION

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

**AGENCY:** National Science Foundation, National Center for Science and Engineering Statistics.

**ACTION:** Submission to OMB and Request for Comments.

**SUMMARY:** The National Science Foundation (NSF) has submitted the following information collection requirements to OMB for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Written comments on this notice must be received by [] to be assured consideration. Comments received after that date will be considered to the extent practicable.

**FOR FURTHER INFORMATION CONTACT:** Comments should be addressed to: Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for National Science Foundation, 725 17th Street NW., Room 10235, Washington, DC 20503, and to Suzanne H. Plimpton, Reports Clearance Officer, National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314; telephone (703) 292-7556; or send email to [splimpto@nsf.gov](mailto:splimpto@nsf.gov). Copies of the submission(s) may be obtained by calling 703-292-7556. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339, which is accessible 24 hours a day, 7 days a week, 365 days a year (including Federal holidays).

**SUPPLEMENTARY INFORMATION:** Comments are invited on: (a) The proposed confidentiality pledge's fit for use by the National Center for Science and Engineering Statistics (NCSES), and (b) ways to enhance the quality, utility, and clarity of the pledge.

*Title:* National Center for Science and Engineering Statistics Confidentiality Pledge.

*OMB Approval Number:* 3145-0245.

*Summary of Collection:* Federal statistics provide key information that the Nation uses to measure its performance and make informed

choices about budgets, employment, health, investments, taxes, and a host of other significant topics. The overwhelming majority of Federal surveys are conducted on a voluntary basis. Respondents, ranging from businesses to households to institutions, may choose whether to provide the requested information. Many of the most valuable Federal statistics come from surveys that ask for highly sensitive information such as proprietary business data from companies or particularly personal information or practices from individuals. Strong and trusted confidentiality and exclusively statistical use pledges under the Confidential Information Protection and Statistical Efficiency Act (CIPSEA) and similar statistical confidentiality pledges are effective and necessary in honoring the trust that businesses, individuals, and institutions, by their responses, place in statistical agencies.

Under CIPSEA and similar statistical confidentiality protection statutes, many Federal statistical agencies make statutory pledges that the information respondents provide will be seen only by statistical agency personnel or their sworn agents, and will be used only for statistical purposes. CIPSEA and similar statutes protect the confidentiality of information that agencies collect solely for statistical purposes and under a pledge of confidentiality. These Acts protect such statistical information from administrative, law enforcement, taxation, regulatory, or any other non-statistical use and immunize the information submitted to statistical agencies from many legal processes. Moreover, statutes like the CIPSEA carry criminal penalties of a Class E felony (fines up to \$250,000, or up to five years in prison, or both) for conviction of a knowing and willful unauthorized disclosure of covered information.

As part of the Consolidated Appropriations Act for Fiscal Year 2016 signed on December 17, 2015, the Congress enacted the Federal

Cybersecurity Enhancement Act of 2015 (H.R. 2029, Division N, Title II, Subtitle B, Sec. 223). This Act, among other provisions, requires the Secretary of the Department of Homeland Security (DHS) to provide Federal civilian agencies' information technology systems with cybersecurity protection for their Internet traffic. The DHS cybersecurity program's objective is to protect Federal civilian information systems from malicious malware attacks. The Federal statistical system's objective is to ensure that the DHS Secretary performs those essential duties in a manner that honors the Government's statutory promises to the public to protect their confidential data. Given that the DHS is not a Federal statistical agency, both DHS and the Federal statistical system have been successfully engaged in finding a way to balance both objectives and achieve these mutually reinforcing objectives.

As required by passage of the Federal Cybersecurity Enhancement Act of 2015, the Federal statistical community will implement DHS' cybersecurity protection program, called Einstein.

The technology currently used to provide this protection against cyber malware electronically searches Internet traffic in and out of Federal civilian agencies in real time for malware signatures. When such a signature is found, the Internet packets that contain the malware signature are shunted aside for further inspection by DHS personnel. Because it is possible that such packets entering or leaving a statistical agency's information technology system may contain confidential statistical data, statistical agencies can no longer promise their respondents that their responses will be seen only by statistical agency personnel or their sworn agents. However, they can promise, in accordance with provisions of the Federal Cybersecurity Enhancement Act of 2015, that such monitoring can be used only to protect information and information systems from cybersecurity

risks, thereby, in effect, providing stronger protection to the security and integrity of the respondents' submissions.

Accordingly, DHS and Federal statistical agencies have developed a Memorandum of Agreement for the installation of Einstein cybersecurity protection technology to monitor their Internet traffic.

On February 2, 2017, in a pair of **Federal Register** notices (82 FR 9599 and 82 FR 9597), the public was notified of the change to the confidentiality pledges to be used by NCSES. No comments were received in response to those notices.

Table 1 contains a listing of the current numbers and information collection titles for those NCSES programs whose confidentiality pledges will change to reflect the statutory implementation of DHS' Einstein monitoring for cybersecurity protection purposes. For the Information Collection Requests (ICRs) listed in the table below, NCSES statistical confidentiality pledges will be modified to include one of two sentences, based on whether the collection agent is another federal agency (e.g., the U.S. Census Bureau) or a private-sector contractor. For collections by another federal agency, the following sentence will be added to the confidentiality pledge: "Per the Federal Cybersecurity Enhancement Act of 2015, your data are protected from cybersecurity risks through screening of the systems that transmit your data." For collections by private-sector contractors, whose systems are not covered by Einstein, the following sentence will be added to the confidentiality pledge: "Per the Federal Cybersecurity Enhancement Act of 2015, your data are protected from cybersecurity risks through screening of the federal information systems that transmit your data."

Table 1 indicates which pledge (federal vs. private) the ICR will use.

TABLE 1—CURRENT PRA OMB NUMBERS, EXPIRATION DATES, AND INFORMATION COLLECTION TITLES INCLUDED IN THIS NOTICE

OMB control no.	Expiration date	Information collection title	Pledge version
3145-0101 .....	08/31/2018	Survey of Science and Engineering Research Facilities (Facilities) .....	Private.
3145-0019 .....	05/31/2018	Survey of Earned Doctorates .....	Private.
3145-0020 .....	08/31/2018	Survey of Doctorate Recipients .....	Private.
3145-0100 .....	09/30/2019	Higher Education R&D Survey .....	Private.
3145-0141 * .....	05/31/2018	National Survey of College Graduates .....	Federal.
3145-0174 .....	07/31/2019	Generic Clearance of Survey Improvement Projects .....	Private.
3145-0235 .....	06/30/2017	Early Career Doctorates Survey .....	Private.

\* This information collection was also named in a **Federal Register** Notice from the U.S. Census Bureau (81 FR 94321), since that agency collects data on NSF's behalf.

Dated: October 24, 2017.

**Suzanne H. Plimpton,**

*Reports Clearance Officer, National Science Foundation.*

[FR Doc. 2017-23466 Filed 10-27-17; 8:45 am]

**BILLING CODE 7555-01-P**

## NUCLEAR REGULATORY COMMISSION

[NRC-2017-0001]

### Sunshine Act Meetings

**DATE:** Weeks of October 30, November 6, 13, 20, 27, December 4, 2017.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and Closed.

#### Week of October 30, 2017

*Monday, October 30, 2017*

3:50 p.m. Affirmation Session (Public Meeting) (Tentative).

Aerotest Operations, Inc. (Aerotest Radiography and Research Reactor), Joint Motion to Terminate Proceedings (Tentative).

*Monday, October 30, 2017*

4:00 p.m. Briefing on Export Licensing (Closed—Ex. 1 & 9).

#### Week of November 6, 2017—Tentative

There are no meetings scheduled for the week of November 6, 2017.

#### Week of November 13, 2017—Tentative

There are no meetings scheduled for the week of November 13, 2017.

#### Week of November 20, 2017—Tentative

There are no meetings scheduled for the week of November 20, 2017.

#### Week of November 27, 2017—Tentative

*Tuesday, November 28, 2017*

10:00 a.m. Briefing on Security Issues (Closed—Ex. 1).

*Thursday, November 30, 2017*

10:00 a.m. Briefing on Equal Employment Opportunity, Affirmative Employment, and Small Business (Public) (Contact: Larniece McKoy Moore: 301-415-1942).

This meeting will be webcast live at the Web address—<http://www.nrc.gov/>.

#### Week of December 4, 2017—Tentative

There are no meetings scheduled for the week of December 4, 2017.

\* \* \* \* \*

#### Additional Information

By a vote of 3-0 on October 25, 2017, the Commission determined pursuant to

U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that the above referenced Affirmation Session be held with less than one week notice to the public. The meeting is scheduled on October 30, 2017

\* \* \* \* \*

The schedule for Commission meetings is subject to change on short notice. For more information or to verify the status of meetings, contact Denise McGovern at 301-415-0681 or via email at [Denise.McGovern@nrc.gov](mailto:Denise.McGovern@nrc.gov).

\* \* \* \* \*

The NRC Commission Meeting Schedule can be found on the Internet at: <http://www.nrc.gov/public-involve/public-meetings/schedule.html>.

\* \* \* \* \*

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g., braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301-287-0739, by videophone at 240-428-3217, or by email at [Kimberly.Meyer-Chambers@nrc.gov](mailto:Kimberly.Meyer-Chambers@nrc.gov). Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

\* \* \* \* \*

Members of the public may request to receive this information electronically. If you would like to be added to the distribution, please contact the Nuclear Regulatory Commission, Office of the Secretary, Washington, DC 20555 (301-415-1969), or email [Brenda.Akstulewicz@nrc.gov](mailto:Brenda.Akstulewicz@nrc.gov) or [Patricia.Jimenez@nrc.gov](mailto:Patricia.Jimenez@nrc.gov).

Dated: October 25, 2017.

**Denise L. McGovern,**

*Policy Coordinator, Office of the Secretary.*

[FR Doc. 2017-23664 Filed 10-26-17; 4:15 pm]

**BILLING CODE 7590-01-P**

## OFFICE OF PERSONNEL MANAGEMENT

### Submission for Review: OPM Form 1654-B, Combined Federal Campaign Federal Retiree Pledge Form

**AGENCY:** Office of Personnel Management.

**ACTION:** 30-Day notice and request for comments.

**SUMMARY:** The Office of Combined Federal Campaign, Office of Personnel Management (OPM) offers the general public and other federal agencies the

opportunity to comment on an information collection request (ICR) 3206-NEW, OPM Form 1654-B, the Combined Federal Campaign Retiree Pledge Form. As required by the Paperwork Reduction Act of 1995, as amended by the Clinger-Cohen Act, OPM is soliciting comments for this collection. The information collection was previously published in the **Federal Register** on August 22, 2017 at 82 FR 39918 allowing for a 60-day public comment period. No comments were received for this information collection. The purpose of this notice is to allow an additional 30 days for public comments.

**DATES:** Comments are encouraged and will be accepted until November 29, 2017. This process is conducted in accordance with 5 CFR 1320.1.

**ADDRESSES:** Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov) or faxed to (202) 395-6974.

**FOR FURTHER INFORMATION CONTACT:** A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Office of Information and Regulatory Affairs, Office of Management Budget, 725 17th Street NW., Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov) or faxed to (202) 395-6974. **SUPPLEMENTARY INFORMATION:** The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

The Combined Federal Campaign (CFC) is the world's largest and most successful annual workplace philanthropic giving campaign, with 36 CFC Zones throughout the country and overseas raising millions of dollars each year. The mission of the CFC is to promote and support philanthropy through a program that is employee focused, cost-efficient, and effective in providing all federal employees and retirees the opportunity to improve the quality of life for others.

OPM Form 1654-B is a new information collection that collects CFC pledge information from federal annuitants and military retirees pursuant to Executive Order 13743 signed October 13, 2016. It will be available in both paper format and as an electronic form administered by the CFC's Central Campaign Administrator pursuant to 5 CFR 950.106(a).

#### Analysis

*Agency:* Combined Federal Campaign, Office of Personnel Management.

*Title:* OPM Form 1654-B, Combined Federal Campaign Federal Retiree Pledge Form.

*OMB Number:* 3206-NEW.

*Frequency:* Annually.

*Affected Public:* Individuals or Households.

*Number of Respondents:* 250,000.

*Estimated Time per Respondent:* 30 minutes.

*Total Burden Hours:* 125,000 hours.

U.S. Office of Personnel Management.

**Kathleen M. McGettigan,**

*Acting Director.*

[FR Doc. 2017-23534 Filed 10-27-17; 8:45 am]

**BILLING CODE 6325-46-P**

## POSTAL REGULATORY COMMISSION

[Docket No. CP2018-28]

### New Postal Products

**AGENCY:** Postal Regulatory Commission.

**ACTION:** Notice.

**SUMMARY:** The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

**DATES:** *Comments are due:* October 30, 2017.

**ADDRESSES:** Submit comments electronically via the Commission's Filing Online system at <http://www.prc.gov>. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER**

**INFORMATION CONTACT** section by telephone for advice on filing alternatives.

**FOR FURTHER INFORMATION CONTACT:** David A. Trissell, General Counsel, at 202-789-6820.

#### SUPPLEMENTARY INFORMATION:

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- I. Introduction
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#### 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 3010, and 39 CFR 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 3015, and 39 CFR 3020, subpart B. Comment deadline(s) for each request appear in section II.

#### II. Docketed Proceeding(s)

1. *Docket No(s):* CP2018-28; *Filing Title:* Notice of United States Postal

Service of Filing a Functionally Equivalent Global Expedited Package Services 7 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal; *Filing Acceptance Date:* October 19, 2017; *Filing Authority:* 39 CFR 3015.5; *Public Representative:* Christopher C. Mohr; *Comments Due:* October 30, 2017.

This notice will be published in the **Federal Register**.

**Stacy L. Ruble,**

*Secretary.*

[FR Doc. 2017-23473 Filed 10-27-17; 8:45 am]

**BILLING CODE 7710-FW-P**

## SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270-399, OMB Control No. 3235-0456]

### Submission for OMB Review; Comment Request

*Upon Written Request, Copies Available*

*From:* Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549-2736

*Extension:*

Form 24F-2.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), the Securities and Exchange Commission (the "Commission") has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Rule 24f-2 (17 CFR 270.24f-2) under the Investment Company Act of 1940 (15 U.S.C. 80a) requires any open-end management companies ("mutual funds"), unit investment trusts ("UITs") or face-amount certificate companies (collectively, "funds") deemed to have registered an indefinite amount of securities to file, not later than 90 days after the end of any fiscal year in which it has publicly offered such securities, Form 24F-2 (17 CFR 274.24) with the Commission. Form 24F-2 is the annual notice of securities sold by funds that accompanies the payment of registration fees with respect to the securities sold during the fiscal year.

The Commission estimates that 7,284 funds file Form 24F-2 on the required annual basis. The average annual burden per respondent for Form 24F-2 is estimated to be two hours. The total annual burden for all respondents to Form 24F-2 is estimated to be 14,568 hours. The estimate of average burden

hours is made solely for the purposes of the Paperwork Reduction Act, and is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules.

Compliance with the collection of information required by Form 24F-2 is mandatory. The Form 24F-2 filing that must be made to the Commission is available to the public. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view the background documentation for this information collection at the following Web site, [www.reginfo.gov](http://www.reginfo.gov). Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: [Shagufta\\_Ahmed@omb.eop.gov](mailto:Shagufta_Ahmed@omb.eop.gov); and (ii) Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549 or send an email to: [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov). Comments must be submitted to OMB within 30 days of this notice.

October 24, 2017.

**Eduardo A. Aleman,**  
Assistant Secretary.

[FR Doc. 2017-23471 Filed 10-27-17; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81933; File No. SR-MIAX-2017-42]

### Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

October 24, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 11, 2017, Miami International Securities Exchange LLC ("MIAX Options" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit

comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX Options Fee Schedule (the "Fee Schedule") to adopt a fee for the sale of certain historical market data.

The text of the proposed rule change is available on the Exchange's Web site at <http://www.miaxoptions.com/rule-filings>, at MIAX's principal office, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to amend its Fee Schedule to adopt a fee for the sale of certain historical market data.

The historical market data that the Exchange proposes to sell provides information about the past activity of all option products traded on the Exchange for each trading session conducted during a particular calendar month. The data is intended to enhance the user's ability to analyze option trade and volume data, evaluate historical trends in the trading activity of a particular option product, and enable the testing of trading models and analytical strategies. Specifically, the historical market data that the Exchange proposes to sell includes all data that is captured and disseminated on the following proprietary MIAX Options data feeds, on a T+1 basis: MIAX Top of Market data feed ("ToM"); MIAX Order Feed ("MOR"); MIAX Administrative Information Subscriber Feed ("AIS"); and MIAX Complex Top of Market data feed ("cToM") ("Historical Market Data"). All such proprietary MIAX Options data feeds that, on a T+1 basis, comprise the Historical Market Data are

described on the Exchange's Fee Schedule.<sup>3</sup>

ToM provides real-time updates of the MIAX Best Bid or Offer, or MBBO,<sup>4</sup> price with aggregate orders and quote size of contracts that can be displayed, display of Public Customer<sup>5</sup> interest at the MBBO, display of Priority Customer<sup>6</sup> interest at the MBBO, and MIAX Options last sale.<sup>7</sup> MOR provides real-time updates of options orders, products traded on MIAX Options, MIAX Options System<sup>8</sup> status, and MIAX Options underlying trading status.<sup>9</sup> AIS provides real-time updates of products traded on MIAX Options, trading status for MIAX Options and products traded on MIAX Options, and liquidity seeking event notifications.<sup>10</sup> cToM provides real-time updates of MIAX Options strategy best bid or offer, or cMBBO,<sup>11</sup> price with aggregated complex order sizes of a strategy that can be displayed at that price, and MIAX Options strategy last sale.<sup>12</sup>

MIAX Options will only assess the fee for Historical Market Data on a user (whether Member or Non-Member) that specifically requests such Historical Market Data. Historical Market Data will be uploaded onto an Exchange-provided device. The amount of the fee is \$500, and it will be assessed on a per device basis. Each device shall have a maximum storage capacity of 8 Terabytes and will be configured to include data for both MIAX Options and MIAX PEARL. Users may request up to six months of Historical Market Data per device, subject to the device's storage capacity. Historical Market Data is available from August 1, 2017 to the present (always on a T+1 basis),

<sup>3</sup> See MIAX Fee Schedule, Section 6.

<sup>4</sup> The term "MBBO" means the best bid or offer on the Exchange. See Exchange Rule 100. See also Exchange Rule 506(c)(2).

<sup>5</sup> The term "Public Customer" means a person that is not a broker or dealer in securities. See Exchange Rule 100.

<sup>6</sup> The term "Priority Customer" means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). See Exchange Rule 100.

<sup>7</sup> See Securities Exchange Act Release No. 69007 (February 28, 2013), 78 FR 14617 (March 6, 2013) (SR-MIAX-2013-05).

<sup>8</sup> The term "System" means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

<sup>9</sup> See Securities Exchange Act Release No. 74759 (April 17, 2015), 80 FR 22749 (April 23, 2015) (SR-MIAX-2015-28).

<sup>10</sup> See Securities Exchange Act Release No. 73326 (October 9, 2014), 79 FR 62233 (October 16, 2014) (SR-MIAX-2014-51).

<sup>11</sup> See Exchange Rule 506(c)(2).

<sup>12</sup> See Securities Exchange Act Release No. 79146 (October 24, 2016), 81 FR 75171 (October 28, 2016) (SR-MIAX-2016-36).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.



however only the most recent six months of Historical Market Data shall be available for purchase from the request date. Historical Market Data usage is restricted to internal use only, and thus may not be distributed to any third-party.

The Exchange notes that this filing is substantially similar to a companion MIAx PEARL filing establishing a fee for historical market data on its exchange.<sup>13</sup>

## 2. Statutory Basis

The Exchange believes that its proposal to amend its fee schedule is consistent with Section 6(b) of the Act<sup>14</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>15</sup> in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and issuers and other persons using its facilities. The proposal provides for the equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities because all persons and entities will have equal access to Historical Market Data.

The Exchange believes the proposed fees are a reasonable allocation of its costs and expenses among its Members and other persons using its facilities since it is recovering the costs associated with distributing such data. Access to the Exchange is provided on fair and non-discriminatory terms. The Exchange believes the proposed fees are equitable and not unfairly discriminatory because the fee level results in a reasonable and equitable allocation of fees amongst users for similar services. Moreover, the decision as to whether or not to purchase Historical Market Data is entirely optional to all users. Potential purchasers are not required to purchase the Historical Market Data, and the Exchange is not required to make the Historical Market Data available. Purchasers may request the data at any time or may decline to purchase such data. The allocation of fees among users is fair and reasonable because, if the market deems the proposed fees to be unfair or inequitable, firms can diminish or discontinue their use of this data.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the

public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data:

“[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.”<sup>16</sup>

By removing “unnecessary regulatory restrictions” on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

In July, 2010, Congress adopted H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), which amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase “on any person, whether or not the person is a member of the self-regulatory organization” after “due, fee or other charge imposed by the self-regulatory organization.” As a result, all SRO rule proposals establishing or changing dues, fees or other charges are immediately effective upon filing regardless of whether such dues, fees or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Act to read, in pertinent part, “At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved.”

The Exchange believes that these amendments to Section 19 of the Act

reflect Congress’s intent to allow the Commission to rely upon the forces of competition to ensure that fees for market data are reasonable and equitably allocated. Although Section 19(b) had formerly authorized immediate effectiveness for a “due, fee or other charge imposed by the self-regulatory organization,” the Commission adopted a policy and subsequently a rule stating that fees for data and other products available to persons that are not members of the self-regulatory organization must be approved by the Commission after first being published for comment. At the time, the Commission supported the adoption of the policy and the rule by pointing out that unlike members, whose representation in self-regulatory organization governance was mandated by the Act, non-members should be given the opportunity to comment on fees before being required to pay them, and that the Commission should specifically approve all such fees. The Exchange believes that the amendment to Section 19 reflects Congress’s conclusion that the evolution of self-regulatory organization governance and competitive market structure have rendered the Commission’s prior policy on non-member fees obsolete. Specifically, many exchanges have evolved from member-owned, not-for-profit corporations into for-profit, investor-owned corporations (or subsidiaries of investor-owned corporations). Accordingly, exchanges no longer have narrow incentives to manage their affairs for the exclusive benefit of their members, but rather have incentives to maximize the appeal of their products to all customers, whether members or non-members, so as to broaden distribution and grow revenues. Moreover, the Exchange believes that the change also reflects an endorsement of the Commission’s determinations that reliance on competitive markets is an appropriate means to ensure equitable and reasonable prices. Simply put, the change reflects a presumption that all fee changes should be permitted to take effect immediately, since the level of all fees are constrained by competitive forces.

Selling proprietary market data, such as Historical Market Data, is a means by which exchanges compete to attract business. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they provide. The need to compete for business places substantial pressure

<sup>13</sup> See SR-PEARL-2017-35 (filed on October 11, 2017).

<sup>14</sup> 15 U.S.C. 78f(b).

<sup>15</sup> 15 U.S.C. 78f(b)(4).

<sup>16</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

upon exchanges to keep their fees for both executions and data reasonable.<sup>17</sup> The Exchange therefore believes that the fees for Historical Market Data are properly assessed on Members and Non-Member users.

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*, No. 09–1042 (D.C. Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data:

"In fact, the legislative history indicates that the Congress intended that the market system 'evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed' and that the SEC wield its regulatory power 'in those situations where competition may not be sufficient,' such as in the creation of a 'consolidated transactional reporting system.'" <sup>18</sup>

The court's conclusions about Congressional intent are therefore reinforced by the Dodd-Frank Act amendments, which create a presumption that exchange fees, including market data fees, may take effect immediately, without prior Commission approval, and that the Commission should take action to suspend a fee change and institute a proceeding to determine whether the fee change should be approved or disapproved only where the Commission has concerns that the change may not be consistent with the Act.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Indeed, the Exchange believes that offering certain Historical Market Data will enhance competition by encouraging sales, which will make analytical data more readily available to investors. Notwithstanding its determination that the Commission may rely upon competition to establish fair and equitably allocated fees for market data, the *NetCoalition* Court found that the

Commission had not, in that case, compiled a record that adequately supported its conclusion that the market for the data at issue in the case was competitive. The Exchange believes that a record may readily be established to demonstrate the competitive nature of the market in question.

The market for data products is extremely competitive and users may freely choose alternative venues and data vendors based on the aggregate fees assessed, the data offered, and the value provided. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price, and distribution of its data products. Without trade executions, exchange data products cannot exist. Moreover, data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, the operation of the Exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (e.g., if the software can be downloaded over the internet after being purchased).<sup>19</sup> In the case of any

exchange, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and are each subject to significant scale economies.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products. The level of competition and contestability in the market is evidence in the numerous alternative venues that compete for order flow, including SRO markets, as well as internalizing BDs and various forms of alternative trading systems ("ATs"), including dark pools and electronic communication networks ("ECNs"). Each SRO market competes to produce transaction reports via trade executions. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, BDs, and ATs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including the Nasdaq exchanges, NYSE exchanges, and CBOE/Bats exchanges.

In this competitive environment, an "excessive" price for one product will have to be reflected in lower prices for other products sold by the Exchange, or otherwise the Exchange may experience a loss in sales that may adversely affect its profitability. In this case, the proposed rule change enhances competition by providing Historical Market Data at a fixed price. As such, the Exchange believes that the proposed changes will enhance, not impair, competition in the financial markets.

The market for market data products is competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the

<sup>17</sup> See Sec. Indus. Fin. Mkts. Ass'n (SIFMA), Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 (ALJ June 1, 2016) (finding the existence of vigorous competition with respect to non-core market data).

<sup>18</sup> *NetCoalition*, at 15 (quoting H.R. Rep. No. 94–229, at 92 (1975), as reprinted in 1975 U.S.C.A.N. 321, 323).

<sup>19</sup> See William J. Baumol and Daniel G. Swanson, "The New Economy and Ubiquitous Competitive

Price Discrimination: Identifying Defensible Criteria of Market Power," *Antitrust Law Journal*, Vol. 70, No. 3 (2003).

proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Broker-dealers currently have numerous alternative venues for their order flow, including fifteen existing options markets. Each SRO market competes to produce transaction reports via trade executions. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO is currently permitted to produce proprietary data products, and many in addition to MIAx Options currently do, including NASDAQ, CBOE, Nasdaq ISE, NYSE American, and NYSE Arca. Additionally, order routers and market data vendors can facilitate single or multiple broker-dealers' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end subscribers. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Thomson Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end subscribers will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract "eyeballs" that contribute to their advertising revenue. Retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. The Exchange and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully.

In addition to the competition and price discipline described above, the

market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, BATS Trading and Direct Edge. Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While broker-dealers have previously published their proprietary data individually, Regulation NMS encourages market data vendors and broker-dealers to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg, and Thomson Reuters.

The Court in *NetCoalition* concluded that the Commission had failed to demonstrate that the market for market data was competitive based on the reasoning of the Commission's *NetCoalition* order because, in the Court's view, the Commission had not adequately demonstrated that the proprietary data at issue in the case is used to attract order flow. The Exchange believes, however, that evidence not then before the court clearly demonstrates that availability of data attracts order flow. Due to competition among platforms, the Exchange intends to improve its platform data offerings on a continuing basis, and to respond promptly to customers' data needs.

The intensity of competition for proprietary information is significant and the Exchange believes that this proposal itself clearly evidences such competition. The Exchange is offering Historical Market Data in order to keep pace with changes in the industry and evolving customer needs. It is entirely optional and is geared towards attracting new order flow. MIAx Options competitors continue to create new market data products and innovative pricing in this space. In all cases, the Exchange expects firms and other parties to make decisions on how much and what types of data to consume on the basis of the total cost of interacting with MIAx Options or other exchanges. Of course, the explicit data fees are only one factor in a total platform analysis. Some competitors have lower transactions fees and higher data fees, and others are vice versa. The market for this proprietary information is highly competitive and continually evolves as products develop and change.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change is effective pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>20</sup> and subparagraph (f)(2) of Rule 19b-4<sup>21</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>22</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MIAx-2017-42 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-MIAx-2017-42. 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

<sup>20</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>21</sup> 17 CFR 240.19b-4(f)(2).

<sup>22</sup> 15 U.S.C. 78s(b)(2)(B).

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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MIAX-2017-42 and should be submitted on or before November 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Robert W. Errett,**  
Deputy Secretary.

[FR Doc. 2017-23482 Filed 10-27-17; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81936; File No. SR-BatsEDGA-2017-27]

### Self-Regulatory Organizations; Bats EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Make Technical Corrections to Its Second Amended and Restated Certificate of Incorporation

October 24, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 13, 2017, Bats EDGA Exchange, Inc. (the "Exchange" or "EDGA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The 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 seeks to amend its Second Amended and Restated Certificate of Incorporation. The text of the proposed rule change is provided below.

(additions are *italicized*; deletions are [bracketed])

\* \* \* \* \*

Second Amended and Restated Certificate of Incorporation of Bats EDGA Exchange, Inc.

The name of the corporation is Bats EDGA Exchange, Inc. The corporation filed its original Certificate of Incorporation with the Secretary of State of the State of Delaware on March 9, 2009 under the name *EDGA Exchange, Inc.* This Second Amended and Restated Certificate of Incorporation of the corporation, which restates and integrates and also further amends the provisions of the corporation's *Restated Certificate of Incorporation*, was duly adopted in accordance with the provisions of Sections 242 and 245 of the General Corporation Law of the State of Delaware and by the written consent of its sole stockholder in accordance with Section 228 of the General Corporation Law of the State of Delaware. The [Second Amended and] Restated Certificate of Incorporation of the corporation is hereby amended, integrated and restated to read in its entirety as follows:

\* \* \* \* \*

The text of the proposed rule change is available at the Exchange's Web site at [www.bats.com](http://www.bats.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

EDGA recently amended its Restated Certificate of Incorporation in connection with a corporate transaction (the "Transaction") involving, among other things, the recent acquisition of EDGA, along with Bats BYX Exchange, Inc. ("Bats BYX"), Bats BZX Exchange, Inc. ("Bats BZX"), and Bats EDGX Exchange, Inc. ("Bats EDGX" and, together with Bats EDGA, Bats BYX, and Bats BZX, the "Bats Exchanges") by CBOE Holdings, Inc. ("CBOE Holdings"). CBOE Holdings is also the parent of Chicago Board Options Exchange, Incorporated ("CBOE") and C2 Options Exchange, Incorporated ("C2"). Particularly, the filing proposed, among other things, to amend and restate the certificate of incorporation of the Exchange based on certificates of incorporation of CBOE and C2.<sup>3</sup> The Exchange notes that in conforming the Exchange's Certificate to the certificates of CBOE and C2, it inadvertently (1) did not comply with a provision of Delaware law and (ii) referred to an inaccurate version of the Certificate in the introductory paragraph. The Exchange seeks to correct those errors.

Particularly, Section 245(c) of the Delaware General Corporation Law (DGCL) requires that a restated certificate of incorporation "shall state, either in its heading or in an introductory paragraph, the corporation's present name, and, if it has been changed, the name under which it was originally incorporated, and the date of filing of its original certificate of incorporation with the secretary of state." The Exchange notes that the conformed Certificate did not reference the name under which the corporation was originally incorporated (*i.e.*, "EDGA Exchange, Inc."). In order to comply with Section 245(c) of the DGCL, the Exchange proposes to amend its Certificate to add a reference to its original name.

The Exchange also notes that it inadvertently did not reference the correct version of the Certificate in two places in the introductory paragraph. Particularly, the Exchange notes that the third sentence of the introductory paragraph provides that the Second Amended and Restated Certificate of Incorporation of the corporation restated and integrated and also further amended

<sup>3</sup> See Securities Exchange Act Release No. 81496 (August 30, 2017), 82 FR 42206 (September 6, 2017) (SR-BatsEDGA-2017-22).

<sup>23</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

the provisions of the corporation's "Certificate of Incorporation" instead of the then current (and now previous) version titled, "Restated Certificate of Incorporation". Additionally, the last sentence of the introductory paragraph which provides that the current certificate is "amended, integrated and restated to read in its entirety as follows:" mistakenly references the new title of the amended Certificate (*i.e.*, "Second Amended and Restated Certificate of Incorporation") instead of the title of the then current (and now previous) Certificate ("Restated Certificate of Incorporation"). As such, the Exchange proposes to add "Restated" to the third sentence and eliminate the new title reference "Second Amended and" from the last sentence to accurately reflect the correct version of the Certificate that was amended and restated.

The Exchange notes that the proposed changes are concerned solely with the administration of the Exchange and do not affect the meaning, administration, or enforcement of any rules of the Exchange or the rights, obligations, or privileges of Exchange members or their associated persons is [sic] any way.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>4</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>5</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>6</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes correcting inadvertent non-substantive, technical errors in its Certificate in

order to comply with Delaware law and reflect the correct and accurate version of the Certificate that was amended will avoid potential confusion, thereby removing impediments to, and perfecting the mechanism for a free and open market and a national market system, and, in general, protecting investors and the public interest of market participants. As noted above, the proposed changes do not affect the meaning, administration, or enforcement of any rules of the Exchange or the rights, obligations, or privileges of Exchange members or their associated persons in any way.

### (B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Rather, the proposed rule change is merely attempting to correct inadvertent technical errors in the Exchange's introductory paragraph of its Certificate. The proposed rule change has no impact on competition.

### (C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>7</sup> and paragraph (f) of Rule 19b-4<sup>8</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act.

Comments may be submitted by any of the following methods:

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BatsEDGA-2017-27 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-BatsEDGA-2017-27. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BatsEDGA-2017-27 and should be submitted on or before November 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Robert W. Errett,**  
Deputy Secretary.

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<sup>4</sup> 15 U.S.C. 78f(b).

<sup>5</sup> 15 U.S.C. 78f(b)(5).

<sup>6</sup> *Id.*

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f).

<sup>9</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–81929; File No. SR–NYSEARCA–2017–122]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Provide Users With Access to Five Additional Third Party Systems and Connectivity to Two Additional Third Party Data Feeds

October 24, 2017.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b–4 thereunder,<sup>3</sup> notice is hereby given that, on October 11, 2017, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to provide Users with access to five additional third party systems and connectivity to two additional third party data feeds. In addition, the Exchange proposes to change its NYSE Arca Options Fees and Charges (the “Options Fee Schedule”) and the NYSE Arca Equities Fees and Charges (the “Equities Fee Schedule”) and, together with the Options Fee Schedule, the “Fee Schedules”) related to these co-location services. The proposed rule change is available on the Exchange’s Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below,

of the most significant parts of such statements.

#### A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The Exchange proposes to amend the co-location<sup>4</sup> services offered by the Exchange to provide Users<sup>5</sup> with access to five additional third party systems and connectivity to two additional third party data feeds. In addition the Exchange proposes to make the corresponding changes to the Exchange’s Fee Schedules related to these co-location services.

As set forth in the Fee Schedules, the Exchange charges fees for connectivity to the execution systems of third party markets and other content service providers (“Third Party Systems”), and data feeds from third party markets and other content service providers (“Third Party Data Feeds”).<sup>6</sup> The lists of Third Party Systems and Third Party Data Feeds are set forth in the Fee Schedules.

The Exchange now proposes to make the following changes:

- Add five content service providers to the list of Third Party Systems: Chicago Mercantile Exchange (CME Group), Chicago Stock Exchange (CHX), Investors Exchange (IEX), OneChicago and TMX Group (together, the “Additional Third Party Systems” or “ATPS”); and
- add two feeds to the list of Third Party Data Feeds: Investors Exchange and OneChicago (together the “Additional Third Part Data Feeds” or “ATPD”).

The Exchange would provide access to the Additional Third Party Systems

<sup>4</sup> The Exchange initially filed rule changes relating to its co-location services with the Commission in 2010. See Securities Exchange Act Release No. 63275 (November 8, 2010), 75 FR 70048 (November 16, 2010) (SR–NYSEArca–2010–100) (the “Original Co-location Filing”). The Exchange operates a data center in Mahwah, New Jersey (the “data center”) from which it provides co-location services to Users.

<sup>5</sup> For purposes of the Exchange’s co-location services, a “User” means any market participant that requests to receive co-location services directly from the Exchange. See Securities Exchange Act Release No. 76010 (September 29, 2015), 80 FR 60197 (October 5, 2015) (SR–NYSEArca–2015–82). As specified in the Fee Schedules, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange’s affiliates New York Stock Exchange LLC (“NYSE LLC”) and NYSE MKT LLC (“NYSE MKT and, together with NYSE LLC, the “Affiliate SROs”). See Securities Exchange Act Release No. 70173 (August 13, 2013), 78 FR 50459 (August 19, 2013) (SR–NYSEArca–2013–80).

<sup>6</sup> See Securities Exchange Act Release No. 80310 (March 24, 2017), 82 FR 15763 (March 30, 2017) (SR–NYSEArca–2016–89).

(“Access”) and connectivity to the Additional Third Party Data Feeds (“Connectivity”) as conveniences to Users. Use of Access or Connectivity would be completely voluntary. The Exchange is not aware of any impediment to third parties offering Access or Connectivity.

The Exchange does not have visibility into whether third parties currently offer, or intend to offer, Users access to the Additional Third Party Systems and connectivity to the Additional Third Party Data Feeds, as such third parties are not required to make that information public. However, if one or more third parties presently offer, or in the future opt to offer, such Access and Connectivity to Users, a User may utilize the Secure Financial Transaction Infrastructure (“SFTI”) network, a third party telecommunication network, third party wireless network, a cross connect, or a combination thereof to access such services and products through a connection to an access center outside the data center (which could be a SFTI access center, a third-party access center, or both), another User, or a third party vendor.

The Exchange will announce the dates that each Product is available through customer notices disseminated to all Users simultaneously.

#### Connectivity to Additional Third Party Systems

The Exchange proposes to revise the Fee Schedules to provide that Users may obtain connectivity to the five Additional Third Party Systems for a fee. As with the current Third Party Systems, Users would connect to the Additional Third Party Systems over the internet protocol (“IP”) network, a local area network available in the data center.<sup>7</sup>

As with the current Third Party Systems, in order to obtain access to an Additional Third Party System, the User would enter into an agreement with the relevant third party content service provider, pursuant to which the third party content service provider would charge the User for access to the Additional Third Party System. The Exchange would then establish a unicast connection between the User and the relevant third party content service provider over the IP network.<sup>8</sup> The

<sup>7</sup> See Securities Exchange Act Release No. 74219 (February 6, 2015), 80 FR 7899 (February 12, 2015) (SR–NYSEArca–2015–03) (notice of filing and immediate effectiveness of proposed rule change to include IP network connections).

<sup>8</sup> Information flows over existing network connections in two formats: “unicast” format, which is a format that allows one-to-one

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b–4.

Exchange would charge the User for the connectivity to the Additional Third Party System. A User would only receive, and only be charged for, access to Additional Third Party Systems for which it enters into agreements with the third party content service provider.

The Exchange has no ownership interest in the Additional Third Party Systems. Establishing a User's access to an Additional Third Party System would not give the Exchange any right to use the Additional Third Party Systems. Connectivity to an Additional Third Party System would not provide access or order entry to the Exchange's execution system, and a User's connection to an Additional Third Party System would not be through the Exchange's execution system.

As with the existing connections to Third Party Systems, the Exchange proposes to charge a monthly recurring fee for connectivity to an Additional Third Party System. Specifically, when a User requests access to an Additional Third Party System, it would identify the applicable content service provider and what bandwidth connection it required.

The Exchange proposes to modify its Fee Schedules to add the Additional Third Party Systems to its existing list of Third Party Systems. The additional items would be as follows:

**Third Party Systems**

Chicago Mercantile Exchange (CME Group)

Chicago Stock Exchange (CHX)

Investors Exchange (IEX)

OneChicago

TMX Group

The Exchange does not propose to change the monthly recurring fee the Exchange charges Users for unicast connectivity to each Third Party System, including the Additional Third Party Systems.

**Connectivity to Additional Third Party Data Feeds**

The Exchange proposes to revise the Fee Schedules to provide that Users may obtain connectivity to each of the two Additional Third Party Data Feeds for a fee. The Exchange would receive the Additional Third Party Data Feeds from the content service provider, at its data center. It would then provide connectivity to that data to Users for a fee. Users would connect to the

communication, similar to a phone line, in which information is sent to and from the Exchange; and "multicast" format, which is a format in which information is sent one-way from the Exchange to multiple recipients at once, like a radio broadcast.

**Additional Third Party Data Feeds over the IP network.<sup>9</sup>**

In order to connect to an Additional Third Party Data Feed, a User would enter into a contract with the content service provider, pursuant to which the content service provider would charge the User for the Third Party Data Feed. The Exchange would receive the Third Party Data Feed over its fiber optic network and, after the content service provider and User entered into the contract and the Exchange received authorization from the content service provider, the Exchange would re-transmit the data to the User over the User's port. The Exchange would charge the User for the connectivity to the Additional Third Party Data Feed. A User would only receive, and would only be charged for, connectivity to the Additional Third Party Data Feeds for which it entered into contracts.

The Exchange has no affiliation with the sellers of the Additional Third Party Data Feeds. It would have no right to use the Additional Third Party Data Feeds other than as a redistributor of the data. The Additional Third Party Data Feeds would not provide access or order entry to the Exchange's execution system. The Additional Third Party Data Feeds would not provide access or order entry to the execution systems of the third parties generating the feed. The Exchange would receive the Additional Third Party Data Feeds via arms-length agreements and it would have no inherent advantage over any other distributor of such data.

As it does with the existing Third Party Data Feeds, the Exchange proposes to charge a monthly recurring fee for connectivity to each Additional Third Party Data Feed. The monthly recurring fee would be per Additional Third Party Data Feed. Depending on its needs and bandwidth, a User may opt to receive all or some of the feeds or services included in an Additional Third Party Data Feed.

The Exchange proposes to add the connectivity fees for the Additional Third Party Data to its existing list in the Fee Schedules. The additional items would be as follows:

Third party data feed	Monthly recurring connectivity fee per third party data feed
Investors Exchange (IEX) .....	\$1,000
OneChicago .....	1,000

<sup>9</sup> See *supra* note 7, at 7899 ("The IP network also provides Users with access to away market data products").

**General**

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (e.g., a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;<sup>10</sup> and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both the Affiliate SROs.<sup>11</sup>

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

**2. Statutory Basis**

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>12</sup> in general, and furthers the objectives of Sections 6(b)(5) of the Act,<sup>13</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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 and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

<sup>10</sup> As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

<sup>11</sup> See SR-NYSEArca-2013-80, *supra* note 5 at 50459. The Affiliate SROs have also submitted substantially the same proposed rule change to propose the changes described herein. See SR-NYSE-2017-52 and SR-NYSEAMER-2017-24.

<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

The Exchange believes that the proposed changes would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because, by offering additional services, the Exchange would give each User additional options for addressing its access and connectivity needs, responding to User demand for access and connectivity options. Providing additional services would help each User tailor its data center operations to the requirements of its business operations by allowing it to select the form and latency of access and connectivity that best suits its needs.

The Exchange would provide Access and Connectivity as conveniences to Users. Use of Access or Connectivity would be completely voluntary. The Exchange is not aware of any impediment to third parties offering Access or Connectivity. The Exchange does not have visibility into whether third parties currently offer, or intend to offer, Users access to the Additional Third Party Systems and connectivity to the Additional Third Party Data Feeds. However, if one or more third parties presently offer, or in the future opt to offer, such Access and Connectivity to Users, a User may utilize the SFTI network, a third party telecommunication network, third party wireless network, a cross connect, or a combination thereof to access such services and products through a connection to an access center outside the data center (which could be a SFTI access center, a third-party access center, or both), another User, or a third party vendor.

The Exchange believes that the proposed changes would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because, by offering access to the Additional Third Party Systems and connectivity to the Additional Third Party Data Feeds to Users upon the effective date of this filing, the Exchange would give Users additional options for connectivity and access to new services as soon as they are available, responding to User demand for access and connectivity options.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>14</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons

using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed fee changes are consistent with Section 6(b)(4) of the Act for multiple reasons. The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange.

The Exchange believes that the additional services and fees proposed herein would be equitably allocated and not unfairly discriminatory because, in addition to the services being completely voluntary, they would be available to all Users on an equal basis (*i.e.*, the same products and services would be available to all Users). All Users that voluntarily selected to receive Access or Connectivity would be charged the same amount for the same services. Users that opted to use Access or Connectivity would not receive access or connectivity that is not available to all Users, as all market participants that contracted with the relevant market or content provider would receive access or connectivity.

The Exchange believes that the proposed charges would be reasonable, equitably allocated and not unfairly discriminatory because the Exchange would offer the Access and Connectivity as conveniences to Users, but in order to do so must provide, maintain and operate the data center facility hardware and technology infrastructure. The Exchange must handle the installation, administration, monitoring, support and maintenance of such services, including

by responding to any production issues. Since the inception of co-location, the Exchange has made numerous improvements to the network hardware and technology infrastructure and has established additional administrative controls. The Exchange has expanded the network infrastructure to keep pace with the increased number of services available to Users, including resilient and redundant feeds. In addition, in order to provide Access and Connectivity, the Exchange would maintain multiple connections to each ATPD and ATPS, allowing the Exchange to provide resilient and redundant connections; adapt to any changes made by the relevant third party; and cover any applicable fees charged by the relevant third party, such as port fees. In addition, Users would not be required to use any of their bandwidth for Access and Connectivity unless they wish to do so.

The Exchange believes the proposed fees for Access and Connectivity would be reasonable because they would allow the Exchange to defray or cover the costs associated with offering Users access to Additional Third Party Systems and connectivity to Additional Third Party Data Feeds while providing Users the convenience of receiving such Access and Connectivity within co-location, helping them tailor their data center operations to the requirements of their business operations.

For the reasons above, the proposed changes would not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act,<sup>15</sup> the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because all of the proposed services are completely voluntary.

The Exchange believes that providing Users with additional options for connectivity and access to new services would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because such proposed Access and Connectivity

<sup>14</sup> 15 U.S.C. 78f(b)(4).

<sup>15</sup> 15 U.S.C. 78f(b)(8).



would satisfy User demand for access and connectivity options. The Exchange would provide Access and Connectivity as conveniences equally to all Users. The Exchange does not have visibility into whether third parties currently offer, or intend to offer, Users access to the Additional Third Party Systems and connectivity to the Additional Third Party Data Feeds, as such third parties are not required to make that information public. However, if one or more third parties presently offer, or in the future opt to offer, such Access and Connectivity to Users, a User may utilize the SFTI network, a third party telecommunication network, third party wireless network, a cross connect, or a combination thereof to access such services and products through a connection to an access center outside the data center (which could be a SFTI access center, a third-party access center, or both), another User, or a third party vendor. Users that opt to use the proposed Access or Connectivity would not receive access or connectivity that is not available to all Users, as all market participants that contract with the content provider may receive access or connectivity. In this way, the proposed changes would enhance competition by helping Users tailor their Access and Connectivity to the needs of their business operations by allowing them to select the form and latency of access and connectivity that best suits their needs.

The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the

market share and revenue of the affected exchange. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>16</sup> and Rule 19b-4(f)(6) thereunder.<sup>17</sup> Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.<sup>18</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>19</sup> normally does not become operative for 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii)<sup>20</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange represents that the proposed rule changes present no new or novel issues. According to the Exchange, waiver of the operative delay would allow Users to access the Additional Third Party Systems and the Additional Third Party Data Feeds without delay, which would assist Users in tailoring their data center operations to the requirements of their business operations. The Exchange also

represents that the proposed changes to the Price List would provide Users with more complete information regarding their Access and Connectivity options. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission waives the 30-day operative delay and designates the proposed rule change operative upon filing.<sup>21</sup>

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>22</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEARCA-2017-122 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEARCA-2017-122. 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

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>17</sup> 17 CFR 240.19b-4(f)(6).

<sup>18</sup> 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.

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

<sup>20</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>21</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>22</sup> 15 U.S.C. 78s(b)(2)(B).

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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEARCA-2017-122 and should be submitted on or before November 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Eduardo A. Aleman,**  
Assistant Secretary.

[FR Doc. 2017-23476 Filed 10-27-17; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81932; File No. SR-PEARL-2017-35]

### Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX PEARL Fee Schedule

October 24, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 11, 2017, MIAX PEARL, LLC ("MIAX PEARL" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>23</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the MIAX PEARL Fee Schedule (the "Fee Schedule") to adopt a fee for the sale of certain historical market data.

The text of the proposed rule change is available on the Exchange's Web site at <http://www.miaxoptions.com/rule-filings/pearl> at MIAX PEARL's principal office, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

#### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The Exchange proposes to amend its Fee Schedule to adopt a fee for the sale of certain historical market data.

The historical market data that the Exchange proposes to sell provides information about the past activity of all option products traded on the Exchange for each trading session conducted during a particular calendar month. The data is intended to enhance the user's ability to analyze option trade and volume data, evaluate historical trends in the trading activity of a particular option product, and enable the testing of trading models and analytical strategies. Specifically, the historical market data that the Exchange proposes to sell includes all data that is captured and disseminated on the following proprietary MIAX PEARL data feeds, on a T+1 basis: MIAX PEARL Top of Market ("ToM"); and MIAX PEARL Liquidity Feed ("PLF") ("Historical Market Data"). All such proprietary MIAX PEARL data feeds that, on a T+1 basis, comprise the Historical Market Data are described on the Exchange's Fee Schedule.<sup>3</sup>

ToM provides real-time, ultra-low latency updates of the MIAX PEARL

<sup>3</sup> See MIAX PEARL Fee Schedule, Section 6.

Best Bid or Offer, or PBBO,<sup>4</sup> the last sale with trade price, size and condition, last sale cancellations, listed series updates, system state, and underlying trading state.<sup>5</sup> PLF provides real-time, ultra-low latency updates of new simple orders added to the MIAX PEARL order book, updates to simple orders resting on the MIAX PEARL order book, listed series updates, System<sup>6</sup> state, and underlying trading state.<sup>7</sup>

MIAX PEARL will only assess the fee for Historical Market Data on a user (whether Member or Non-Member) that specifically requests such Historical Market Data. Historical Market Data will be uploaded onto an Exchange-provided device. The amount of the fee is \$500, and it will be assessed on a per device basis. Each device shall have a maximum storage capacity of 8 Terabytes and will be configured to include data for both MIAX Options and MIAX PEARL. Users may request up to six months of Historical Market Data per device, subject to the device's storage capacity. Historical Market Data is available from August 1, 2017 to the present (always on a T+1 basis), however only the most recent six months of Historical Market Data shall be available for purchase from the request date. Historical Market Data usage is restricted to internal use only, and thus may not be distributed to any third-party.

The Exchange notes that this filing is substantially similar to a companion MIAX Options filing<sup>8</sup> establishing a fee for historical market data on its exchange.

##### 2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act<sup>9</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>10</sup> in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and issuers and other persons using its facilities. The proposal provides for the equitable allocation of reasonable fees and other charges among Exchange

<sup>4</sup> The term "PBBO" means the best bid or offer on the PEARL Exchange. See Exchange Rule 100. See also Exchange Rule 506(d).

<sup>5</sup> See Securities Exchange Act Release No. 79913 (February 1, 2017), 82 FR 9617 (February 7, 2017) (SR-PEARL-2017-01) (Establishing MIAX PEARL ToM and PLF Data Products).

<sup>6</sup> The term "System" means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

<sup>7</sup> See supra note 5.

<sup>8</sup> See SR-MAX-2017-42 (filed on October 11, 2017).

<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(4).

members and other persons using its facilities because all persons and entities will have equal access to Historical Market Data.

The Exchange believes the proposed fees are a reasonable allocation of its costs and expenses among its Members and other persons using its facilities since it is recovering the costs associated with distributing such data. Access to the Exchange is provided on fair and non-discriminatory terms. The Exchange believes the proposed fees are equitable and not unfairly discriminatory because the fee level results in a reasonable and equitable allocation of fees amongst users for similar services. Moreover, the decision as to whether or not to purchase Historical Market Data is entirely optional to all users. Potential purchasers are not required to purchase the Historical Market Data, and the Exchange is not required to make the Historical Market Data available. Purchasers may request the data at any time or may decline to purchase such data. The allocation of fees among users is fair and reasonable because, if the market deems the proposed fees to be unfair or inequitable, firms can diminish or discontinue their use of this data.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.<sup>11</sup>

By removing “unnecessary regulatory restrictions” on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

In July, 2010, Congress adopted H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), which

amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase “on any person, whether or not the person is a member of the self-regulatory organization” after “due, fee or other charge imposed by the self-regulatory organization.” As a result, all SRO rule proposals establishing or changing dues, fees or other charges are immediately effective upon filing regardless of whether such dues, fees or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Act to read, in pertinent part, “At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved.”

The Exchange believes that these amendments to Section 19 of the Act reflect Congress’s intent to allow the Commission to rely upon the forces of competition to ensure that fees for market data are reasonable and equitably allocated. Although Section 19(b) had formerly authorized immediate effectiveness for a “due, fee or other charge imposed by the self-regulatory organization,” the Commission adopted a policy and subsequently a rule stating that fees for data and other products available to persons that are not members of the self-regulatory organization must be approved by the Commission after first being published for comment. At the time, the Commission supported the adoption of the policy and the rule by pointing out that unlike members, whose representation in self-regulatory organization governance was mandated by the Act, non-members should be given the opportunity to comment on fees before being required to pay them, and that the Commission should specifically approve all such fees. The Exchange believes that the amendment to Section 19 reflects Congress’s conclusion that the evolution of self-regulatory organization governance and

competitive market structure have rendered the Commission’s prior policy on non-member fees obsolete. Specifically, many exchanges have evolved from member-owned, not-for-profit corporations into for-profit, investor-owned corporations (or subsidiaries of investor-owned corporations). Accordingly, exchanges no longer have narrow incentives to manage their affairs for the exclusive benefit of their members, but rather have incentives to maximize the appeal of their products to all customers, whether members or non-members, so as to broaden distribution and grow revenues. Moreover, the Exchange believes that the change also reflects an endorsement of the Commission’s determinations that reliance on competitive markets is an appropriate means to ensure equitable and reasonable prices. Simply put, the change reflects a presumption that all fee changes should be permitted to take effect immediately, since the level of all fees are constrained by competitive forces.

Selling proprietary market data, such as Historical Market Data, is a means by which exchanges compete to attract business. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they provide. The need to compete for business places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.<sup>12</sup> The Exchange therefore believes that the fees for Historical Market Data are properly assessed on Members and Non-Member users.

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*, No. 09–1042 (D.C. Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission’s reliance upon competitive markets to set reasonable and equitably allocated fees for market data:

In fact, the legislative history indicates that the Congress intended that the market system ‘evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed’ and that the SEC wield its regulatory power ‘in those situations where competition may not be sufficient,’ such as

<sup>11</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

<sup>12</sup> See Sec. Indus. Fin. Mkts. Ass’n (SIFMA), Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 (ALJ June 1, 2016) (finding the existence of vigorous competition with respect to non-core market data).

in the creation of a 'consolidated transactional reporting system.'<sup>13</sup>

The court's conclusions about Congressional intent are therefore reinforced by the Dodd-Frank Act amendments, which create a presumption that exchange fees, including market data fees, may take effect immediately, without prior Commission approval, and that the Commission should take action to suspend a fee change and institute a proceeding to determine whether the fee change should be approved or disapproved only where the Commission has concerns that the change may not be consistent with the Act.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

MIAx PEARL does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Indeed, the Exchange believes that offering certain Historical Market Data will enhance competition by encouraging sales, which will make analytical data more readily available to investors. Notwithstanding its determination that the Commission may rely upon competition to establish fair and equitably allocated fees for market data, the *NetCoalition* Court found that the Commission had not, in that case, compiled a record that adequately supported its conclusion that the market for the data at issue in the case was competitive. The Exchange believes that a record may readily be established to demonstrate the competitive nature of the market in question.

The market for data products is extremely competitive and users may freely choose alternative venues and data vendors based on the aggregate fees assessed, the data offered, and the value provided. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted,

including the execution fees, data quality and price, and distribution of its data products. Without trade executions, exchange data products cannot exist. Moreover, data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, the operation of the Exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (e.g., if the software can be downloaded over the internet after being purchased).<sup>14</sup> In the case of any exchange, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and are each subject to significant scale economies.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products. The level of competition and contestability in the market is evidence in the numerous alternative venues that compete for order flow, including SRO markets, as well as internalizing BDs and various forms of alternative trading systems ("ATs"), including dark pools and electronic communication networks ("ECNs"). Each SRO market competes to produce transaction reports via trade executions. It is common for BDs to

further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, BDs, and ATs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATs, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including the Nasdaq exchanges, NYSE exchanges, and CBOE/Bats exchanges.

In this competitive environment, an "excessive" price for one product will have to be reflected in lower prices for other products sold by the Exchange, or otherwise the Exchange may experience a loss in sales that may adversely affect its profitability. In this case, the proposed rule change enhances competition by providing Historical Market Data at a fixed price. As such, the Exchange believes that the proposed changes will enhance, not impair, competition in the financial markets.

The market for market data products is competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Broker-dealers currently have numerous alternative venues for their order flow, including fifteen existing options markets. Each SRO market competes to produce transaction reports via trade executions. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO is currently permitted to produce proprietary data products, and many in addition to MIAx PEARL currently do, including NASDAQ, CBOE, Nasdaq ISE, NYSE American, and NYSE Arca. Additionally, order routers and market data vendors can

<sup>13</sup> *NetCoalition*, at 15 (quoting H.R. Rep. No. 94-229, at 92 (1975), as reprinted in 1975 U.S.C.A.N. 321, 323).

<sup>14</sup> See William J. Baumol and Daniel G. Swanson, "The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power," *Antitrust Law Journal*, Vol. 70, No. 3 (2003).

facilitate single or multiple broker-dealers' production of proprietary data products. The potential sources of proprietary products are virtually limitless.

Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end subscribers. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Thomson Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end subscribers will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract "eyeballs" that contribute to their advertising revenue. Retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: They can simply refuse to purchase any proprietary data product that fails to provide sufficient value. The Exchange and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully.

In addition to the competition and price discipline described above, the market for proprietary data products is also highly contestable because market entry is rapid, inexpensive, and profitable. The history of electronic trading is replete with examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, BATS Trading and Direct Edge. Regulation NMS, by deregulating the market for proprietary data, has increased the contestability of that market. While broker-dealers have previously published their proprietary data individually, Regulation NMS encourages market data vendors and broker-dealers to produce proprietary products cooperatively in a manner never before possible. Multiple market data vendors already have the capability to aggregate data and disseminate it on a profitable scale, including Bloomberg, and Thomson Reuters.

The Court in *NetCoalition* concluded that the Commission had failed to demonstrate that the market for market data was competitive based on the reasoning of the Commission's *NetCoalition* order because, in the Court's view, the Commission had not adequately demonstrated that the

proprietary data at issue in the case is used to attract order flow. The Exchange believes, however, that evidence not then before the court clearly demonstrates that availability of data attracts order flow. Due to competition among platforms, the Exchange intends to improve its platform data offerings on a continuing basis, and to respond promptly to customers' data needs.

The intensity of competition for proprietary information is significant and the Exchange believes that this proposal itself clearly evidences such competition. The Exchange is offering Historical Market Data in order to keep pace with changes in the industry and evolving customer needs. It is entirely optional and is geared towards attracting new order flow. MIAX PEARL competitors continue to create new market data products and innovative pricing in this space. In all cases, the Exchange expects firms and other parties to make decisions on how much and what types of data to consume on the basis of the total cost of interacting with MIAX PEARL or other exchanges. Of course, the explicit data fees are only one factor in a total platform analysis. Some competitors have lower transactions fees and higher data fees, and others are vice versa. The market for this proprietary information is highly competitive and continually evolves as products develop and change.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change is effective pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>15</sup> and subparagraph (f)(2) of Rule 19b-4<sup>16</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange. At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>17</sup> of the Act to determine

<sup>15</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>16</sup> 17 CFR 240.19b-4(f)(2).

<sup>17</sup> 15 U.S.C. 78s(b)(2)(B).

whether the proposed rule change should be approved or disapproved.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-PEARL-2017-35 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-PEARL-2017-35. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-PEARL-2017-35 and should be submitted on or before November 20, 2017.

<sup>18</sup> 17 CFR 200.30-3(a)(12).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

[FR Doc. 2017-23480 Filed 10-27-17; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81938; File No. SR-Phlx-2017-83]

### Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Exchange's Name Change

October 24, 2017.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 19, 2017, NASDAQ PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its rules as well as certain corporate documents of the Exchange to reflect legal name changes.

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.

#### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The purpose of this filing is to reflect in the Exchange's governing documents (and the governing documents of its parent company)<sup>3</sup> and the Exchange's Rulebook a non-substantive corporate branding change to the Exchange's name.<sup>4</sup> Specifically, current references will be changed as follows:

- References to "NASDAQ" will be changed to "Nasdaq"
  - References to "NASDAQ PHLX LLC" or "NASDAQ PHLX" will be changed to "Nasdaq PHLX LLC" or "Nasdaq PHLX"
  - References to "NASDAQ OMX PSX" or "NASDAQ PSX" will be changed to "Nasdaq PSX"
  - References to "The NASDAQ OMX Group, Inc." or "NASDAQ OMX Group, Inc." will be changed to "Nasdaq, Inc."<sup>5</sup>
  - In addition to the preceding changes, all references to "OMX" will be removed from the Rulebook.<sup>6</sup>
  - References to "The NASDAQ Stock Market LLC" or "NASDAQ Stock Market LLC" will be changed to "The Nasdaq Stock Market LLC"
  - References to "NASDAQ BX, Inc." or "NASDAQ BX" will be changed to "Nasdaq BX, Inc." or "Nasdaq BX"
  - In all instances where the word "the" should have been capitalized, (e.g., Rule 1080(n)(ii)(j)(1)), the Exchange will make the appropriate correction.
- This name change proposal is a non-substantive change. No changes to the ownership or structure of the Exchange have taken place. No other changes are being proposed in this filing. The Exchange represents that these changes are concerned solely with the administration of the Exchange and do not affect the meaning, administration, or enforcement of any rules of the Exchange or the rights, obligations, or privileges of Exchange members or their associated persons in any way. Accordingly, this filing is being submitted under Rule 19b-4(f)(3). In lieu of providing a copy of the marked

<sup>3</sup> The Exchange proposes to amend: (i) The Amended Certificate of Formation; (ii) Second Amended Limited Liability Company Agreement; (iii) By-Laws; (iv) Rulebook; and (v) Pricing Schedule.

<sup>4</sup> The NASDAQ Stock Market LLC and NASDAQ BX, Inc. will also be filing similar rule changes.

<sup>5</sup> See Securities Exchange Act Release No. 75421 (July 10, 2015), 80 FR 42136 (July 16, 2015) (SR-BSECC-2015-001, SR-BX-2015-030, SR-NASDAQ-2015-058, SR-Phlx-2015-46, SR-SCCP-2015-01).

<sup>6</sup> *Id.*

changes, the Exchange represents that it will make the necessary non-substantive revisions to the Amended Certificate of Formation, Second Amended Limited Liability Company Agreement, By-Laws, Rulebook, and Pricing Schedule and post updated versions of each on the Exchange's Web site pursuant to Rule 19b-4(m)(2).

The Exchange notes that the following references are not being amended in the Exchange's governing documents and the Exchange's Rulebook:

- Any name with a trademark (TM) or service mark (SM) attached to the name.
- Any references in the Amended Certificate of Formation or Second Amended Limited Liability Company Agreement which references [sic] a prior name of the Exchange and reflects a historical date wherein that name was in effect.

##### 2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of section 6(b)(5) of the Act,<sup>8</sup> 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 by avoiding confusion with the name. The Exchange proposes to conform its name to that of its parent, Nasdaq Inc., by changing the capitalization in the word "NASDAQ" to "Nasdaq." The Exchange also proposes to amend the names of affiliated markets in a similar manner, by changing the name "NASDAQ" to "Nasdaq." The name change of the Exchange as well as other name changes to related entities are non-substantive changes. No changes to the ownership or structure of the Exchange have taken place.

#### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The name change will align with the parent company, Nasdaq, Inc.

#### 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.

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Pursuant to section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(3) thereunder,<sup>10</sup> the Exchange has designated this proposal as one that is concerned solely with the administration of the self-regulatory organization, and therefore has become effective.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2017-83 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-2017-83. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2017-83 and should be submitted on or before November 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

[FR Doc. 2017-23488 Filed 10-27-17; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81926; File No. SR-NYSE-2017-52]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Provide Users With Access to Five Additional Third Party Systems and Connectivity to Two Additional Third Party Data Feeds

October 24, 2017.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on October 11, 2017, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to provide Users with access to five additional third party systems and connectivity to two additional third party data feeds. In

addition, the Exchange proposes to change its Price List related to these co-location services. The proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to amend the co-location<sup>4</sup> services offered by the Exchange to provide Users<sup>5</sup> with access to five additional third party systems and connectivity to two additional third party data feeds. In addition the Exchange proposes to make the corresponding changes to the Exchange's Price List related to these co-location services.

As set forth in the Price List, the Exchange charges fees for connectivity to the execution systems of third party markets and other content service providers ("Third Party Systems"), and data feeds from third party markets and

<sup>4</sup> The Exchange initially filed rule changes relating to its co-location services with the Commission in 2010. See Securities Exchange Act Release No. 62960 (September 21, 2010), 75 FR 59310 (September 27, 2010) (SR-NYSE-2010-56) (the "Original Co-location Filing"). The Exchange operates a data center in Mahwah, New Jersey (the "data center") from which it provides co-location services to Users.

<sup>5</sup> For purposes of the Exchange's co-location services, a "User" means any market participant that requests to receive co-location services directly from the Exchange. See Securities Exchange Act Release No. 76008 (September 29, 2015), 80 FR 60190 (October 5, 2015) (SR-NYSE-2015-40). As specified in the Price List, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates NYSE American LLC ("NYSE American") and NYSE Arca, Inc. ("NYSE Arca" and, together with NYSE American, the "Affiliate SROs"). See Securities Exchange Act Release No. 70206 (August 15, 2013), 78 FR 51765 (August 21, 2013) (SR-NYSE-2013-59).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

<sup>15</sup> U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(3).

other content service providers (“Third Party Data Feeds”).<sup>6</sup> The lists of Third Party Systems and Third Party Data Feeds are set forth in the Price List.

The Exchange now proposes to make the following changes:

- Add five content service providers to the list of Third Party Systems: Chicago Mercantile Exchange (CME Group), Chicago Stock Exchange (CHX), Investors Exchange (IEX), OneChicago and TMX Group (together, the “Additional Third Party Systems” or “ATPS”); and
- add two feeds to the list of Third Party Data Feeds: Investors Exchange and OneChicago (together the “Additional Third Part Data Feeds” or “ATPD”).

The Exchange would provide access to the Additional Third Party Systems (“Access”) and connectivity to the Additional Third Party Data Feeds (“Connectivity”) as conveniences to Users. Use of Access or Connectivity would be completely voluntary. The Exchange is not aware of any impediment to third parties offering Access or Connectivity.

The Exchange does not have visibility into whether third parties currently offer, or intend to offer, Users access to the Additional Third Party Systems and connectivity to the Additional Third Party Data Feeds, as such third parties are not required to make that information public. However, if one or more third parties presently offer, or in the future opt to offer, such Access and Connectivity to Users, a User may utilize the Secure Financial Transaction Infrastructure (“SFTI”) network, a third party telecommunication network, third party wireless network, a cross connect, or a combination thereof to access such services and products through a connection to an access center outside the data center (which could be a SFTI access center, a third-party access center, or both), another User, or a third party vendor.

The Exchange will announce the dates that each Product is available through customer notices disseminated to all Users simultaneously.

#### Connectivity to Additional Third Party Systems

The Exchange proposes to revise the Price List to provide that Users may obtain connectivity to the five Additional Third Party Systems for a fee. As with the current Third Party Systems, Users would connect to the Additional Third Party Systems over the

internet protocol (“IP”) network, a local area network available in the data center.<sup>7</sup>

As with the current Third Party Systems, in order to obtain access to an Additional Third Party System, the User would enter into an agreement with the relevant third party content service provider, pursuant to which the third party content service provider would charge the User for access to the Additional Third Party System. The Exchange would then establish a unicast connection between the User and the relevant third party content service provider over the IP network.<sup>8</sup> The Exchange would charge the User for the connectivity to the Additional Third Party System. A User would only receive, and only be charged for, access to Additional Third Party Systems for which it enters into agreements with the third party content service provider.

The Exchange has no ownership interest in the Additional Third Party Systems. Establishing a User’s access to an Additional Third Party System would not give the Exchange any right to use the Additional Third Party Systems. Connectivity to an Additional Third Party System would not provide access or order entry to the Exchange’s execution system, and a User’s connection to an Additional Third Party System would not be through the Exchange’s execution system.

As with the existing connections to Third Party Systems, the Exchange proposes to charge a monthly recurring fee for connectivity to an Additional Third Party System. Specifically, when a User requests access to an Additional Third Party System, it would identify the applicable content service provider and what bandwidth connection it required.

The Exchange proposes to modify its Price List to add the Additional Third Party Systems to its existing list of Third Party Systems. The additional items would be as follows:

#### *Third Party Systems*

Chicago Mercantile Exchange (CME Group)  
Chicago Stock Exchange (CHX)  
Investors Exchange (IEX)  
OneChicago

<sup>7</sup> See Securities Exchange Act Release No. 74222 (February 6, 2015), 80 FR 7888 (February 12, 2015) (SR-NYSE-2015-05) (notice of filing and immediate effectiveness of proposed rule change to include IP network connections).

<sup>8</sup> Information flows over existing network connections in two formats: “unicast” format, which is a format that allows one-to-one communication, similar to a phone line, in which information is sent to and from the Exchange; and “multicast” format, which is a format in which information is sent one-way from the Exchange to multiple recipients at once, like a radio broadcast.

#### TMX Group

The Exchange does not propose to change the monthly recurring fee the Exchange charges Users for unicast connectivity to each Third Party System, including the Additional Third Party Systems.

#### Connectivity to Additional Third Party Data Feeds

The Exchange proposes to revise the Price List to provide that Users may obtain connectivity to each of the two Additional Third Party Data Feeds for a fee. The Exchange would receive the Additional Third Party Data Feeds from the content service provider, at its data center. It would then provide connectivity to that data to Users for a fee. Users would connect to the Additional Third Party Data Feeds over the IP network.<sup>9</sup>

In order to connect to an Additional Third Party Data Feed, a User would enter into a contract with the content service provider, pursuant to which the content service provider would charge the User for the Third Party Data Feed. The Exchange would receive the Third Party Data Feed over its fiber optic network and, after the content service provider and User entered into the contract and the Exchange received authorization from the content service provider, the Exchange would re-transmit the data to the User over the User’s port. The Exchange would charge the User for the connectivity to the Additional Third Party Data Feed. A User would only receive, and would only be charged for, connectivity to the Additional Third Party Data Feeds for which it entered into contracts.

The Exchange has no affiliation with the sellers of the Additional Third Party Data Feeds. It would have no right to use the Additional Third Party Data Feeds other than as a redistributor of the data. The Additional Third Party Data Feeds would not provide access or order entry to the Exchange’s execution system. The Additional Third Party Data Feeds would not provide access or order entry to the execution systems of the third parties generating the feed. The Exchange would receive the Additional Third Party Data Feeds via arms-length agreements and it would have no inherent advantage over any other distributor of such data.

As it does with the existing Third Party Data Feeds, the Exchange proposes to charge a monthly recurring fee for connectivity to each Additional Third Party Data Feed. The monthly

<sup>9</sup> See *supra* note 7, at 7889 (“The IP network also provides Users with access to away market data products”).

<sup>6</sup> See Securities Exchange Act Release No. 80311 (March 24, 2017), 82 FR 15741 (March 30, 2017) (SR-NYSE-2016-45).



recurring fee would be per Additional Third Party Data Feed. Depending on its needs and bandwidth, a User may opt to receive all or some of the feeds or services included in an Additional Third Party Data Feed.

The Exchange proposes to add the connectivity fees for the Additional Third Party Data to its existing list in the Price List. The additional items would be as follows:

Third party data feed	Monthly recurring connectivity fee per third party data feed
Investors Exchange (IEX) .....	\$1,000
OneChicago .....	1,000

General

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (e.g., a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;<sup>10</sup> and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both the Affiliate SROs.<sup>11</sup>

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with

<sup>10</sup> As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

<sup>11</sup> See SR-NYSE-2013-59, *supra* note 5 at 51766. The Affiliate SROs have also submitted substantially the same proposed rule change to propose the changes described herein. See SR-NYSEAMER-2017-24 and SR-NYSEArca-2017-122.

Section 6(b) of the Act,<sup>12</sup> in general, and furthers the objectives of Sections 6(b)(5) of the Act,<sup>13</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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 and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed changes would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because, by offering additional services, the Exchange would give each User additional options for addressing its access and connectivity needs, responding to User demand for access and connectivity options. Providing additional services would help each User tailor its data center operations to the requirements of its business operations by allowing it to select the form and latency of access and connectivity that best suits its needs.

The Exchange would provide Access and Connectivity as conveniences to Users. Use of Access or Connectivity would be completely voluntary. The Exchange is not aware of any impediment to third parties offering Access or Connectivity. The Exchange does not have visibility into whether third parties currently offer, or intend to offer, Users access to the Additional Third Party Systems and connectivity to the Additional Third Party Data Feeds. However, if one or more third parties presently offer, or in the future opt to offer, such Access and Connectivity to Users, a User may utilize the SFTI network, a third party telecommunication network, third party wireless network, a cross connect, or a combination thereof to access such services and products through a connection to an access center outside the data center (which could be a SFTI access center, a third-party access center, or both), another User, or a third party vendor.

The Exchange believes that the proposed changes would remove impediments to, and perfect the

mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because, by offering access to the Additional Third Party Systems and connectivity to the Additional Third Party Data Feeds to Users upon the effective date of this filing, the Exchange would give Users additional options for connectivity and access to new services as soon as they are available, responding to User demand for access and connectivity options.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>14</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed fee changes are consistent with Section 6(b)(4) of the Act for multiple reasons. The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange.

The Exchange believes that the additional services and fees proposed herein would be equitably allocated and not unfairly discriminatory because, in addition to the services being completely voluntary, they would be available to all Users on an equal basis (i.e., the same products and services would be available to all Users). All

<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> 15 U.S.C. 78f(b)(4).

Users that voluntarily selected to receive Access or Connectivity would be charged the same amount for the same services. Users that opted to use Access or Connectivity would not receive access or connectivity that is not available to all Users, as all market participants that contracted with the relevant market or content provider would receive access or connectivity.

The Exchange believes that the proposed charges would be reasonable, equitably allocated and not unfairly discriminatory because the Exchange would offer the Access and Connectivity as conveniences to Users, but in order to do so must provide, maintain and operate the data center facility hardware and technology infrastructure. The Exchange must handle the installation, administration, monitoring, support and maintenance of such services, including by responding to any production issues. Since the inception of co-location, the Exchange has made numerous improvements to the network hardware and technology infrastructure and has established additional administrative controls. The Exchange has expanded the network infrastructure to keep pace with the increased number of services available to Users, including resilient and redundant feeds. In addition, in order to provide Access and Connectivity, the Exchange would maintain multiple connections to each ATPD and ATPS, allowing the Exchange to provide resilient and redundant connections; adapt to any changes made by the relevant third party; and cover any applicable fees charged by the relevant third party, such as port fees. In addition, Users would not be required to use any of their bandwidth for Access and Connectivity unless they wish to do so.

The Exchange believes the proposed fees for Access and Connectivity would be reasonable because they would allow the Exchange to defray or cover the costs associated with offering Users access to Additional Third Party Systems and connectivity to Additional Third Party Data Feeds while providing Users the convenience of receiving such Access and Connectivity within co-location, helping them tailor their data center operations to the requirements of their business operations.

For the reasons above, the proposed changes would not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act,<sup>15</sup> the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because all of the proposed services are completely voluntary.

The Exchange believes that providing Users with additional options for connectivity and access to new services would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because such proposed Access and Connectivity would satisfy User demand for access and connectivity options. The Exchange would provide Access and Connectivity as conveniences equally to all Users. The Exchange does not have visibility into whether third parties currently offer, or intend to offer, Users access to the Additional Third Party Systems and connectivity to the Additional Third Party Data Feeds, as such third parties are not required to make that information public. However, if one or more third parties presently offer, or in the future opt to offer, such Access and Connectivity to Users, a User may utilize the SFTI network, a third party telecommunication network, third party wireless network, a cross connect, or a combination thereof to access such services and products through a connection to an access center outside the data center (which could be a SFTI access center, a third-party access center, or both), another User, or a third party vendor. Users that opt to use the proposed Access or Connectivity would not receive access or connectivity that is not available to all Users, as all market participants that contract with the content provider may receive access or connectivity. In this way, the proposed changes would enhance competition by helping Users tailor their Access and Connectivity to the needs of their business operations by allowing them to select the form and latency of access and connectivity that best suits their needs.

The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations.

<sup>15</sup> 15 U.S.C. 78f(b)(8).

Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>16</sup> and Rule 19b-4(f)(6) thereunder.<sup>17</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.<sup>18</sup>

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>17</sup> 17 CFR 240.19b-4(f)(6).

<sup>18</sup> 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.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>19</sup> normally does not become operative for 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii)<sup>20</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange represents that the proposed rule changes present no new or novel issues. According to the Exchange, waiver of the operative delay would allow Users to access the Additional Third Party Systems and the Additional Third Party Data Feeds without delay, which would assist Users in tailoring their data center operations to the requirements of their business operations. The Exchange also represents that the proposed changes to the Price List would provide Users with more complete information regarding their Access and Connectivity options. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission waives the 30-day operative delay and designates the proposed rule change operative upon filing.<sup>21</sup>

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>22</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

<sup>20</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>21</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>22</sup> 15 U.S.C. 78s(b)(2)(B).

#### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2017-52 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2017-52. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2017-52 and should be submitted on or before November 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

[FR Doc. 2017-23481 Filed 10-27-17; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>23</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81927; File No. SR-NYSEAMER-2017-24]

### Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Provide Users With Access to Five Additional Third Party Systems and Connectivity to Two Additional Third Party Data Feeds

October 24, 2017.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on October 11, 2017, NYSE American LLC (the "Exchange" or "NYSE American") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to provide Users with access to five additional third party systems and connectivity to two additional third party data feeds. In addition, the Exchange proposes to change its NYSE American Equities Price List ("Price List") and the NYSE American Options Fee Schedule ("Fee Schedule") related to these co-location services. The proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

*A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend the co-location<sup>4</sup> services offered by the Exchange to provide Users<sup>5</sup> with access to five additional third party systems and connectivity to two additional third party data feeds. In addition the Exchange proposes to make the corresponding changes to the Exchange's Price List and Fee Schedule related to these co-location services.

As set forth in the Price List and Fee Schedule, the Exchange charges fees for connectivity to the execution systems of third party markets and other content service providers ("Third Party Systems"), and data feeds from third party markets and other content service providers ("Third Party Data Feeds").<sup>6</sup> The lists of Third Party Systems and Third Party Data Feeds are set forth in the Price List and Fee Schedule.

The Exchange now proposes to make the following changes:

- Add five content service providers to the list of Third Party Systems: Chicago Mercantile Exchange (CME Group), Chicago Stock Exchange (CHX), Investors Exchange (IEX), OneChicago and TMX Group (together, the "Additional Third Party Systems" or "ATPS"); and
- add two feeds to the list of Third Party Data Feeds: Investors Exchange and OneChicago (together the "Additional Third Part Data Feeds" or "ATPD").

The Exchange would provide access to the Additional Third Party Systems ("Access") and connectivity to the

Additional Third Party Data Feeds ("Connectivity") as conveniences to Users. Use of Access or Connectivity would be completely voluntary. The Exchange is not aware of any impediment to third parties offering Access or Connectivity.

The Exchange does not have visibility into whether third parties currently offer, or intend to offer, Users access to the Additional Third Party Systems and connectivity to the Additional Third Party Data Feeds, as such third parties are not required to make that information public. However, if one or more third parties presently offer, or in the future opt to offer, such Access and Connectivity to Users, a User may utilize the Secure Financial Transaction Infrastructure ("SFTI") network, a third party telecommunication network, third party wireless network, a cross connect, or a combination thereof to access such services and products through a connection to an access center outside the data center (which could be a SFTI access center, a third-party access center, or both), another User, or a third party vendor.

The Exchange will announce the dates that each Product is available through customer notices disseminated to all Users simultaneously.

Connectivity to Additional Third Party Systems

The Exchange proposes to revise the Price List and Fee Schedule to provide that Users may obtain connectivity to the five Additional Third Party Systems for a fee. As with the current Third Party Systems, Users would connect to the Additional Third Party Systems over the internet protocol ("IP") network, a local area network available in the data center.<sup>7</sup>

As with the current Third Party Systems, in order to obtain access to an Additional Third Party System, the User would enter into an agreement with the relevant third party content service provider, pursuant to which the third party content service provider would charge the User for access to the Additional Third Party System. The Exchange would then establish a unicast connection between the User and the relevant third party content service provider over the IP network.<sup>8</sup> The

Exchange would charge the User for the connectivity to the Additional Third Party System. A User would only receive, and only be charged for, access to Additional Third Party Systems for which it enters into agreements with the third party content service provider.

The Exchange has no ownership interest in the Additional Third Party Systems. Establishing a User's access to an Additional Third Party System would not give the Exchange any right to use the Additional Third Party Systems. Connectivity to an Additional Third Party System would not provide access or order entry to the Exchange's execution system, and a User's connection to an Additional Third Party System would not be through the Exchange's execution system.

As with the existing connections to Third Party Systems, the Exchange proposes to charge a monthly recurring fee for connectivity to an Additional Third Party System. Specifically, when a User requests access to an Additional Third Party System, it would identify the applicable content service provider and what bandwidth connection it required.

The Exchange proposes to modify its Price List and Fee Schedule to add the Additional Third Party Systems to its existing list of Third Party Systems. The additional items would be as follows:

Third party systems

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Chicago Mercantile Exchange (CME Group)  
Chicago Stock Exchange (CHX)  
Investors Exchange (IEX)  
OneChicago  
TMX Group

---

The Exchange does not propose to change the monthly recurring fee the Exchange charges Users for unicast connectivity to each Third Party System, including the Additional Third Party Systems.

Connectivity to Additional Third Party Data Feeds

The Exchange proposes to revise the Price List and Fee Schedule to provide that Users may obtain connectivity to each of the two Additional Third Party Data Feeds for a fee. The Exchange would receive the Additional Third Party Data Feeds from the content service provider, at its data center. It would then provide connectivity to that data to Users for a fee. Users would

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information is sent one-way from the Exchange to multiple recipients at once, like a radio broadcast.

<sup>4</sup> The Exchange initially filed rule changes relating to its co-location services with the Commission in 2010. See Securities Exchange Act Release No. 62961 (September 21, 2010), 75 FR 59299 (September 27, 2010) (SR-NYSEAmex-2010-80) (the "Original Co-location Filing"). The Exchange operates a data center in Mahwah, New Jersey (the "data center") from which it provides co-location services to Users.

<sup>5</sup> For purposes of the Exchange's co-location services, a "User" means any market participant that requests to receive co-location services directly from the Exchange. See Securities Exchange Act Release No. 76009 (September 29, 2015), 80 FR 60213 (October 5, 2015) (SR-NYSEMK-2015-67). As specified in the Price List and Fee Schedule, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates New York Stock Exchange LLC ("NYSE LLC") and NYSE Arca, Inc. ("NYSE Arca" and, together with NYSE LLC, the "Affiliate SROs"). See Securities Exchange Act Release No. 70176 (August 13, 2013), 78 FR 50471 (August 19, 2013) (SR-NYSEMK-2013-67).

<sup>6</sup> See Securities Exchange Act Release No. 80309 (March 24, 2017), 82 FR 15725 (March 30, 2017) (SR-NYSEMK-2016-63).

<sup>7</sup> See Securities Exchange Act Release No. 74220 (February 6, 2015), 80 FR 7894 (February 12, 2015) (SR-NYSEMK-2015-08) (notice of filing and immediate effectiveness of proposed rule change to include IP network connections).

<sup>8</sup> Information flows over existing network connections in two formats: "unicast" format, which is a format that allows one-to-one communication, similar to a phone line, in which information is sent to and from the Exchange; and "multicast" format, which is a format in which

connect to the Additional Third Party Data Feeds over the IP network.<sup>9</sup>

In order to connect to an Additional Third Party Data Feed, a User would enter into a contract with the content service provider, pursuant to which the content service provider would charge the User for the Third Party Data Feed. The Exchange would receive the Third Party Data Feed over its fiber optic network and, after the content service provider and User entered into the contract and the Exchange received authorization from the content service provider, the Exchange would re-transmit the data to the User over the User's port. The Exchange would charge the User for the connectivity to the Additional Third Party Data Feed. A User would only receive, and would only be charged for, connectivity to the Additional Third Party Data Feeds for which it entered into contracts.

The Exchange has no affiliation with the sellers of the Additional Third Party Data Feeds. It would have no right to use the Additional Third Party Data Feeds other than as a redistributor of the data. The Additional Third Party Data Feeds would not provide access or order entry to the Exchange's execution system. The Additional Third Party Data Feeds would not provide access or order entry to the execution systems of the third parties generating the feed. The Exchange would receive the Additional Third Party Data Feeds via arms-length agreements and it would have no inherent advantage over any other distributor of such data.

As it does with the existing Third Party Data Feeds, the Exchange proposes to charge a monthly recurring fee for connectivity to each Additional Third Party Data Feed. The monthly recurring fee would be per Additional Third Party Data Feed. Depending on its needs and bandwidth, a User may opt to receive all or some of the feeds or services included in an Additional Third Party Data Feed.

The Exchange proposes to add the connectivity fees for the Additional Third Party Data to its existing list in the Price List and Fee Schedule. The additional items would be as follows:

Third party data feed	Monthly recurring connectivity fee per third party data feed
Investors Exchange (IEX) .....	\$1,000
OneChicago .....	1,000

<sup>9</sup> See *supra* note 7, at 7894 ("The IP network also provides Users with access to away market data products").

General

As is the case with all Exchange co-location arrangements, (i) neither a User nor any of the User's customers would be permitted to submit orders directly to the Exchange unless such User or customer is a member organization, a Sponsored Participant or an agent thereof (e.g., a service bureau providing order entry services); (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis;<sup>10</sup> and (iii) a User would only incur one charge for the particular co-location service described herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both the Affiliate SROs.<sup>11</sup>

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>12</sup> in general, and furthers the objectives of Sections 6(b)(5) of the Act,<sup>13</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and 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 and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

<sup>10</sup> As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange's trading and execution systems that is separate from, or superior to, that of other Users. In this regard, all orders sent to the Exchange enter the Exchange's trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to all Users, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

<sup>11</sup> See SR-NYSEMKT-2013-67, *supra* note 5 at 50471. The Affiliate SROs have also submitted substantially the same proposed rule change to propose the changes described herein. See SR-NYSE-2017-52 and SR-NYSEArca-2017-122.

<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

The Exchange believes that the proposed changes would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because, by offering additional services, the Exchange would give each User additional options for addressing its access and connectivity needs, responding to User demand for access and connectivity options. Providing additional services would help each User tailor its data center operations to the requirements of its business operations by allowing it to select the form and latency of access and connectivity that best suits its needs.

The Exchange would provide Access and Connectivity as conveniences to Users. Use of Access or Connectivity would be completely voluntary. The Exchange is not aware of any impediment to third parties offering Access or Connectivity. The Exchange does not have visibility into whether third parties currently offer, or intend to offer, Users access to the Additional Third Party Systems and connectivity to the Additional Third Party Data Feeds. However, if one or more third parties presently offer, or in the future opt to offer, such Access and Connectivity to Users, a User may utilize the SFTI network, a third party telecommunication network, third party wireless network, a cross connect, or a combination thereof to access such services and products through a connection to an access center outside the data center (which could be a SFTI access center, a third-party access center, or both), another User, or a third party vendor.

The Exchange believes that the proposed changes would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because, by offering access to the Additional Third Party Systems and connectivity to the Additional Third Party Data Feeds to Users upon the effective date of this filing, the Exchange would give Users additional options for connectivity and access to new services as soon as they are available, responding to User demand for access and connectivity options.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>14</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons

<sup>14</sup> 15 U.S.C. 78f(b)(4).

using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed fee changes are consistent with Section 6(b)(4) of the Act for multiple reasons. The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the market share and revenue of the affected exchange.

The Exchange believes that the additional services and fees proposed herein would be equitably allocated and not unfairly discriminatory because, in addition to the services being completely voluntary, they would be available to all Users on an equal basis (*i.e.*, the same products and services would be available to all Users). All Users that voluntarily selected to receive Access or Connectivity would be charged the same amount for the same services. Users that opted to use Access or Connectivity would not receive access or connectivity that is not available to all Users, as all market participants that contracted with the relevant market or content provider would receive access or connectivity.

The Exchange believes that the proposed changes would be reasonable, equitably allocated and not unfairly discriminatory because the Exchange would offer the Access and Connectivity as conveniences to Users, but in order to do so must provide, maintain and operate the data center facility hardware and technology infrastructure. The Exchange must handle the installation, administration, monitoring, support and maintenance of such services, including

by responding to any production issues. Since the inception of co-location, the Exchange has made numerous improvements to the network hardware and technology infrastructure and has established additional administrative controls. The Exchange has expanded the network infrastructure to keep pace with the increased number of services available to Users, including resilient and redundant feeds. In addition, in order to provide Access and Connectivity, the Exchange would maintain multiple connections to each ATPD and ATPS, allowing the Exchange to provide resilient and redundant connections; adapt to any changes made by the relevant third party; and cover any applicable fees charged by the relevant third party, such as port fees. In addition, Users would not be required to use any of their bandwidth for Access and Connectivity unless they wish to do so.

The Exchange believes the proposed fees for Access and Connectivity would be reasonable because they would allow the Exchange to defray or cover the costs associated with offering Users access to Additional Third Party Systems and connectivity to Additional Third Party Data Feeds while providing Users the convenience of receiving such Access and Connectivity within co-location, helping them tailor their data center operations to the requirements of their business operations.

For the reasons above, the proposed changes would not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act,<sup>15</sup> the Exchange believes that the proposed rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because all of the proposed services are completely voluntary.

The Exchange believes that providing Users with additional options for connectivity and access to new services would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because such proposed Access and Connectivity

would satisfy User demand for access and connectivity options. The Exchange would provide Access and Connectivity as conveniences equally to all Users. The Exchange does not have visibility into whether third parties currently offer, or intend to offer, Users access to the Additional Third Party Systems and connectivity to the Additional Third Party Data Feeds, as such third parties are not required to make that information public. However, if one or more third parties presently offer, or in the future opt to offer, such Access and Connectivity to Users, a User may utilize the SFTI network, a third party telecommunication network, third party wireless network, a cross connect, or a combination thereof to access such services and products through a connection to an access center outside the data center (which could be a SFTI access center, a third-party access center, or both), another User, or a third party vendor. Users that opt to use the proposed Access or Connectivity would not receive access or connectivity that is not available to all Users, as all market participants that contract with the content provider may receive access or connectivity. In this way, the proposed changes would enhance competition by helping Users tailor their Access and Connectivity to the needs of their business operations by allowing them to select the form and latency of access and connectivity that best suits their needs.

The Exchange operates in a highly competitive market in which exchanges offer co-location services as a means to facilitate the trading and other market activities of those market participants who believe that co-location enhances the efficiency of their operations. Accordingly, fees charged for co-location services are constrained by the active competition for the order flow of, and other business from, such market participants. If a particular exchange charges excessive fees for co-location services, affected market participants will opt to terminate their co-location arrangements with that exchange, and adopt a possible range of alternative strategies, including placing their servers in a physically proximate location outside the exchange's data center (which could be a competing exchange), or pursuing strategies less dependent upon the lower exchange-to-participant latency associated with co-location. Accordingly, the exchange charging excessive fees would stand to lose not only co-location revenues but also the liquidity of the formerly co-located trading firms, which could have additional follow-on effects on the

<sup>15</sup> 15 U.S.C. 78f(b)(8).

market share and revenue of the affected exchange. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>16</sup> and Rule 19b-4(f)(6) thereunder.<sup>17</sup> Because the proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.<sup>18</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>19</sup> normally does not become operative for 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii)<sup>20</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange represents that the proposed rule changes present no new or novel issues. According to the Exchange, waiver of the operative delay would allow Users to access the Additional Third Party Systems and the Additional Third Party Data Feeds without delay, which would assist Users in tailoring their data center operations to the requirements of their business operations. The Exchange also

represents that the proposed changes to the Price List would provide Users with more complete information regarding their Access and Connectivity options. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission waives the 30-day operative delay and designates the proposed rule change operative upon filing.<sup>21</sup>

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>22</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEAMER-2017-24 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-NYSEAMER-2017-24. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAMER-2017-24 and should be submitted on or before November 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Eduardo A. Aleman,**  
*Assistant Secretary.*

[FR Doc. 2017-23474 Filed 10-27-17; 8:45 am]

**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-81931; File No. SR-FINRA-2017-032]

**Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Make Permanent an Exception to TRACE Reporting for Certain Bond Transactions Effected on the New York Stock Exchange**

October 24, 2017.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 20, 2017, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>17</sup> 17 CFR 240.19b-4(f)(6).

<sup>18</sup> 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.

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

<sup>20</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>21</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>22</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>23</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

constituting a “non-controversial” rule change under paragraph (f)(6) of Rule 19b-4 under the Act,<sup>3</sup> which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### **I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change**

FINRA is proposing to amend Rule 6730 to make permanent an exemption from TRACE reporting transactions in TRACE-Eligible Securities that are executed on a facility of the New York Stock Exchange (“NYSE”), subject to specified conditions.

The text of the proposed rule change is available on FINRA’s Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission’s Public Reference Room.

### **II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

#### *A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change*

##### **1. Purpose**

Rule 6730(e) (Reporting Requirements for Certain Transactions and Transfers of Securities) exempts members from reporting to the Trade Reporting and Compliance Engine (“TRACE”) transactions in TRACE-Eligible Securities<sup>4</sup> that are executed on a facility of the New York Stock Exchange (“NYSE”) in accordance with specified

NYSE rules and that are reported to NYSE and disseminated publicly, provided that a data sharing agreement between FINRA and NYSE related to transactions covered by Rule 6730 remains in effect.<sup>5</sup> This exemption currently operates as a pilot program and is scheduled to expire on October 27, 2017.<sup>6</sup>

FINRA is proposing to make the exemption in Rule 6730(e)(4) permanent. Thus, pursuant to the proposed rule change, members would not be required to report to TRACE transactions in TRACE-Eligible Securities that are executed on a NYSE facility in accordance with NYSE Rules 1400, 1401 and 86, where such transactions are disseminated publicly by NYSE, so long as a data sharing agreement is in effect between FINRA and NYSE related to transactions covered by Rule 6730.<sup>7</sup>

<sup>5</sup> Rule 6730(e)(2) exempts members from TRACE reporting transactions in TRACE-Eligible Securities that are listed on a national securities exchange when certain conditions are met. Rule 6730(e)(4), in contrast, exempts transactions in TRACE-Eligible Securities that are not listed on an exchange, but that are executed on a facility of NYSE when certain conditions are met.

<sup>6</sup> See Securities Exchange Act Release No. 54768 (November 16, 2006), 71 FR 67673 (November 22, 2006) (Order Approving File No. SR-NASD-2006-110) (pilot program in FINRA Rule 6730(e)(4), then NASD Rule 6230(e)(4), subject to the execution of a data sharing agreement addressing relevant transactions, became effective on January 9, 2007); Securities Exchange Act Release No. 59216 (January 8, 2009), 74 FR 2147 (January 14, 2009) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2008-065) (pilot program extended to January 7, 2011); Securities Exchange Act Release No. 63673 (January 7, 2011), 76 FR 2739 (January 14, 2011) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2011-002) (pilot program extended to July 8, 2011); Securities Exchange Act Release No. 64665 (June 14, 2011), 76 FR 35933 (June 20, 2011) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2011-025) (pilot program extended to January 27, 2012); Securities Exchange Act Release No. 66018 (December 21, 2011), 76 FR 81549 (December 28, 2011) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2011-072) (pilot program extended to October 26, 2012); Securities Exchange Act Release No. 68076 (October 22, 2012), 77 FR 65431 (October 26, 2012) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2012-047) (pilot program extended to October 25, 2013); Securities Exchange Act Release No. 70288 (August 29, 2013), 78 FR 54694 (September 5, 2013) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2013-038) (pilot program extended to October 23, 2015); and Securities Exchange Act Release No. 76121 (October 9, 2015) 80 FR 62578 (October 16, 2015) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2015-037) (pilot program extended to October 27, 2017).

<sup>7</sup> FINRA is proposing to delete existing language conditioning the exemption on transactions being “reported to NYSE in accordance with NYSE’s applicable trade reporting rules.” FINRA understands that, because NYSE immediately and automatically publicly disseminates transactions, NYSE does not have any rules requiring members to also trade report transactions in TRACE-Eligible

FINRA is proposing to make the exemption available on a permanent basis as the pilot has been operating without incident since its inception in 2007. Providing this exemption on a permanent basis would solidify in the FINRA rule a measure to avoid trade reporting to FINRA with regard to transactions in these securities that are disseminated publicly by NYSE. FINRA notes that the exemption under Rule 6730(e)(4) continues to be conditional on a data sharing agreement being in effect between FINRA and NYSE related to transactions covered by Rule 6730.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so FINRA can implement the proposed rule change on the date of filing and prior to the expiration of the current pilot.

##### **2. Statutory Basis**

FINRA believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,<sup>8</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

FINRA believes that providing the exemption on a permanent basis protects investors and the public because it continues to ensure that transactions are required to be publicly disseminated, and therefore transparency will be maintained for these transactions. The continued condition that a data sharing agreement remain in effect between NYSE and FINRA for transactions covered by the Rule 6730(e)(4) exemption allows FINRA to conduct surveillance in TRACE-Eligible Securities. In addition, providing the exemption on a permanent basis enhances regulatory efficiency and, with regard to covered transactions, permits members to avoid trade reporting to FINRA and the increased costs that may be incurred as a result of such requirement.

#### *B. Self-Regulatory Organization’s Statement on Burden on Competition*

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. FINRA

Securities executed in accordance with NYSE Rules 1400, 1401 and 86.

<sup>8</sup> 15 U.S.C. 78o-3(b)(6).

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> Rule 6710 (Definitions) provides that a “TRACE-Eligible Security” is a debt security that is United States (“U.S.”) dollar-denominated and is: (1) Issued by a U.S. or foreign private issuer, and, if a “restricted security” as defined in Securities Act Rule 144(a)(3), sold pursuant to Securities Act Rule 144A; (2) issued or guaranteed by an Agency as defined in paragraph (k) or a Government-Sponsored Enterprise as defined in paragraph (n); or (3) a U.S. Treasury Security as defined in paragraph (p). “TRACE-Eligible Security” does not include a debt security that is issued by a foreign sovereign or a Money Market Instrument as defined in paragraph (o).



believes that providing the exemption on a permanent basis does not result in any burden on competition since it treats all similarly-situated members the same. Specifically, with regard to covered transactions, the proposal allows members to avoid trade reporting to FINRA and the increased costs that may be incurred as a result of such requirement.

*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 from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(6) thereunder.<sup>10</sup>

FINRA has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because such action will allow the existing TRACE exemption to remain available without interruption. If the pilot program were to expire on October 27, 2017, FINRA members would immediately become subject to duplicative reporting obligations with respect to transactions in TRACE-eligible debt securities effected on NYSE. In addition, the Commission notes that the pilot has been operating since 2007 without any issues being raised in the various comment periods to extend the pilot. For these reasons, the Commission hereby waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing.<sup>11</sup>

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has satisfied this requirement.

<sup>11</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the

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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2017-032 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-FINRA-2017-032. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received
- proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2017-032, and should be submitted on or before November 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**Eduardo A. Aleman,**  
*Assistant Secretary.*

[FR Doc. 2017-23479 Filed 10-27-17; 8:45 am]

**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-81935; File No. SR-GEMX-2017-49]

**Self-Regulatory Organizations; Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 723 To Remove Obsolete Rule Text**

October 24, 2017.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 17, 2017, Nasdaq GEMX, LLC ("GEMX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend Rule 723 (Price Improvement Mechanism for Crossing Transactions) to remove obsolete rule text.

The text of the proposed rule change is available on the Exchange's Web site at [www.ise.com](http://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

<sup>12</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to amend Rule 723 (Price Improvement Mechanism for Crossing Transactions) to remove obsolete rule text.

Rule 723 sets forth the requirements for the PIM, which was adopted as part of its application to be registered as a national securities exchange under its previous name of Topaz Exchange, LLC ("Topaz").<sup>3</sup> Certain aspects of PIM were adopted on a pilot basis ("Pilot"); specifically, the termination of the exposure period by unrelated orders, and no minimum size requirement of orders eligible for PIM. The Pilot expired on January 18, 2017.

On December 12, 2016, the Exchange filed with the Commission a proposed rule change to make the Pilot permanent, and also to change the requirements for providing price improvement for Agency Orders of less than 50 option contracts (other than auctions involving Complex Orders) where the National Best Bid and Offer ("NBBO") is only \$0.01 wide.<sup>4</sup> The Commission approved this proposal on January 18, 2017.<sup>5</sup>

In modifying the requirements for price improvement for Agency Orders of less than 50 contracts, the Exchange proposed to amend Rule 723(b) to

require Electronic Access Members to provide at least \$0.01 price improvement for an Agency Order if that order is for less than 50 contracts and if the difference between the NBBO is \$0.01.

The Exchange adopted a member conduct standard to implement this requirement during the time pursuant to which ISE Gemini symbols were migrating from the ISE Gemini platform to the Nasdaq INET platform. At the time it proposed the member conduct standard, the Exchange anticipated that the migration to the Nasdaq platform would be complete on or before April 15, 2017. Accordingly, Rule 723(b) stated that, for the period beginning January 19, 2017 until a date specified by the Exchange in a Regulatory Information Circular, which date shall be no later than April 15, 2017, if the Agency Order is for less than 50 option contracts, and if the difference between the NBBO is \$0.01, an Electronic Access Member shall not enter a Crossing Transaction unless such Crossing Transaction is entered at one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order, and better than the limit order or quote on the Nasdaq GEMX order book on the same side of the Agency Order. This requirement applied regardless of whether the Agency Order is for the account of a public customer, or where the Agency Order is for the account of a broker dealer or any other person or entity that is not a Public Customer.<sup>6</sup>

<sup>6</sup> Nasdaq ISE, LLC ("ISE") filed a proposed rule change at the same time as the Exchange to adopt the same price improvement requirement. To enforce this requirement, ISE also amended its Rule 1614 (Imposition of Fines for Minor Rule Violations). Specifically, ISE added Rule 1614(d)(4), which provides that any Member who enters an order into PIM for less than 50 contracts, while the National Best Bid or Offer spread is \$0.01, must provide price improvement of at least one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order, which increment may not be smaller than \$0.01. Failure to provide such price improvement will result in members being subject to the following fines: \$500 for the second offense, \$1,000 for the third offense, and \$2,500 for the fourth offense. Subsequent offenses will subject the member to formal disciplinary action. The Exchange will review violations on a monthly cycle to assess these violations. This provision was to be in effect for the period beginning January 19, 2017 until a date specified by the Exchange in a Regulatory Information Circular, which date shall be no later than until September 15, 2017. The Exchange incorporated this provision by reference. See GEMX Chapter 16 (Discipline). Contemporaneous with this proposal, ISE is now submitting a filing to remove the member conduct standard for its price improvement rule and the corresponding provision in Rule 1614 for violations of that standard. As such, GEMX will no longer incorporate this provision of Rule 1614 by reference.

In adopting the price improvement requirement for Agency Orders of less than 50 contracts, the Exchange also proposed to amend Rule 723(b) to adopt a systems-based mechanism to implement this requirement, which shall be effective following the migration of a symbol to the Nasdaq INET platform. Under this provision, if the Agency Order is for less than 50 option contracts, and if the difference between the NBBO is \$0.01, the Crossing Transaction must be entered at one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order and better than the limit order or quote on the Nasdaq GEMX order book on the same side of the Agency Order.

By April 15, 2017, the Exchange had completed the migration of symbols to the Nasdaq INET platform, and adopted the corresponding systems-based mechanism for enforcing the price improvement requirement where the Agency Order is for less than 50 option contracts, and if the difference between the NBBO is \$0.01. Accordingly, the Exchange is now proposing to delete the rule text in Rule 723 that implements the member conduct standard.

2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of section 6(b)(5) of the Act,<sup>8</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes this proposal is consistent with the Act because it removes language that implements the member conduct standard where the Agency Order is for less than 50 option contracts, and if the difference between the NBBO is \$0.01. As noted above, this standard has become obsolete with the migration of all symbols to the Nasdaq INET system and the corresponding adoption of the systems-based mechanism for enforcing that requirement, which was previously approved by the Commission.<sup>9</sup>

*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

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> See *supra* note 5.

<sup>3</sup> See Securities Exchange Act Release No. 70050 (July 26, 2013), 78 FR 46622 (August 1, 2013) (File No. 10-209) ("Exchange Approval Order"). The Exchange subsequently changed its name to ISE Gemini. See Securities Exchange Act Release No. 71586 (February 20, 2014), 79 FR 10861 (February 26, 2014) (SR-Topaz-2014-06).

<sup>4</sup> See Securities Exchange Act Release No. 79541 (December 13, 2016), 81 FR 91974 (December 19, 2017) (SR-ISEGemini-2016-23). The Exchange notes that, on April 3, 2017, ISE Gemini, LLC was renamed Nasdaq GEMX, LLC to reflect its new placement within the Nasdaq, Inc. corporate structure in connection with the March 9, 2016 acquisition by Nasdaq of the capital stock of U.S. Exchange Holdings, and the indirect acquisition all of the interests of the International Securities Exchange, LLC, ISE Gemini, LLC and ISE Mercury, LLC. See Securities Exchange Act Release No. 80248 (March 15, 2017), 82 FR 14547 (March 21, 2017) (SR-ISEGemini-2017-13).

<sup>5</sup> See Securities Exchange Act Release No. 79840 (January 18, 2017), 82 FR 8474 (January 25, 2017) (SR-ISEGemini-2016-23).

necessary or appropriate in furtherance of the purposes of the Act, as the rule text to be removed has become obsolete with the migration of all symbols to the Nasdaq INET system and the corresponding adoption of the systems-based mechanism for enforcing the price improvement requirement where the Agency Order is for less than 50 option contracts, and if the differences between the NBBO is \$0.01.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6) thereunder.<sup>11</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>12</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>13</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange states that waiver of the operative delay will allow the Exchange to remove the obsolete rule text immediately, minimizing potential investor confusion. The Commission believes the waiver of the operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.<sup>14</sup>

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>14</sup> For purposes only of waiving the 30-day operative delay, the Commission has also

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](mailto:rule-comments@sec.gov). Please include File Number SR-GEMX-2017-49 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-GEMX-2017-49. 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

considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-GEMX-2017-49, and should be submitted on or before November 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

[FR Doc. 2017-23484 Filed 10-27-17; 8:45 am]

BILLING CODE 8011-01-P

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-81930; File No. SR-NASDAQ-2017-107]

**Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Nasdaq Closing Cross Rules**

October 24, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 10, 2017, The NASDAQ Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend Rule 4702 (Order Types) and Rule 4754 [sic] (Nasdaq Closing Cross) to enhance the Nasdaq Closing Cross by permitting members to submit LOC Orders until immediately prior to 3:55 p.m. ET subject to certain conditions, and to make other changes related to Closing Cross/Extended Hours Orders [sic].

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

<sup>15</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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

On July 13, 2017, the Exchange filed a proposed rule change to amend Rule 4702 (Order Types) and Rule 4754 (Nasdaq Closing Cross) to enhance the Nasdaq Closing Cross by permitting members to submit Limit On Close ("LOC") Orders<sup>3</sup> until immediately prior to 3:55 p.m. ET subject to certain conditions.<sup>4</sup> This proposed rule change was approved by the Commission on September 8, 2017,<sup>5</sup> and the Exchange began to introduce this functionality pursuant to a symbol-by-symbol rollout beginning on October 2, 2017.<sup>6</sup> The purpose of the proposed rule change is to amend the Nasdaq Closing Cross rules to: (1) Reject all Market Maker Peg Orders flagged to participate in the Nasdaq Closing Cross; and (2) account for the minimum increment for Tick Size Pilot securities when re-pricing LOC Orders entered between 3:50 p.m. ET and immediately prior to 3:55 p.m. ET.

A "Market Maker Peg Order" is an Order Type designed to allow a Market Maker to maintain a continuous two-sided quotation at a displayed price that is compliant with the quotation requirements for Market Makers set forth in Rule 4613(a)(2).<sup>7</sup> Pursuant to

<sup>3</sup> A "Limit On Close Order" or "LOC Order" is an Order Type entered with a price that may be executed only in the Nasdaq Closing Cross, and only if the price determined by the Nasdaq Closing Cross is equal to or better than the price at which the LOC Order was entered. See Rule 4702(b)(12).

<sup>4</sup> See Securities Exchange Act Release No. 81188 (July 21, 2017), 82 FR 35014 (July 27, 2017) (SR-NASDAQ-2017-061).

<sup>5</sup> See Securities Exchange Act Release No. 81556 (September 8, 2017), 82 FR 43264 (September 14, 2017) (SR-NASDAQ-2017-061) (Approval Order).

<sup>6</sup> See Equity Trader Alert #2017-184.

<sup>7</sup> See Rule 4702(b)(7).

SR-NASDAQ-2017-061, a Market Maker Peg Order will not be permitted to operate as a Closing Cross/Extend Hours Order.<sup>8</sup> Instead, such orders will be rejected. Market Maker Peg Orders would, however, remain permitted to be flagged to participate solely in the Nasdaq Closing Cross if entered with a time-in-force ("TIF") that does not continue after the time of the Nasdaq Closing Cross. After additional consideration, the Exchange believes that all Market Maker Peg Orders flagged with an on-close instruction should be rejected. The Exchange therefore proposes to amend its rules to state that a Market Maker Peg Order may not be flagged to solely participate in the Nasdaq Closing Cross. This will supplement current language stating that such Market maker Peg Orders may not operate as Closing Cross/Extended Hours Orders. With this change, all Market Maker Peg Orders entered with an on-close instruction will be rejected, regardless of whether the order is entered with a TIF that continues after the Nasdaq Closing Cross. The Exchange believes that this change will more closely align with member expectations and the design of this order type, which is to assist members with their quoting obligations. Market Maker Peg Orders that are not entered with an on-close instruction will remain eligible to participate in the Nasdaq Closing Cross if the order remains unexecuted at the time of the Nasdaq Closing Cross.

Furthermore, when the Nasdaq Closing Cross changes are introduced, the Exchange will re-price LOC Orders entered between 3:50 p.m. ET and immediately prior to 3:55 p.m. ET to the less aggressive of the order's limit price or the First Reference Price<sup>9</sup> in order to prevent these orders from having a significant impact on the price established by the Nasdaq Closing Cross.<sup>10</sup> In addition, Rule 4702 provides that if the First Reference Price is not at a permissible minimum increment of \$0.01 or \$0.0001, as applicable, the First Reference Price will be rounded (i) to the nearest permitted minimum increment (with midpoint prices being rounded up) if there is no imbalance, (ii) up if there is a buy imbalance, or (iii) down if there is a sell imbalance. Although the rule explicitly mentions

<sup>8</sup> A Closing Cross/Extended Hours Order is an order that is flagged to participate in the Nasdaq Closing Cross and has a Time-in-Force that continues after the time of the Nasdaq Closing Cross.

<sup>9</sup> "First Reference Price" is the Current Reference Price in the first Order Imbalance Indicator disseminated at or after 3:50 p.m. ET. See Rule 4754(a)(9).

<sup>10</sup> See Rule 4702(b)(12)(A).

the regular trading increments of \$0.01 or \$0.0001, however, it does not account for the minimum increments approved for securities selected for inclusion in the Tick Size Pilot Program, which are subject to \$0.05 minimum increments.<sup>11</sup> The Exchange therefore proposes to remove the explicit reference to these specific minimum increments. With the proposed change, the rule will state that if the First Reference Price is not at a permissible minimum increment, the First Reference Price will be rounded (i) to the nearest permitted minimum increment (with midpoint prices being rounded up) if there is no imbalance, (ii) up if there is a buy imbalance, or (iii) down if there is a sell imbalance. The Exchange believes that this change will avoid potential member confusion with respect to the application of this rule to securities selected for inclusion in the Tick Size Pilot Program, and help ensure compliance with the Tick Size Pilot Program.

#### Implementation

The Exchange proposes to introduce the changes described in this proposed rule change on October 10, 2017. The Exchange began the rollout of functionality described in SR-NASDAQ-2017-061, as announced to members via Equity Trader Alert, with three symbols, VSAT, TEAM, and UNIT. The rollout of those changes will continue in the fourth quarter of 2017 after the completion of additional industry testing of the functionality.<sup>12</sup> The Exchange believes that implementing the proposed change to Market Maker Peg Order handling is important for the operation of the three symbols to which the functionality proposed in SR-NASDAQ-2017-061 currently applies. The changes to Market Maker Peg Order handling proposed herein cannot be applied on a symbol-by-symbol basis, but rather must be applied to all symbols simultaneously. Accordingly, the Exchange is proposing to implement the

<sup>11</sup> See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (Order Approving the Tick Size Pilot Program). See also Rule 4770 (Compliance with Regulation NMS Plan to Implement a Tick Size Pilot).

<sup>12</sup> The Exchange recently informed market participants that it will pause the rollout of the remaining symbols for the enhancements to the Nasdaq Closing Cross approved by the Commission on September 8, 2017, in an effort to provide further customer testing opportunities. See Nasdaq Equity Trader Alert #2017-189. The Exchange anticipates continuing the implementation in the near future, with its completion in the fourth quarter consistent with its proposal. The Exchange will release an Equity Trader Alert announcing resumption of the rollout schedule.

proposed changes applied to all symbols on October 10, 2017.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>13</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>14</sup> 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.

When the Exchange filed to restrict Market Maker Peg Orders from operating as Closing Cross/Extended Hours Orders, the Exchange explained that Market Maker Peg Orders were designed to assist members in meeting their quoting obligations and not as a means of submitting interest flagged with an on-close instruction. Furthermore, the Exchange explained that it did not believe that members want functionality that allows Market Maker Peg Orders to be entered with a flag designating an on-close instruction. The Exchange believes that this is true both for Market Maker Peg Orders entered with a TIF that continues after the time of the Nasdaq Closing Cross, and that therefore operate as Closing Cross/Extended Hours Orders, and Market Maker Peg Orders entered with a TIF that causes it to execute solely in the Nasdaq Closing Cross. The Exchange is therefore proposing to reject all Market Maker Peg Orders flagged to participate in the Nasdaq Closing Cross, regardless of TIF. The Exchange believes that this change will perfect the mechanism of a free and open market by eliminating the possibility that members can inadvertently enter this order type combination, while preserving the design of Market Maker Peg Orders to aid members in meeting their quoting obligations.

In addition, the Exchange believes that the current language in Rule 4702 could be confusing to members and investors when applied to securities that are selected for inclusion in the Tick Size Pilot Program, as these securities are subject to a \$0.05 minimum increment instead of the \$0.01 or \$0.0001 minimum increments cited in the rule today. The Exchange believes that removing the reference to these specific increments will reduce confusion because permissible minimum increments may be \$0.01 or \$0.0001 for most securities, and \$0.05 for a handful of securities selected for

inclusion in the Tick Size Pilot Program. The Exchange must round to a permissible minimum increment whenever the First Reference Price is not in such a minimum increment. The proposed rule change makes this clear and will therefore increase transparency to the benefit of members and investors, and help ensure compliance with the Tick Size Pilot Program.

### 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. With respect to Market Maker Peg Orders flagged for the Nasdaq Closing Cross, the proposed change eliminates an order type combination that is not consistent with the purpose of aiding members in meeting their quoting obligations. Furthermore, the proposed change related to minimum increments properly reflects the increments applicable to securities traded on the Exchange, including securities selected for inclusion in the Tick Size Pilot Program. Neither of these proposed changes is designed to have any significant competitive impact.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>15</sup> and Rule 19b-4(f)(6) thereunder.<sup>16</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>17</sup> normally does not become operative for 30 days after the date of its

filing. However, Rule 19b-4(f)(6)(iii)<sup>18</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay. The Commission notes that waiver of the operative delay would allow the Exchange to implement the proposed change to Market Maker Peg Orders for all symbols without delay, including the three symbols to which the functionalities described in SR-NASDAQ-2017-061 currently apply. Moreover, the proposed change relating to minimum increments is designed to avoid confusion and help ensure compliance with the Tick Size Pilot Program. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.<sup>19</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2017-107 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

<sup>18</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>19</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(5).

<sup>15</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>16</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission has waived this requirement.

<sup>17</sup> 17 CFR 240.19b-4(f)(6).

All submissions should refer to File Number SR–NASDAQ–2017–107. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2017–107 and should be submitted on or before November 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**Eduardo A. Aleman,**  
Assistant Secretary.

[FR Doc. 2017–23478 Filed 10–27–17; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–81934; File No. SR–MRX–2017–22]

### Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 723 To Remove Obsolete Rule Text

October 24, 2017.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup>

notice is hereby given that on October 17, 2017, Nasdaq MRX, LLC ("MRX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 723 (Price Improvement Mechanism for Crossing Transactions) to remove obsolete rule text.

The text of the proposed rule change is available on the Exchange's Web site at [www.ise.com](http://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.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to amend Rule 723 (Price Improvement Mechanism for Crossing Transactions) to remove obsolete rule text.

Rule 723 sets forth the requirements for the PIM, which was adopted as part of the Exchange's application to be registered as a national securities exchange.<sup>3</sup> Certain aspects of PIM were adopted on a pilot basis ("Pilot"); specifically, the termination of the exposure period by unrelated orders, and no minimum size requirement of orders eligible for PIM. The Pilot expired on January 18, 2017.

On December 12, 2016, the Exchange filed with the Commission a proposed rule change to make the Pilot

permanent, and also to change the requirements for providing price improvement for Agency Orders of less than 50 option contracts (other than auctions involving Complex Orders) where the National Best Bid and Offer ("NBBO") is only \$0.01 wide.<sup>4</sup> The Commission approved this proposal on January 18, 2017.<sup>5</sup>

In modifying the requirements for price improvement for Agency Orders of less than 50 contracts, the Exchange proposed to amend Rule 723(b) to require Electronic Access Members to provide at least \$0.01 price improvement for an Agency Order if that order is for less than 50 contracts and if the difference between the NBBO is \$0.01.

The Exchange adopted a member conduct standard to implement this requirement during the time pursuant to which ISE Mercury symbols were migrating from the ISE Mercury platform to the Nasdaq INET platform. At the time it proposed the member conduct standard, the Exchange anticipated that the migration to the Nasdaq platform would be complete on or before September 15, 2017. Accordingly, Rule 723(b) stated that, for the period beginning January 19, 2017 until a date specified by the Exchange in a Regulatory Information Circular, which date shall be no later than September 15, 2017, if the Agency Order is for less than 50 option contracts, and if the difference between the NBBO is \$0.01, an Electronic Access Member shall not enter a Crossing Transaction unless such Crossing Transaction is entered at one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order, and better than the limit order or quote on the Nasdaq MRX order book on the same side of the Agency Order. This requirement applied regardless of whether the Agency Order is for the account of a public customer, or where the Agency Order is for the account of

<sup>4</sup> See Securities Exchange Act Release No. 79539 (December 13, 2016), 81 FR 91982 (December 19, 2016) (SR–ISEMercury–2016–25). The Exchange notes that, on April 3, 2017, ISE Mercury, LLC was renamed Nasdaq MRX, LLC to reflect its new placement within the Nasdaq, Inc. corporate structure in connection with the March 9, 2016 acquisition by Nasdaq of the capital stock of U.S. Exchange Holdings, and the indirect acquisition all of the interests of the International Securities Exchange, LLC, ISE Gemini, LLC and ISE Mercury, LLC. See Securities Exchange Act Release No. 80326 (March 29, 2017), 82 FR 16460 (April 4, 2017) (SR–ISEMercury–2017–05).

<sup>5</sup> See Securities Exchange Act Release No. 79841 (January 18, 2017), 82 FR 8452 (January 25, 2017) (SR–ISEMercury–2016–25).

<sup>20</sup> 17 CFR 200.30–3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> See Securities Exchange Act Release No. 76998 (January 29, 2016), 81 FR 6066 (February 4, 2016) (File No. 10–221).

a broker dealer or any other person or entity that is not a Public Customer.<sup>6</sup>

In adopting the price improvement requirement for Agency Orders of less than 50 contracts, the Exchange also proposed to amend Rule 723(b) to adopt a systems-based mechanism to implement this requirement, which shall be effective following the migration of a symbol to the Nasdaq INET platform. Under this provision, if the Agency Order is for less than 50 option contracts, and if the difference between the NBBO is \$0.01, the Crossing Transaction must be entered at one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order and better than the limit order or quote on the Nasdaq MRX order book on the same side of the Agency Order.

By September 15, 2017, the Exchange had completed the migration of symbols to the Nasdaq INET platform, and adopted the corresponding systems-based mechanism for enforcing the price improvement requirement where the Agency Order is for less than 50 option contracts, and if the difference between the NBBO is \$0.01. Accordingly, the Exchange is now proposing to delete the rule text in Rule 723 that implements the member conduct standard.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,<sup>7</sup> in general, and furthers the

<sup>6</sup> Nasdaq ISE, LLC ("ISE") filed a proposed rule change at the same time as the Exchange to adopt the same price improvement requirement. To enforce this requirement, ISE also amended its Rule 1614 (Imposition of Fines for Minor Rule Violations). Specifically, ISE added Rule 1614(d)(4), which provides that any Member who enters an order into PIM for less than 50 contracts, while the National Best Bid or Offer spread is \$0.01, must provide price improvement of at least one minimum price improvement increment better than the NBBO on the opposite side of the market from the Agency Order, which increment may not be smaller than \$0.01. Failure to provide such price improvement will result in members being subject to the following fines: \$500 for the second offense, \$1,000 for the third offense, and \$2,500 for the fourth offense. Subsequent offenses will subject the member to formal disciplinary action. The Exchange will review violations on a monthly cycle to assess these violations. This provision was to be in effect for the period beginning January 19, 2017 until a date specified by the Exchange in a Regulatory Information Circular, which date shall be no later than until September 15, 2017. The Exchange incorporated this provision by reference. See MRX Chapter 16 (Discipline).

Contemporaneous with this proposal, ISE is now submitting a filing to remove the member conduct standard for its price improvement rule and the corresponding provision in Rule 1614 for violations of that standard. As such, MRX will no longer incorporate this provision of Rule 1614 by reference.

<sup>7</sup> 15 U.S.C. 78f(b).

objectives of section 6(b)(5) of the Act,<sup>8</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange believes this proposal is consistent with the Act because it removes language that implements the member conduct standard where the Agency Order is for less than 50 option contracts, and if the difference between the NBBO is \$0.01. As noted above, this standard has become obsolete with the migration of all symbols to the Nasdaq INET system and the corresponding adoption of the systems-based mechanism for enforcing that requirement, which was previously approved by the Commission.<sup>9</sup>

### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, as the rule text to be removed has become obsolete with the migration of all symbols to the Nasdaq INET system and the corresponding adoption of the systems-based mechanism for enforcing the price improvement requirement where the Agency Order is for less than 50 option contracts, and if the differences between the NBBO is \$0.01.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to section 19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6) thereunder.<sup>11</sup>

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> See *supra* note 5.

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>12</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>13</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange states that waiver of the operative delay will allow the Exchange to remove the obsolete rule text immediately, minimizing potential investor confusion. The Commission believes the waiver of the operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.<sup>14</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MRX-2017-22 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.

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.

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>14</sup> 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).

All submissions should refer to File Number SR-MRX-2017-22. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MRX-2017-22, and should be submitted on or before November 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Robert W. Errett,**  
Deputy Secretary.

[FR Doc. 2017-23483 Filed 10-27-17; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81937; File No. SR-BatsEDGX-2017-40]

### Self-Regulatory Organizations; Bats EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Make Technical Corrections to Its Second Amended and Restated Certificate of Incorporation

October 24, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the

“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 13, 2017, 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 seeks to amend its Second Amended and Restated Certificate of Incorporation. The text of the proposed rule change is provided below.

(additions are *italicized*; deletions are [bracketed])

\* \* \* \* \*

Second Amended and Restated Certificate of Incorporation of Bats EDGX Exchange, Inc.

The name of the corporation is Bats EDGX Exchange, Inc. The corporation filed its original Certificate of Incorporation with the Secretary of State of the State of Delaware on March 9, 2009 *under the name EDGX Exchange, Inc.* This Second Amended and Restated Certificate of Incorporation of the corporation, which restates and integrates and also further amends the provisions of the corporation's *Restated Certificate of Incorporation*, was duly adopted in accordance with the provisions of Sections 242 and 245 of the General Corporation Law of the State of Delaware and by the written consent of its sole stockholder in accordance with Section 228 of the General Corporation Law of the State of Delaware. The [Second Amended and] Restated Certificate of Incorporation of the corporation is hereby amended, integrated and restated to read in its entirety as follows:

\* \* \* \* \*

The text of the proposed rule change is available at the Exchange's Web site at [www.bats.com](http://www.bats.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

EDGX recently amended its Restated Certificate of Incorporation in connection with a corporate transaction (the “Transaction”) involving, among other things, the recent acquisition of EDGX, along with Bats BYX Exchange, Inc. (“Bats BYX”), Bats BZX Exchange, Inc. (“Bats BZX”), and Bats EDGA Exchange, Inc. (“Bats EDGA”) and, together with Bats EDGX, Bats BYX, and Bats BZX, the “Bats Exchanges”) by CBOE Holdings, Inc. (“CBOE Holdings”). CBOE Holdings is also the parent of Chicago Board Options Exchange, Incorporated (“CBOE”) and C2 Options Exchange, Incorporated (“C2”). Particularly, the filing proposed, among other things, to amend and restate the certificate of incorporation of the Exchange based on certificates of incorporation of CBOE and C2.<sup>3</sup> The Exchange notes that in conforming the Exchange's Certificate to the certificates of CBOE and C2, it inadvertently (1) did not comply with a provision of Delaware law and (ii) referred to an inaccurate version of the Certificate in the introductory paragraph. The Exchange seeks to correct those errors.

Particularly, Section 245(c) of the Delaware General Corporation Law (DGCL) requires that a restated certificate of incorporation “shall state, either in its heading or in an introductory paragraph, the corporation's present name, and, if it has been changed, the name under which it was originally incorporated, and the date of filing of its original certificate of incorporation with the secretary of state.” The Exchange notes that the conformed Certificate did not reference the name under which the corporation was originally incorporated (*i.e.*, “EDGX Exchange, Inc.”). In order to comply with Section 245(c) of the DGCL, the Exchange proposes to amend its Certificate to add a reference to its original name.

<sup>3</sup> See Securities Exchange Act Release No. 81503 (August 30, 2017), 82 FR 42153 (September 6, 2017) (SR-BatsEDGX-2017-35).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>15</sup> 17 CFR 200.30-3(a)(12).



The Exchange also notes that it inadvertently did not reference the correct version of the Certificate in two places in the introductory paragraph. Particularly, the Exchange notes that the third sentence of the introductory paragraph provides that the Second Amended and Restated Certificate of Incorporation of the corporation restated and integrated and also further amended the provisions of the corporation's "Certificate of Incorporation" instead of the then current (and now previous) version titled, "Restated Certificate of Incorporation". Additionally, the last sentence of the introductory paragraph which provides that the current certificate is "amended, integrated and restated to read in its entirety as follows:" mistakenly references the new title of the amended Certificate (*i.e.*, "Second Amended and Restated Certificate of Incorporation") instead of the title of the then current (and now previous) Certificate ("Restated Certificate of Incorporation"). As such, the Exchange proposes to add "Restated" to the third sentence and eliminate the new title reference "Second Amended and" from the last sentence to accurately reflect the correct version of the Certificate that was amended and restated.

The Exchange notes that the proposed changes are concerned solely with the administration of the Exchange and do not affect the meaning, administration, or enforcement of any rules of the Exchange or the rights, obligations, or privileges of Exchange members or their associated persons is [sic] any way.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>4</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>5</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>6</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes correcting inadvertent non-substantive, technical errors in its Certificate in order to comply with Delaware law and reflect the correct and accurate version of the Certificate that was amended will avoid potential confusion, thereby removing impediments to, and perfecting the mechanism for a free and open market and a national market system, and, in general, protecting investors and the public interest of market participants. As noted above, the proposed changes do not affect the meaning, administration, or enforcement of any rules of the Exchange or the rights, obligations, or privileges of Exchange members or their associated persons in any way.

### (B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Rather, the proposed rule change is merely attempting to correct inadvertent technical errors in the Exchange's introductory paragraph of its Certificate. The proposed rule change has no impact on competition.

### (C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange neither solicited nor received comments on the proposed rule change.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>7</sup> and paragraph (f) of Rule 19b-4<sup>8</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings

to determine whether the proposed rule change should be approved or disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BatsEDGX-2017-40 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-2017-40. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BatsEDGX-2017-40 and should be submitted on or before November 20, 2017.

<sup>6</sup> *Id.*

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f).

<sup>9</sup> 17 CFR 200.30-3(a)(12).

<sup>4</sup> 15 U.S.C. 78f(b).

<sup>5</sup> 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Robert W. Errett,**

*Deputy Secretary.*

[FR Doc. 2017-23487 Filed 10-27-17; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81928; File No. SR-NYSEAMER-2017-23]

### Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Rule 964.2NY Regarding the Participation Entitlement Formula for Specialists and e-Specialists

October 24, 2017.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on October 10, 2017, NYSE American LLC (the “Exchange” or “NYSE American”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify Rule 964.2NY regarding the participation entitlement formula for Specialists and e-Specialists. The proposed rule change is available on the Exchange’s Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries,

set forth in sections A, B, and C below, of the most significant parts of such statements.

#### A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The purpose of the filing is to modify Rule 964.2NY regarding the participation entitlement of Specialists and e-Specialists.<sup>4</sup>

Rule 964.2NY sets forth the priority for the allocation of incoming orders to resting interest at a particular price in the System,<sup>5</sup> which includes the allocation to the Specialist Pool.<sup>6</sup> Rule 964.2NY sets forth the participant entitlement formula applicable to the Specialist Pool and provides that, on a quarterly basis, the Exchange will determine a Primary Specialist from among the Specialists e-Specialists [sic] in each option class.

Generally, the Specialist Pool is entitled to 40% of the remaining balance of an order after any orders on behalf of Customers in the Consolidated Book are satisfied.<sup>7</sup> Rule 964.2NY(b)(3)(A) provides that Specialists and e-Specialists quoting at the NBBO will share in the Specialist Pool participation entitlement on a size pro rata basis and provides that the Primary Specialist’s size pro rata participation will receive additional weighting, as determined by the Exchange and announced by Trader Update (the “Additional Weighting”). Pursuant to the current Rule, this Additional Weighting afforded to the Primary Specialist is capped at 66⅔% if there is only one e-Specialist, and at 50% if there are two or more e-Specialists (the “Cap”).<sup>8</sup>

<sup>4</sup> A Specialist is “an individual or entity that has been deemed qualified by the Exchange for the purpose of making transactions on the Exchange in accordance with the provisions of Rule 920NY [Market Makers], and who meets the qualification requirements of Rule 927NY(b) [Specialists]. Each Specialist must be registered with the Exchange as a Market Maker. Any ATP Holder registered as a Market Maker with the Exchange is eligible to be qualified as a Specialist. See Rule 900.2NY(76). Rule 923NY(b) also provides that “[t]he Exchange may designate e-Specialists in an option class in accordance with Rule 927.4NY [e-Specialists].” See Rule 923NY(b).

<sup>5</sup> The term “System” refers to the Exchange’s electronic order delivery, execution and reporting system through which orders and quotes for listed options are consolidated for execution and/or display. See Rule 900.2NY (48) (defining “Exchange System” or “System”).

<sup>6</sup> The Specialist Pool refers to the aggregated size of the best bid and best offer, in a given series, amongst the Specialist and e-Specialists that match in price. See Rule 900.2NY(75).

<sup>7</sup> See Rule 964.2NY(b)(2).

<sup>8</sup> See Rule 964.2NY(b)(3)(A).

Currently, the Exchange applies the Additional Weighting as follows: When an inbound order is allocated against the Specialist Pool, the Primary Specialist’s quoted size is treated as if it were double (*i.e.*, two (2) times the number of contracts being quoted) and this doubled size is then used in the calculation (as shown in the examples below) to determine the allocation to both the Primary Specialist as well as the other participants in the Specialist Pool.<sup>9</sup> When there is only one e-Specialist and both the Specialist and e-Specialist are quoting the same size, this Additional Weighting will not be greater than 66⅔%. When there is more than one e-Specialist and the Specialist and e-Specialists are all quoting the same size, this Additional Weighting will not be greater than 50%.

Because current Rule 964.2NY(b)(3)(A) does not specify the circumstances under which the Primary Specialist’s allocation in the Specialist Pool is subject to the Cap, the Exchange proposes to make clear that the Cap only applies if “all participants in the Specialist Pool are quoting the same size.”<sup>10</sup> When all participants in the Specialist Pool are not quoting the same size, the Primary Specialist may receive up to the entirety of the Specialist Pool’s participation allocation. However, for this scenario to occur, the Primary Specialist’s quoted size would need to be disproportionately larger than the other participants in the Specialist Pool such that the allocation to which the other participant(s) in the Specialist Pool is entitled is less than one contract (*i.e.*, a fractional share). For example, if the Primary Specialist is quoting 300 contracts and the other eSpecialist in

<sup>9</sup> The Exchange may modify how it calculates the Additional Weighting, which calculation would be announced by Trader Update. See Rule 964.2NY(b)(3)(A). See, *e.g.*, September 27, 2012 Trader Update, available here, <https://www.nyse.com/publicdocs/nyse/notifications/trader-update/NYSE%20AMEX%20OPTIONS%20Trader%20Update%20Primary%20Specialist%20Implementation%209-27-12%20FINALtw.pdf>; and December 21, 2012 Trader Update, available here, <https://www.nyse.com/publicdocs/nyse/notifications/trader-update/NYSE%20AMEX%20OPTIONS%20Trader%20Update%20Primary%20Specialist%20Implementation%2010213%20%20%20.pdf>.

<sup>10</sup> See proposed Rule 964.2NY(b)(3)(A) (providing, in part, that the “Primary Specialist’s size pro-rata participation in the Specialist Pool will receive additional weighting, as determined by the Exchange, and announced via Trader Update; provided, however, that if all participants in the Specialist Pool are quoting the same size, this additional weighting will be no greater than 66⅔% if there is only one e-Specialist, and no greater than 50% if there are two or more e-Specialists”). The Exchange also proposes to capitalize the “s” in the defined term “e-Specialist.” See *id.*

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

the Specialist Pool is quoting 1 contract [sic].

Pursuant to Rule 964.2NY(b)(1)(iv), each participant in the Specialist Pool would “be allocated a number of contracts equal to the *greater of* their share in the Specialist Pool guaranteed participation or their ‘size pro rata’ allocation as provided in Rule 964NY(b)(3), but in either case, no greater than the size of the Specialist’s disseminated size.”<sup>11</sup> Thus, it may be possible that the Primary Specialist receives its allocation based on its share of the Specialist Pool, while other participants in the Pool receive a pro rata allocation, because the latter allocation is more favorable to that participant (*i.e.*, provides a “greater share”) to that participant. In this regard, because the Exchange maximizes the allocation to each participant in the Specialist Pool, certain non-Specialist participants (at the same price) may be allocated fewer contracts than their pro rata share.<sup>12</sup>

Below are examples of how the Exchange applies the Additional Weighting in circumstances where the Specialist Pool participation guarantee entitles each participant to a more favorable allocation than size pro rata:<sup>13</sup>

*Example 1 to illustrate application of 66⅔% cap:*

Primary Specialist quoting 60 contracts  
Only one other participant in the Specialist Pool also quoting 60 contracts  
Other non-customer interest resting on the Consolidated Book for 500 contracts  
An inbound order arrives for 200 contracts

*Allocation Results:*

The Specialist Pool is entitled to a 40% allocation of the inbound order (80 contracts).

The Primary Specialist is entitled to an allocation of  $(2 \times 60) / [60 + (2 \times 60)] = 66\frac{2}{3}\%$  of the 80 contracts allocated to the Specialist Pool. The Primary Specialist will receive 53 contracts.

The other participant in the Specialist Pool is entitled to an allocation of  $60 / [60 + (2 \times 60)] = 33\frac{1}{3}\%$  of the 80 contracts allocated to the Specialist Pool. The e-Specialist will receive 27 contracts.

*Example 2 to illustrate application of 50% cap:*

Primary Specialist quoting 60 contracts  
Two other participants in the Specialist Pool each quoting 60 contracts  
Other non-customer interest resting on the Consolidated Book for 500 contracts

An inbound order arrives for 200 contracts

*Allocation Results:*

The Specialist Pool is entitled to a 40% allocation of the inbound order (80 contracts).

The Primary Specialist is entitled to an allocation of  $(2 \times 60) / [60 + 60 + (2 \times 60)] = 50\%$  of the 80 contracts allocated to the Specialist Pool. The Primary Specialist will receive 40 contracts.

Each other participant in the Specialist Pool is entitled to an allocation of  $60 / [60 + 60 + (2 \times 60)] = 25\%$  of the 80 contracts allocated to the Specialist Pool. Each other participant in the Specialist Pool will receive 20 contracts.

*Example 3 to illustrate allocation (i.e., no cap) when all are not quoting the same size:*

Primary Specialist quoting 60 contracts  
Only one other participant in the Specialist Pool also quoting 30 contracts  
Other non-customer interest resting on the Consolidated Book for 500 contracts  
An inbound order arrives for 200 contracts

*Allocation Results:*

The Specialist Pool is entitled to a 40% allocation of the inbound order (80 contracts).

The Primary Specialist is entitled to an allocation of  $(2 \times 60) / [30 + (2 \times 60)] = 80\%$  of the 80 contracts allocated to the Specialist Pool. The Primary Specialist is entitled to 64 contracts, which exceeds the size of their quote. Rule 964.2NY(b)(1)(iv), the Primary Specialist will receive no more than 60 contracts, so their allocation does not exceed their quoted size.

The other participant in the Specialist Pool is entitled to an allocation of  $30 / [30 + (2 \times 60)] = 20\%$  of the 80 contracts allocated to the Specialist Pool. The other participant in the Specialist Pool is entitled to 16 contracts and will receive 20 contracts, which represent the remaining of the Specialist Pool allocation. In this case, the other participant in the Specialist Pool is granted the balance of its share in the Specialist Pool guaranteed participation, as it is greater than the contracts to which it is entitled per Rule 964.2NY(1)(iv) [sic].

*Example 4 to illustrate allocating each Specialist the “greater of” their share in either the Specialist Pool or size pro rata:*

Primary Specialist quoting 90 contracts  
Other participant in the Specialist Pool quoting 200 contracts  
Market Maker quoting 200 contracts  
An inbound order arrives for 100 contracts

*Allocation Results:*

The Specialist Pool is entitled to a 40% allocation of the inbound order (40 contracts).

The Primary Specialist is entitled to an allocation of  $(2 \times 90) / [200 + (2 \times 90)] = 47.37\%$  of the 40 contracts allocated to the Specialist Pool (19 contracts).

The Primary Specialist pro rata allocation would be  $90 / (200 + 200 + 90) = 18.37\%$  of the 100 contracts of the inbound order (18 contracts). Since the 19-contract Specialist Pool allocation is greater than the 18-contract pro rata allocation, the Primary Specialist will receive 19 contracts.

The other participant in the Specialist Pool is entitled to an allocation of  $200 / [200 + (2 \times 90)] = 52.63\%$  of the 40 contracts allocated to the Specialist Pool (21 contracts).

The other participant in the Specialist Pool would also be entitled to a pro rata allocation  $200 / (200 + 200) = 50\%$  of the remaining 81 contracts of the inbound order (41 contracts). Since the 41-contract pro rata allocation of the balance is greater than the 21-contract Specialist Pool allocation, the other participant in the Specialist Pool will receive 41 contracts, pursuant to Rule 964.2NY(1)(iv) [sic]. The Market Maker will receive the remaining 40 contracts.

\* \* \* \* \*

The Exchange believes the proposed change, which does not alter current functionality, would provide additional specificity regarding how orders are allocated and the circumstances under which the Cap would apply to the Primary Specialist allocation, which adds clarity and transparency to Exchange rules to the benefit of all market participants.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.<sup>14</sup> In particular, the proposal is

<sup>11</sup> See Rule 964.2NY(b)(1)(iv).

<sup>12</sup> See generally Rule 964NY(b).

<sup>13</sup> The Exchange notes that when a participant in the Specialist Pool would fare better based on its pro rata share, rather than its share of the Specialist Pool guaranteed participation, the pro rata share allocation will be applied. See Rule 964.2NY(b)(1)(iv).

<sup>14</sup> 15 U.S.C. 78f(b).

consistent with Section 6(b)(5) of the Act<sup>15</sup> because it is designed promote [sic] just and equitable principles of trade, [sic] foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to, and perfect the mechanisms [sic] of, [sic] a free and open market and a national market system.

The proposed rule change would promote just and equitable principles of trade as it is intended to provide additional specificity regarding the circumstances under which the Primary Specialist's allocation would be subject to a Cap, which adds clarity and transparency to Exchange rules regarding order allocation. The Exchange believes that the proposed change promotes just and equitable principles of trade, fosters cooperation and coordination among persons engaged in facilitating securities transactions, and removes impediments to and perfects the mechanism of a free and open market by ensuring that members, regulators and the public can more easily navigate and better understand the Exchange's rulebook.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues. Rather, the proposed change is designed to provide ATP Holders and the investing public with additional specificity and transparency regarding the circumstances under which the Primary Specialist's allocation would be subject to a Cap, which in turn adds clarity and transparency to Exchange rules.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were solicited or received with respect to the proposed rule change.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time

as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>16</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>17</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>18</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>19</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest as it will allow the Exchange to immediately provide greater clarity to market participants concerning order allocation on the Exchange. Accordingly, the Commission hereby waives the operative delay and designates the proposal operative upon filing.<sup>20</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>17</sup> 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, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>18</sup> 17 CFR 240.19b-4(f)(6).

<sup>19</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>20</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEAMER-2017-23 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-NYSEAMER-2017-23. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAMER-2017-23 and should be submitted on or before November 20, 2017.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

**Eduardo A. Aleman,**

*Assistant Secretary.*

[FR Doc. 2017-23475 Filed 10-27-17; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>21</sup> 17 CFR 200.30-3(a)(12).

<sup>15</sup> 15 U.S.C. 78f(b)(5).

**SMALL BUSINESS ADMINISTRATION****National Small Business Development Centers Advisory Board**

**AGENCY:** Small Business Administration.  
**ACTION:** Notice of open Federal Advisory Committee meetings.

**SUMMARY:** The SBA is issuing this notice to announce the location, date, time and agenda for November meeting of the Federal Advisory Committee for the Small Business Development Centers Program. The meeting will be open to the public; however, advance notice of attendance is required.

**DATES:** Tuesday, November 14, 2017, at 1:00 p.m. EST.

**ADDRESSES:** Meeting will be held via conference call.

**FOR FURTHER INFORMATION CONTACT:** Monika Nixon, Office of Small Business Development Center, U.S. Small Business Administration, 409 Third Street SW., Washington, DC 20416; [monika.nixon@sba.gov](mailto:monika.nixon@sba.gov); (202) 205-7310.

If anyone wishes to be a listening participant or would like to request accommodations, please contact Monika Nixon at the information above.

**SUPPLEMENTARY INFORMATION:** Pursuant to section 10(a) of the Federal Advisory Committee Act (5 U.S.C. Appendix 2), SBA announces the meetings of the National SBDC Advisory Board. This Board provides advice and counsel to the SBA Administrator and Associate Administrator for Small Business Development Centers.

The purpose of the meetings is to discuss the following issues pertaining to the SBDC Program:

SBA Update  
 Annual Meetings  
 Board Assignments  
 Member Roundtable

**Richard Kingan,**

*Acting White House Liaison.*

[FR Doc. 2017-23337 Filed 10-27-17; 8:45 am]

**BILLING CODE P**

**SMALL BUSINESS ADMINISTRATION**

**[Disaster Declaration #15302 and #15303; FLORIDA Disaster Number FL-00130]**

**Presidential Declaration Amendment of a Major Disaster for the State of Florida**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 6.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for the State of Florida (FEMA-4337-DR), dated 09/10/2017.

*Incident:* Hurricane Irma.  
*Incident Period:* 09/04/2017 through 10/18/2017.

**DATES:** Issued on 10/20/2017.

*Physical Loan Application Deadline Date:* 11/09/2017.

*Economic Injury (EIDL) Loan Application Deadline Date:* 06/11/2018.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416, (202) 205-6734.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for the State of FLORIDA, dated 09/10/2017, is hereby amended to establish the incident period for this disaster as beginning 09/04/2017 through 10/18/2017. All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2017-23508 Filed 10-27-17; 8:45 am]

**BILLING CODE 8025-01-P**

**SMALL BUSINESS ADMINISTRATION**

**[Disaster Declaration # 15324 and # 15325; Florida Disaster Number FL-00131]**

**Presidential Declaration Amendment of a Major Disaster for Public Assistance Only for the State of Florida**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Amendment 3.

**SUMMARY:** This is an amendment of the Presidential declaration of a major disaster for Public Assistance Only for the State of Florida (FEMA-4337-DR), dated 09/21/2017.

*Incident:* Hurricane Irma.  
*Incident Period:* 09/04/2017 through 10/18/2017.

**DATES:** Issued on 10/20/2017.

*Physical Loan Application Deadline Date:* 11/20/2017.

*Economic Injury (EIDL) Loan Application Deadline Date:* 06/21/2018.

**ADDRESSES:** Submit completed loan applications to: U.S. Small Business Administration, Processing and Disbursement Center, 14925 Kingsport Road, Fort Worth, TX 76155.

**FOR FURTHER INFORMATION CONTACT:** A. Escobar, Office of Disaster Assistance,

U.S. Small Business Administration, 409 3rd Street SW., Suite 6050, Washington, DC 20416, (202) 205-6734.

**SUPPLEMENTARY INFORMATION:** The notice of the President's major disaster declaration for Private Non-Profit organizations in the State of Florida, dated 09/21/2017, is hereby amended to establish the incident period for this disaster as beginning 09/04/2017 through 10/18/2017.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Number 59008)

**James E. Rivera,**

*Associate Administrator for Disaster Assistance.*

[FR Doc. 2017-23506 Filed 10-27-17; 8:45 am]

**BILLING CODE 8025-01-P**

**SMALL BUSINESS ADMINISTRATION**

**[License No. 09/09-0481]**

**Notice Seeking Exemption Under Section 312 of the Small Business Investment Act, Conflicts of Interest: Propel Venture Partners US Fund I, L.P.**

Notice is hereby given that Propel Venture Partners US Fund, L.P., 201 Mission Street, 25th Floor, San Francisco, CA 94105, a Federal Licensee under the Small Business Investment Act of 1958, as amended ("the Act"), in connection with the financing of a small concerns, 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). Propel Venture Partners US Fund, L.P. proposes to purchase common stock of Kasisto, Inc. from BBVA Compass Bancshares, Inc. ("BBVA"). Kasisto has requested the transaction because it prefers the shares to be held by a venture investor who will support the continued growth of the company.

The proposed transaction is brought within the purview of section 107.730 of the Regulations because BBVA is the sole owner of Propel Venture Partners US Fund, L.P. BBVA is considered an Associate of Propel Venture Partners US Fund, L.P. pursuant to section 107.50. Therefore, the proposed transaction is considered self-deal pursuant to 13 CFR 107.730 and requires a regulatory exemption. Notice is hereby given that any interested person may submit written comments on the transaction within fifteen days of the date of this publication to Associate Administrator for Investment, U.S. Small Business

Administration, 409 Third Street SW., Washington, DC 20416.

Dated: October 23, 2017.

**A. Joseph Shepard,**

*Associate Administrator for Investment and Innovation.*

[FR Doc. 2017-23499 Filed 10-27-17; 8:45 am]

**BILLING CODE P**

**SOCIAL SECURITY ADMINISTRATION**

[Docket No. SSA-2017-0053]

**Cost-of-Living Increase and Other Determinations for 2018**

**AGENCY:** Social Security Administration.

**ACTION:** Notice.

**SUMMARY:** Under title II of the Social Security Act (Act), there will be a 2.0 percent cost-of-living increase in Social Security benefits effective December 2017. In addition, the national average wage index for 2016 is \$48,664.73. The cost-of-living increase and national average wage index affect other program parameters as described below.

**FOR FURTHER INFORMATION CONTACT:**

Susan C. Kunkel, Office of the Chief Actuary, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 965-3000. Information relating to this announcement is available on our Internet site at [www.socialsecurity.gov/oact/cola/index.html](http://www.socialsecurity.gov/oact/cola/index.html). For information on eligibility or claiming benefits, call 1-800-772-1213 (TTY 1-800-325-0778), or visit our Internet site at [www.socialsecurity.gov](http://www.socialsecurity.gov).

**SUPPLEMENTARY INFORMATION:** Because of the 2.0 percent cost-of-living increase, the following items will increase for 2018:

(1) The maximum Federal Supplemental Security Income (SSI) monthly payment amounts for 2018 under title XVI of the Act will be \$750 for an eligible individual, \$1,125 for an eligible individual with an eligible spouse, and \$376 for an essential person;

(2) The special benefit amount under title VIII of the Act for certain World War II veterans will be \$562.50 for 2018;

(3) The student earned income exclusion under title XVI of the Act will be \$1,820 per month in 2018, but not more than \$7,350 for all of 2018;

(4) The dollar fee limit for services performed as a representative payee will be \$42 per month (\$80 per month in the case of a beneficiary who is disabled and has an alcoholism or drug addiction condition that leaves him or her incapable of managing benefits) in 2018; and

(5) The dollar limit on the administrative-cost fee assessment charged to an appointed representative such as an attorney, agent, or other person who represents claimants will be \$93 beginning in December 2017.

The national average wage index for 2016 is \$48,664.73. This index affects the following amounts:

(1) The Old-Age, Survivors, and Disability Insurance (OASDI) contribution and benefit base will be \$128,700 for remuneration paid in 2018 and self-employment income earned in taxable years beginning in 2018;

(2) The monthly exempt amounts under the OASDI retirement earnings test for taxable years ending in calendar year 2018 will be \$1,420 for beneficiaries who will attain their Normal Retirement Age (NRA) (defined in the *Retirement Earnings Test Exempt Amounts* section below) after 2018 and \$3,780 for those who attain NRA in 2018;

(3) The dollar amounts (“bend points”) used in the primary insurance amount (PIA) formula for workers who become eligible for benefits, or who die before becoming eligible, in 2018 will be \$896 and \$5,399;

(4) The bend points used in the formula for computing maximum family benefits for workers who become eligible for benefits, or who die before becoming eligible, in 2018 will be \$1,145, \$1,652, and \$2,155;

(5) The taxable earnings a person must have to be credited with a quarter of coverage in 2018 will be \$1,320;

(6) The “old-law” contribution and benefit base under title II of the Act will be \$95,400 for 2018;

(7) The monthly amount deemed to constitute substantial gainful activity (SGA) for statutorily blind persons in 2018 will be \$1,970. The corresponding amount for non-blind disabled persons will be \$1,180;

(8) The earnings threshold establishing a month as a part of a trial work period will be \$850 for 2018; and

(9) Coverage thresholds for 2018 will be \$2,100 for domestic workers and \$1,800 for election officials and election workers.

According to section 215(i)(2)(D) of the Act, we must publish the benefit increase percentage and the revised table of “special minimum” benefits within 45 days after the close of the third calendar quarter of 2017. We must also publish the following by November 1: The national average wage index for 2016 (215(a)(1)(D)), the OASDI fund ratio for 2017 (section 215(i)(2)(C)(ii)), the OASDI contribution and benefit base for 2018 (section 230(a)), the earnings required to be credited with a quarter of

coverage in 2018 (section 213(d)(2)), the monthly exempt amounts under the Social Security retirement earnings test for 2018 (section 203(f)(8)(A)), the formula for computing a PIA for workers who first become eligible for benefits or die in 2018 (section 215(a)(1)(D)), and the formula for computing the maximum benefits payable to the family of a worker who first becomes eligible for old-age benefits or dies in 2018 (section 203(a)(2)(C)).

**Cost-of-Living Increases**

*General*

The cost-of-living increase is 2.0 percent for monthly benefits under title II and for monthly payments under title XVI of the Act. Under title II, OASDI benefits will increase by 2.0 percent for individuals eligible for December 2017 benefits, payable in January 2018. We base this increase on the authority contained in section 215(i) of the Act.

Pursuant to section 1617 of the Act, Federal SSI payment levels will also increase by 2.0 percent effective for payments made for January 2018 but paid on December 29, 2017.

*Computation*

Computation of the cost-of-living increase is based on an increase in a Consumer Price Index produced by the Bureau of Labor Statistics. At the time the Act was amended to provide cost-of-living increases, only one Consumer Price Index existed, namely the Consumer Price Index for Urban Wage Earners and Clerical Workers. Although the Bureau of Labor Statistics has since developed other consumer price indices, we follow precedent by continuing to use the Consumer Price Index for Urban Wage Earners and Clerical Workers. We refer to this index in the following paragraphs as the CPI.

Section 215(i)(1)(B) of the Act defines a “computation quarter” to be a third calendar quarter in which the average CPI exceeded the average CPI in the previous computation quarter. The last cost-of-living increase, effective for those eligible to receive title II benefits for December 2016, was based on the CPI increase from the third quarter of 2014 to the third quarter of 2016. Therefore, the last computation quarter is the third quarter of 2016. The law states that a cost-of-living increase for benefits is determined based on the percentage increase, if any, in the CPI from the last computation quarter to the third quarter of the current year. Therefore, we compute the increase in the CPI from the third quarter of 2016 to the third quarter of 2017.

Section 215(i)(1) of the Act states that the CPI for a cost-of-living computation quarter is the arithmetic mean of this index for the 3 months in that quarter. In accordance with 20 CFR 404.275, we round the arithmetic mean, if necessary, to the nearest 0.001. The CPI for each month in the quarter ending September 30, 2016, the last computation quarter, is: For July 2016, 234.771; for August 2016, 234.904; and for September 2016, 235.495. The arithmetic mean for the calendar quarter ending September 30, 2016 is 235.057. The CPI for each month in the quarter ending September 30, 2017, is: For July 2017, 238.617; for August 2017, 239.448; and for September 2017, 240.939. The arithmetic mean for the calendar quarter ending September 30, 2017 is 239.668. The CPI for the calendar quarter ending September 30, 2017, exceeds that for the calendar quarter ending September 30, 2016 by 2.0 percent (rounded to the nearest 0.1). Therefore, beginning December 2017 a cost-of-living benefit increase of 2.0 percent is effective for benefits under title II of the Act.

Section 215(i) also specifies that a benefit increase under title II, effective for December of any year, will be limited to the increase in the national average wage index for the prior year if the OASDI fund ratio for that year is below 20.0 percent. The OASDI fund ratio for a year is the ratio of the combined assets of the OASDI Trust

Funds at the beginning of that year to the combined expenditures of these funds during that year. For 2017, the OASDI fund ratio is assets of \$2,847,687 million divided by estimated expenditures of \$954027 million, or 298.5 percent. Because the 298.5 percent OASDI fund ratio exceeds 20.0 percent, the benefit increase for December 2017 is not limited.

**Program Amounts That Change Based on the Cost-of-Living Increase**

The following program amounts change based on the cost-of-living increase: (1) Title II benefits; (2) title XVI payments; (3) title VIII benefits; (4) the student earned income exclusion; (5) the fee for services performed by a representative payee; and (6) the appointed representative fee assessment.

*Title II Benefit Amounts*

In accordance with section 215(i) of the Act, for workers and family members for whom eligibility for benefits (that is, the worker's attainment of age 62, or disability or death before age 62) occurred before 2018, benefits will increase by 2.0 percent beginning with benefits for December 2017, which are payable in January 2018. For those first eligible after 2017, the 2.0 percent increase will not apply.

For eligibility after 1978, we determine benefits using a formula provided by the Social Security

Amendments of 1977 (Pub. L. 95–216), as described later in this notice.

For eligibility before 1979, we determine benefits by using a benefit table. The table is available on the Internet at [www.socialsecurity.gov/oact/ProgData/tableForm.html](http://www.socialsecurity.gov/oact/ProgData/tableForm.html) or by writing to: Social Security Administration, Office of Public Inquiries, Windsor Park Building, 6401 Security Boulevard, Baltimore, MD 21235.

Section 215(i)(2)(D) of the Act requires that, when we determine an increase in Social Security benefits, we will publish in the **Federal Register** a revision of the range of the PIAs and maximum family benefits based on the dollar amount and other provisions described in section 215(a)(1)(C)(i). We refer to these benefits as “special minimum” benefits. These benefits are payable to certain individuals with long periods of low earnings. To qualify for these benefits, an individual must have at least 11 years of coverage. To earn a year of coverage for purposes of the special minimum benefit, a person must earn at least a certain proportion of the old-law contribution and benefit base (described later in this notice). For years before 1991, the proportion is 25 percent; for years after 1990, it is 15 percent. In accordance with section 215(a)(1)(C)(i), the table below shows the revised range of PIAs and maximum family benefit amounts after the 2.0 percent benefit increase.

**SPECIAL MINIMUM PIAs AND MAXIMUM FAMILY BENEFITS PAYABLE FOR DECEMBER 2017**

Number of years of coverage	PIA	Maximum family benefit
11	\$40.80	\$62.10
12	83.30	126.10
13	125.90	190.10
14	168.30	253.60
15	210.50	317.10
16	253.30	381.20
17	295.80	445.40
18	338.30	508.80
19	380.80	572.70
20	423.50	636.00
21	466.00	700.40
22	508.20	764.00
23	551.50	828.80
24	593.90	892.00
25	636.00	955.30
26	679.30	1,020.10
27	721.30	1,083.70
28	763.80	1,147.20
29	806.40	1,211.50
30	848.80	1,274.60

*Title XVI Payment Amounts*

In accordance with section 1617 of the Act, maximum Federal SSI payments amounts for the aged, blind,

and disabled will increase by 2.0 percent effective January 2018. For 2017, we derived the monthly payment amounts for an eligible individual, an

eligible individual with an eligible spouse, and for an essential person—\$735, \$1,103, and \$368, respectively—from yearly, unrounded Federal SSI

payment amounts of \$8,830.84, \$13,244.80, and \$4,425.55. For 2018, these yearly unrounded amounts respectively increased by 2.0 percent to \$9,007.46, \$13,509.70, and \$4,514.06. We must round each of these resulting amounts, when not a multiple of \$12, to the next lower multiple of \$12. Therefore, the annual amounts, effective for 2018, are \$9,000, \$13,500, and \$4,512. Dividing the yearly amounts by 12 gives the respective monthly amounts for 2018—\$750, \$1,125, and \$376. For an eligible individual with an eligible spouse, we equally divide the amount payable between the two spouses.

#### *Title VIII Benefit Amount*

Title VIII of the Act provides for special benefits to certain World War II veterans who reside outside the United States. Section 805 of the Act provides that “[t]he benefit under this title payable to a qualified individual for any month shall be in an amount equal to 75 percent of the Federal benefit rate [the maximum amount for an eligible individual] under title XVI for the month, reduced by the amount of the qualified individual’s benefit income for the month.” Therefore, the monthly benefit for 2018 under this provision is 75 percent of \$750, or \$562.50.

#### *Student Earned Income Exclusion*

A blind or disabled child who is a student regularly attending school, college, university, or a course of vocational or technical training can have limited earnings that do not count against his or her SSI payments. The maximum amount of such income that we may exclude in 2017 is \$1,790 per month, but not more than \$7,200 in all of 2017. These amounts increase based on a formula set forth in regulation 20 CFR 416.1112.

To compute each of the monthly and yearly maximum amounts for 2018, we increase the unrounded amount for 2017 by the latest cost-of-living increase. If the amount so calculated is not a multiple of \$10, we round it to the nearest multiple of \$10. The unrounded monthly amount for 2017 is \$1,786.71. We increase this amount by 2.0 percent to \$1,822.44, which we then round to \$1,820. Similarly, we increase the unrounded yearly amount for 2017, \$7,202.19, by 2.0 percent to \$7,346.23 and round this to \$7,350. Therefore, the maximum amount of the income exclusion applicable to a student in 2018 is \$1,820 per month but not more than \$7,350 in all of 2018.

#### *Fee for Services Performed as a Representative Payee*

Sections 205(j)(4)(A)(i) and 1631(a)(2)(D)(i) of the Act permit a qualified organization to collect a monthly fee from a beneficiary for expenses incurred in providing services as the beneficiary’s representative payee. In 2017, the fee is limited to the lesser of: (1) 10 percent of the monthly benefit involved; or (2) \$41 each month (\$78 each month when the beneficiary is entitled to disability benefits and has an alcoholism or drug addiction condition that makes the individual incapable of managing such benefits). The dollar fee limits are subject to increase by the cost-of-living increase, with the resulting amounts rounded to the nearest whole dollar amount. Therefore, we increase the current amounts by 2.0 percent to \$42 and \$80 for 2018.

#### *Appointed Representative Fee Assessment*

Under sections 206(d) and 1631(d) of the Act, whenever we pay a fee to a representative such as an attorney, agent, or other person who represents claimants, we must impose on the representative an assessment to cover administrative costs. The assessment is no more than 6.3 percent of the representative’s authorized fee or, if lower, a dollar amount that is subject to increase by the cost-of-living increase. We derive the dollar limit for December 2017 by increasing the unrounded limit for December 2016, \$91.47, by 2.0 percent, which is \$93.30. We then round \$93.30 to the next lower multiple of \$1. The dollar limit effective for December 2017 is, therefore, \$93.

#### **National Average Wage Index for 2016** *Computation*

We determined the national average wage index for calendar year 2016 based on the 2015 national average wage index of \$48,098.63, published in the **Federal Register** on October 27, 2016 (81 FR 74859), and the percentage increase in average wages from 2015 to 2016, as measured by annual wage data. We tabulate the annual wage data, including contributions to deferred compensation plans, as required by section 209(k) of the Act. The average amounts of wages calculated from these data were \$46,119.78 for 2015 and \$46,662.59 for 2016. To determine the national average wage index for 2016 at a level consistent with the national average wage indexing series for 1951 through 1977 (published December 29, 1978, at 43 FR 61016), we multiply the 2015 national average wage index of \$48,098.63 by the percentage

increase in average wages from 2015 to 2016 (based on SSA-tabulated wage data) as follows. We round the result to the nearest cent.

#### *National Average Wage Index Amount*

Multiplying the national average wage index for 2015 (\$48,098.63) by the ratio of the average wage for 2016 (\$46,662.59) to that for 2015 (\$46,119.78) produces the 2016 index, \$48,664.73. The national average wage index for calendar year 2016 is about 1.18 percent higher than the 2015 index.

#### **Program Amounts That Change Based on the National Average Wage Index**

Under the Act, the following amounts change with annual changes in the national average wage index: (1) The OASDI contribution and benefit base; (2) the exempt amounts under the retirement earnings test; (3) the dollar amounts, or bend points, in the PIA formula; (4) the bend points in the maximum family benefit formula; (5) the earnings required to credit a worker with a quarter of coverage; (6) the old-law contribution and benefit base (as determined under section 230 of the Act as in effect before the 1977 amendments); (7) the substantial gainful activity (SGA) amount applicable to statutorily blind individuals; and (8) the coverage threshold for election officials and election workers. Additionally, under section 3121(x) of the Internal Revenue Code, the domestic employee coverage threshold is based on changes in the national average wage index.

Two amounts also increase under regulatory requirements—the SGA amount applicable to non-blind disabled persons, and the monthly earnings threshold that establishes a month as part of a trial work period for disabled beneficiaries.

#### **OASDI Contribution and Benefit Base** *General*

The OASDI contribution and benefit base is \$128,700 for remuneration paid in 2018 and self-employment income earned in taxable years beginning in 2018. The OASDI contribution and benefit base serves as the maximum annual earnings on which OASDI taxes are paid. It is also the maximum annual earnings used in determining a person’s OASDI benefits.

#### *Computation*

Section 230(b) of the Act provides the formula used to determine the OASDI contribution and benefit base. Under the formula, the base for 2018 is the larger of: (1) The 1994 base of \$60,600 multiplied by the ratio of the national average wage index for 2016 to that for



1992; or (2) the current base (\$127,200). If the resulting amount is not a multiple of \$300, we round it to the nearest multiple of \$300.

#### *OASDI Contribution and Benefit Base Amount*

Multiplying the 1994 OASDI contribution and benefit base (\$60,600) by the ratio of the national average wage index for 2016 (\$48,664.73 as determined above) to that for 1992 (\$22,935.42) produces \$128,582.02. We round this amount to \$128,700. Because \$128,700 exceeds the current base amount of \$127,200, the OASDI contribution and benefit base is \$128,700 for 2018.

#### **Retirement Earnings Test Exempt Amounts**

##### *General*

We withhold Social Security benefits when a beneficiary under the NRA has earnings over the applicable retirement earnings test exempt amount. The NRA is the age when retirement benefits (before rounding) are equal to the PIA. The NRA is age 66 for those born in 1943–54, and it gradually increases to age 67 for those born in 1960 or later. A higher exempt amount applies in the year in which a person attains NRA, but only for earnings in months before such attainment. A lower exempt amount applies at all other ages below NRA. Section 203(f)(8)(B) of the Act provides formulas for determining the monthly exempt amounts. The annual exempt amounts are exactly 12 times the monthly amounts.

For beneficiaries who attain NRA in the year, we withhold \$1 in benefits for every \$3 of earnings over the annual exempt amount for months before NRA. For all other beneficiaries under NRA, we withhold \$1 in benefits for every \$2 of earnings over the annual exempt amount.

##### *Computation*

Under the formula that applies to beneficiaries attaining NRA after 2018, the lower monthly exempt amount for 2018 is the larger of: (1) The 1994 monthly exempt amount multiplied by the ratio of the national average wage index for 2016 to that for 1992; or (2) the 2017 monthly exempt amount (\$1,410). If the resulting amount is not a multiple of \$10, we round it to the nearest multiple of \$10.

Under the formula that applies to beneficiaries attaining NRA in 2018, the higher monthly exempt amount for 2018 is the larger of: (1) The 2002 monthly exempt amount multiplied by the ratio of the national average wage index for

2016 to that for 2000; or (2) the 2017 monthly exempt amount (\$3,740). If the resulting amount is not a multiple of \$10, we round it to the nearest multiple of \$10.

##### *Lower Exempt Amount*

Multiplying the 1994 retirement earnings test monthly exempt amount of \$670 by the ratio of the national average wage index for 2016 (\$48,664.73) to that for 1992 (\$22,935.42) produces \$1,421.62. We round this to \$1,420. Because \$1,420 exceeds the current exempt amount of \$1,410, the lower retirement earnings test monthly exempt amount is \$1,420 for 2018. The lower annual exempt amount is \$17,040 under the retirement earnings test.

##### *Higher Exempt Amount*

Multiplying the 2002 retirement earnings test monthly exempt amount of \$2,500 by the ratio of the national average wage index for 2016 (\$48,664.73) to that for 2000 (\$32,154.82) produces \$3,783.63. We round this to \$3,780. Because \$3,780 exceeds the current exempt amount of \$3,740, the higher retirement earnings test monthly exempt amount is \$3,780 for 2018. The higher annual exempt amount is \$45,360 under the retirement earnings test.

#### **Primary Insurance Amount Formula**

##### *General*

The Social Security Amendments of 1977 provided a method for computing benefits that generally applies when a worker first becomes eligible for benefits after 1978. This method uses the worker's average indexed monthly earnings (AIME) to compute the PIA. We adjust the formula each year to reflect changes in general wage levels, as measured by the national average wage index.

We also adjust, or index, a worker's earnings to reflect the change in the general wage levels that occurred during the worker's years of employment. Such indexing ensures that a worker's future benefit level will reflect the general rise in the standard of living that will occur during his or her working lifetime. To compute the AIME, we first determine the required number of years of earnings. We then select the number of years with the highest indexed earnings, add the indexed earnings for those years, and divide the total amount by the total number of months in those years. We then round the resulting average amount down to the next lower dollar amount. The result is the AIME.

#### Computing the PIA

The PIA is the sum of three separate percentages of portions of the AIME. In 1979 (the first year the formula was in effect), these portions were the first \$180, the amount between \$180 and \$1,085, and the amount over \$1,085. We call the dollar amounts in the formula governing the portions of the AIME the "bend points" of the formula. Therefore, the bend points for 1979 were \$180 and \$1,085.

To obtain the bend points for 2018, we multiply each of the 1979 bend-point amounts by the ratio of the national average wage index for 2016 to that average for 1977. We then round these results to the nearest dollar. Multiplying the 1979 amounts of \$180 and \$1,085 by the ratio of the national average wage index for 2016 (\$48,664.73) to that for 1977 (\$9,779.44) produces the amounts of \$895.72 and \$5,399.21. We round these to \$896 and \$5,399. Therefore, the portions of the AIME to be used in 2018 are the first \$896, the amount between \$896 and \$5,399, and the amount over \$5,399.

Therefore, for individuals who first become eligible for old-age insurance benefits or disability insurance benefits in 2018, or who die in 2018 before becoming eligible for benefits, their PIA will be the sum of:

- (a) 90 percent of the first \$896 of their AIME, plus
- (b) 32 percent of their AIME over \$896 and through \$5,399, plus
- (c) 15 percent of their AIME over \$5,399.

We round this amount to the next lower multiple of \$0.10 if it is not already a multiple of \$0.10. This formula and the rounding adjustment are stated in section 215(a) of the Act.

#### **Maximum Benefits Payable to a Family**

##### *General*

The 1977 amendments continued the policy of limiting the total monthly benefits that a worker's family may receive based on the worker's PIA. Those amendments also continued the relationship between maximum family benefits and PIAs but changed the method of computing the maximum benefits that may be paid to a worker's family. The Social Security Disability Amendments of 1980 (Pub. L. 96–265) established a formula for computing the maximum benefits payable to the family of a disabled worker. This formula applies to the family benefits of workers who first become entitled to disability insurance benefits after June 30, 1980, and who first become eligible for these benefits after 1978. For disabled workers initially entitled to disability benefits

before July 1980 or whose disability began before 1979, we compute the family maximum payable the same as the old-age and survivor family maximum.

#### *Computing the Old-Age and Survivor Family Maximum*

The formula used to compute the family maximum is similar to that used to compute the PIA. It involves computing the sum of four separate percentages of portions of the worker's PIA. In 1979, these portions were the first \$230, the amount between \$230 and \$332, the amount between \$332 and \$433, and the amount over \$433. We refer to such dollar amounts in the formula as the "bend points" of the family-maximum formula.

To obtain the bend points for 2018, we multiply each of the 1979 bend-point amounts by the ratio of the national average wage index for 2016 to that average for 1977. Then we round this amount to the nearest dollar. Multiplying the amounts of \$230, \$332, and \$433 by the ratio of the national average wage index for 2016 (\$48,664.73) to that for 1977 (\$9,779.44) produces the amounts of \$1,144.53, \$1,652.11, and \$2,154.71. We round these amounts to \$1,145, \$1,652, and \$2,155. Therefore, the portions of the PIAs to be used in 2018 are the first \$1,145, the amount between \$1,145 and \$1,652, the amount between \$1,652 and \$2,155, and the amount over \$2,155.

Thus, for the family of a worker who becomes age 62 or dies in 2018 before age 62, we will compute the total benefits payable to them so that it does not exceed:

- (a) 150 percent of the first \$1,145 of the worker's PIA, plus
- (b) 272 percent of the worker's PIA over \$1,145 through \$1,652, plus
- (c) 134 percent of the worker's PIA over \$1,652 through \$2,155, plus
- (d) 175 percent of the worker's PIA over \$2,155.

We then round this amount to the next lower multiple of \$0.10 if it is not already a multiple of \$0.10. This formula and the rounding adjustment are stated in section 203(a) of the Act.

#### **Quarter of Coverage Amount**

##### *General*

The earnings required for a quarter of coverage in 2018 is \$1,320. A quarter of coverage is the basic unit for determining if a worker is insured under the Social Security program. For years before 1978, we generally credited an individual with a quarter of coverage for each quarter in which wages of \$50 or more were paid, or with 4 quarters of

coverage for every taxable year in which \$400 or more of self-employment income was earned. Beginning in 1978, employers generally report wages yearly instead of quarterly. With the change to yearly reporting, section 352(b) of the Social Security Amendments of 1977 amended section 213(d) of the Act to provide that a quarter of coverage would be credited for each \$250 of an individual's total wages and self-employment income for calendar year 1978, up to a maximum of 4 quarters of coverage for the year. The amendment also provided a formula for years after 1978.

##### *Computation*

Under the prescribed formula, the quarter of coverage amount for 2018 is the larger of: (1) The 1978 amount of \$250 multiplied by the ratio of the national average wage index for 2016 to that for 1976; or (2) the current amount of \$1,300. Section 213(d) provides that if the resulting amount is not a multiple of \$10, we round it to the nearest multiple of \$10.

##### *Quarter of Coverage Amount*

Multiplying the 1978 quarter of coverage amount (\$250) by the ratio of the national average wage index for 2016 (\$48,664.73) to that for 1976 (\$9,226.48) produces \$1,318.62. We then round this amount to \$1,320. Because \$1,320 exceeds the current amount of \$1,300, the quarter of coverage amount is \$1,320 for 2018.

#### **Old-Law Contribution and Benefit Base**

##### *General*

The old-law contribution and benefit base for 2018 is \$95,400. This base would have been effective under the Act without the enactment of the 1977 amendments.

The old-law contribution and benefit base is used by:

- (a) The Railroad Retirement program to determine certain tax liabilities and tier II benefits payable under that program to supplement the tier I payments that correspond to basic Social Security benefits,
- (b) the Pension Benefit Guaranty Corporation to determine the maximum amount of pension guaranteed under the Employee Retirement Income Security Act (section 230(d) of the Act),
- (c) Social Security to determine a year of coverage in computing the special minimum benefit, as described earlier, and
- (d) Social Security to determine a year of coverage (acquired whenever earnings equal or exceed 25 percent of the old-law base for this purpose only)

in computing benefits for persons who are also eligible to receive pensions based on employment not covered under section 210 of the Act.

##### *Computation*

The old-law contribution and benefit base is the larger of: (1) The 1994 old-law base (\$45,000) multiplied by the ratio of the national average wage index for 2016 to that for 1992; or (2) the current old-law base (\$94,500). If the resulting amount is not a multiple of \$300, we round it to the nearest multiple of \$300.

##### *Old-Law Contribution and Benefit Base Amount*

Multiplying the 1994 old-law contribution and benefit base (\$45,000) by the ratio of the national average wage index for 2016 (\$48,664.73) to that for 1992 (\$22,935.42) produces \$95,481.70. We round this amount to \$95,400. Because \$95,400 exceeds the current amount of \$94,500, the old-law contribution and benefit base is \$95,400 for 2018.

#### **Substantial Gainful Activity Amounts**

##### *General*

A finding of disability under titles II and XVI of the Act requires that a person, except for a title XVI disabled child, be unable to engage in SGA. A person who is earning more than a certain monthly amount is ordinarily considered to be engaging in SGA. The monthly earnings considered as SGA depends on the nature of a person's disability. Section 223(d)(4)(A) of the Act specifies the SGA amount for statutorily blind individuals under title II while our regulations (20 CFR 404.1574 and 416.974) specify the SGA amount for non-blind individuals.

##### *Computation*

The monthly SGA amount for statutorily blind individuals under title II for 2018 is the larger of: (1) The amount for 1994 multiplied by the ratio of the national average wage index for 2016 to that for 1992; or (2) the amount for 2017. The monthly SGA amount for non-blind disabled individuals for 2018 is the larger of: (1) The amount for 2000 multiplied by the ratio of the national average wage index for 2016 to that for 1998; or (2) the amount for 2017. In either case, if the resulting amount is not a multiple of \$10, we round it to the nearest multiple of \$10.

##### *SGA Amount for Statutorily Blind Individuals*

Multiplying the 1994 monthly SGA amount for statutorily blind individuals (\$930) by the ratio of the national

average wage index for 2016 (\$48,664.73) to that for 1992 (\$22,935.42) produces \$1,973.29. We then round this amount to \$1,970. Because \$1,970 exceeds the current amount of \$1,950, the monthly SGA amount for statutorily blind individuals is \$1,970 for 2018.

#### **SGA Amount for Non-Blind Disabled Individuals**

Multiplying the 2000 monthly SGA amount for non-blind individuals (\$700) by the ratio of the national average wage index for 2016 (\$48,664.73) to that for 1998 (\$28,861.44) produces \$1,180.31. We then round this amount to \$1,180. Because \$1,180 exceeds the current amount of \$1,170, the monthly SGA amount for non-blind disabled individuals is \$1,180 for 2018.

#### **Trial Work Period Earnings Threshold**

##### *General*

During a trial work period of 9 months in a rolling 60-month period, a beneficiary receiving Social Security disability benefits may test his or her ability to work and still receive monthly benefit payments. To be considered a trial work period month, earnings must be over a certain level. In 2018, any month in which earnings exceed \$850 is considered a month of services for an individual's trial work period.

##### *Computation*

The method used to determine the new amount is set forth in our regulations at 20 CFR 404.1592(b). Monthly earnings in 2018, used to determine whether a month is part of a trial work period, is the larger of: (1) The amount for 2001 (\$530) multiplied by the ratio of the national average wage index for 2016 to that for 1999; or (2) the amount for 2017. If the amount so calculated is not a multiple of \$10, we round it to the nearest multiple of \$10.

##### *Trial Work Period Earnings Threshold Amount*

Multiplying the 2001 monthly earnings threshold (\$530) by the ratio of the national average wage index for 2016 (\$48,664.73) to that for 1999 (\$30,469.84) produces \$846.49. We then round this amount to \$850. Because \$850 exceeds the current amount of \$840, the monthly earnings threshold is \$850 for 2018.

#### **Domestic Employee Coverage Threshold**

##### *General*

The minimum amount a domestic worker must earn so that such earnings are covered under Social Security or

Medicare is the domestic employee coverage threshold. For 2018, this threshold is \$2,100. Section 3121(x) of the Internal Revenue Code provides the formula for increasing the threshold.

##### *Computation*

Under the formula, the domestic employee coverage threshold for 2018 is equal to the 1995 amount of \$1,000 multiplied by the ratio of the national average wage index for 2016 to that for 1993. If the resulting amount is not a multiple of \$100, we round it to the next lower multiple of \$100.

##### *Domestic Employee Coverage Threshold Amount*

Multiplying the 1995 domestic employee coverage threshold (\$1,000) by the ratio of the national average wage index for 2016 (\$48,664.73) to that for 1993 (\$23,132.67) produces \$2,103.72. We then round this amount to \$2,100. Therefore, the domestic employee coverage threshold amount is \$2,100 for 2018.

#### **Election Official and Election Worker Coverage Threshold**

##### *General*

The minimum amount an election official and election worker must earn so the earnings are covered under Social Security or Medicare is the election official and election worker coverage threshold. For 2018, this threshold is \$1,800. Section 218(c)(8)(B) of the Act provides the formula for increasing the threshold.

##### *Computation*

Under the formula, the election official and election worker coverage threshold for 2018 is equal to the 1999 amount of \$1,000 multiplied by the ratio of the national average wage index for 2016 to that for 1997. If the amount we determine is not a multiple of \$100, it we round it to the nearest multiple of \$100.

##### *Election Official and Election Worker Coverage Threshold Amount*

Multiplying the 1999 coverage threshold amount (\$1,000) by the ratio of the national average wage index for 2016 (\$48,664.73) to that for 1997 (\$27,426.00) produces \$1,774.40. We then round this amount to \$1,800. Therefore, the election official and election worker coverage threshold amount is \$1,800 for 2018.

(Catalog of Federal Domestic Assistance: Program Nos. 96.001 Social Security-Disability Insurance; 96.002 Social Security-Retirement Insurance; 96.004 Social Security-

Survivors Insurance; 96.006 Supplemental Security Income)

**Nancy A. Berryhill,**

*Acting Commissioner of Social Security.*

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## **SOCIAL SECURITY ADMINISTRATION**

[Docket No. SSA-2017-0032]

### **Social Security Disability Program Demonstration Project: Promoting Opportunity Demonstration (POD)**

**AGENCY:** Social Security Administration.

**ACTION:** Notice.

**SUMMARY:** We are announcing a demonstration project for the Social Security disability program under title II of the Social Security Act (Act). Under this project, we will modify program rules applied to beneficiaries who work and receive title II disability benefits. We are required to conduct the Promoting Opportunity Demonstration (POD), in compliance with section 823 of the Bipartisan Budget Act (BBA) of 2015.

In this project, we will test simplified work incentives and use a benefit offset based on earnings as an alternative to rules we currently apply to title II disability beneficiaries who work. Under the benefit offset, we will reduce title II disability benefits by \$1 for every \$2 that a beneficiary earns above a certain threshold.

We will select beneficiaries and offer them the opportunity to volunteer for the project. When we make the selection, we will include beneficiaries who receive title II disability benefits only as well as beneficiaries who receive both title II disability benefits and Supplemental Security Income (SSI) based on disability or blindness under title XVI of the Act. We are modifying rules that apply to the title II program and the Ticket to Work program under title XI. We will continue to apply the usual SSI program rules for participants who receive SSI payments in addition to title II disability benefits.

**DATES:** We plan to begin this project in November 2017 and end it in June 2021.

**FOR FURTHER INFORMATION CONTACT:** Jeffrey Hemmeter, Office of Retirement and Disability Policy, Social Security Administration, 6401 Security Boulevard, Baltimore, MD 21235, (410) 597-1815.

**SUPPLEMENTARY INFORMATION:**

## Background

We are required to conduct this demonstration under Social Security Act section 234(f).<sup>1</sup>

In this section, we broadly outline our usual rules for paying disability benefits, how those benefits may terminate, and the work incentives that affect payments. Then, we discuss the modified rules we will apply under the demonstration project.

### Who may receive disability benefits?

Under title II of the Act, we pay the following benefits to persons who meet the Act's definition of disability:

- Disability insurance benefits for a worker insured under the Act;
- Widow's and widower's insurance benefits based on disability for a widow, widower, or surviving divorced spouse of an insured worker; and
- Childhood disability benefits for a child of an insured worker who is entitled to retirement or disability benefits or has died.

In the rest of this notice, we refer to these benefits collectively as Social Security Disability Insurance (SSDI) benefits and refer to the beneficiaries who receive them as SSDI beneficiaries.

Under title XVI of the Act, we pay SSI to persons who are aged, blind, or disabled, and who also have limited income and resources. An SSDI beneficiary with limited income and resources may qualify for SSI payments.

A person must meet the definition of disability under title II of the Act in order to be eligible for SSDI benefits. A person is disabled under title II if the person has a physical or mental impairment or combination of impairments that has lasted or is expected to last for at least 12 months or can be expected to result in death and that prevents the person from doing any substantial gainful activity (SGA).<sup>2</sup> This definition also applies under title XVI of the Act for persons age 18 or older who receive payments based on disability.<sup>3</sup>

### Continuing Disability Reviews

We periodically reevaluate a disability beneficiary's impairment(s) to determine whether the person continues to be under a disability.<sup>4</sup> We call this evaluation a continuing disability review (CDR). We conduct CDRs at regularly scheduled intervals. We may begin a CDR at a time other than a

regular interval if circumstances warrant. There are two main types of CDRs: (1) Medical CDRs, in which we examine medical improvement, if any, and (2) work CDRs, in which we examine earnings. If we determine in a CDR that the individual is no longer under a disability, we will stop benefits in most cases.

### How do we help disability beneficiaries to return to work?

We offer certain work incentives to encourage disability beneficiaries to attempt to work. We also administer the Ticket to Work program and other employment support programs to help disability beneficiaries become as self-sufficient as possible through work and to promote their economic independence. Under certain provisions of the Act, such as the title II provision for a trial work period, beneficiaries may test their ability to work while keeping their cash and medical benefits.

### The Trial Work Period

We provide a trial work period (TWP) that allows SSDI beneficiaries<sup>5</sup> to test their ability to work for at least nine months and not have that work considered for disability purposes during that period.<sup>6</sup> During this period, beneficiaries continue to receive full SSDI benefits, regardless of how much money they earn, as long as they report the work activity and continue to have a disabling impairment. The TWP ends when a beneficiary has completed nine trial work months (which do not have to be consecutive) within a rolling 60-month period. (The TWP may end earlier if we determine that the beneficiary's disability ended based on medical factors.)<sup>7</sup> We count as a trial work month any month in which a beneficiary's gross earnings are above a specified amount (\$840 a month in 2017) or in which the beneficiary works more than 80 hours in self-employment.<sup>8</sup>

### What happens if a beneficiary works after the TWP?

If a beneficiary works after the TWP ends, we review the beneficiary's work and earnings to decide if the work is SGA. Work is "substantial" if it involves doing significant physical or mental activities. Work activity may be

"substantial" even if it is performed on a part-time basis. Work activity is "gainful" if it is performed for pay or profit or is the kind of work usually performed for pay or profit, whether or not a profit is realized.<sup>9</sup>

In deciding whether work is SGA, we consider the nature of the person's job duties, the skills and experience the person needs to do the job, and how much the person actually earned.<sup>10</sup> Usually, we consider a person's work to be substantial and gainful if monthly earnings, after allowable deductions, average more than the monthly SGA amount (in 2017, \$1,170 a month for a person who is not blind, or \$1,950 a month for a person who is blind). If the person is self-employed, we may give more consideration to the kind and value of the work, including the person's part in the management of the business, than to the person's income alone.<sup>11</sup>

When we decide whether work is SGA and figure earnings, we deduct the reasonable costs of certain "impairment-related work expenses" (IRWEs), that is, items and services that enable a person to work.<sup>12</sup> We will decide that an SSDI beneficiary's disability has ended in the first month the person performs SGA after completion of the TWP.<sup>13</sup> We pay benefits for the month disability ended and the following two months, no matter how much the beneficiary earns.<sup>14</sup> We call this three-month period the "grace period."<sup>15</sup>

### The Reentitlement Period

Immediately after an SSDI beneficiary completes the TWP, the reentitlement period begins. The reentitlement period is also called the extended period of eligibility. The reentitlement period typically lasts for 36 months, but it may end earlier if we determine that the beneficiary ceases to have a disabling impairment for medical reasons.<sup>16</sup> The reentitlement period allows an SSDI beneficiary with a disabling impairment an additional period to test the ability to work.<sup>17</sup> If the beneficiary performs SGA during the reentitlement period, we will determine that the beneficiary's disability has ended, and we will stop

<sup>9</sup> 20 CFR 404.1572.

<sup>10</sup> 20 CFR 404.1571–404.1576.

<sup>11</sup> 20 CFR 404.1575.

<sup>12</sup> Section 223(d)(4)(A) of the Act; 20 CFR 404.1576.

<sup>13</sup> 20 CFR 404.1592a(a)(1) and 404.1594(d)(5).

<sup>14</sup> 20 CFR 404.401a and 404.1592a(a)(2).

<sup>15</sup> Program Operations Manual System, DI 13010.210.

<sup>16</sup> 20 CFR 404.1592a(b).

<sup>17</sup> Sections 202(d)(1), (d)(6), (e)(1), and (f)(1) and 223(a)(1) of the Act; 20 CFR 404.316(d), 404.337(d), 404.352(e), 404.401a, and 404.1592a(a).

<sup>1</sup> Section 823 of the Bipartisan Budget Act of 2015, Public Law 114–74, added this requirement.

<sup>2</sup> Section 223(d)(1)(A) of the Act; 20 CFR 404.1505(a).

<sup>3</sup> Section 1614(a)(3)(A) of the Act; 20 CFR 416.905(a).

<sup>4</sup> Section 221(i), (m) of the Act; 20 CFR 404.1589, 404.1590, and 404.1594.

<sup>5</sup> The SSI program under title XVI of the Act does not provide a TWP. The performance of SGA by a recipient of SSI payments based on disability or blindness does not affect the recipient's disability or blindness status under the SSI program. Section 1619 of the Act; 20 CFR 416.260–416.269.

<sup>6</sup> Sections 222(c) and 223(d)(4) of the Act; 20 CFR 404.1592.

<sup>7</sup> *Id.*

<sup>8</sup> 20 CFR 404.1592(b).

benefits, subject to the grace period. After the grace period, we will not pay benefits to the disability beneficiary or anyone receiving benefits on the earnings record for any month during the reentitlement period in which the disability beneficiary performs SGA.<sup>18</sup> However, if the beneficiary does not perform SGA in a subsequent month in the reentitlement period, we will pay benefits again. The beneficiary does not need to file a new application for the benefits to start again.

### Expedited Reinstatement

Expedited reinstatement is an employment support available under both the SSDI and SSI programs.<sup>19</sup> We provide expedited reinstatement for 60 months after we terminate entitlement to disability benefits due to work activity.<sup>20</sup> Rather than filing a new application for a new period of entitlement, individuals can, during this 60-month period, request reinstatement of their prior entitlement to disability benefits. An individual may receive up to six consecutive months of provisional cash benefits and Medicare while we make a determination about whether the individual's prior entitlement will be reinstated.<sup>21</sup> The provisional cash benefits may be equal to the last monthly benefit payable during the prior entitlement. After we approve reinstatement, the initial reinstatement period (IRP) begins.<sup>22</sup> During the IRP, the TWP and reentitlement provisions discussed above do not apply; if a beneficiary performs SGA in a month during the IRP, we will not pay benefits for that month. The IRP ends after a beneficiary has 24 months of payable benefits; the months do not have to be consecutive. At that point, the TWP and reentitlement provisions discussed above apply to the beneficiary.

### Ticket to Work Program

In addition to the work incentives policies discussed above, we also administer the Ticket to Work program, which can help disability beneficiaries access employment services, vocational rehabilitation services, and other support services.<sup>23</sup> A beneficiary participates in the program by assigning a ticket to a qualified provider, which may be an employment network or a

State vocational rehabilitation agency.<sup>24</sup> We pay these providers for certain outcomes achieved by the beneficiary.<sup>25</sup> We may pay an outcome payment for each month for which SSDI benefits and Federal SSI payments are not payable to the beneficiary because of the performance of SGA or by reason of earnings from work activity.<sup>26</sup> If the beneficiary is an SSDI-only or concurrent SSDI/SSI beneficiary, we may make up to 36 outcome payments.<sup>27</sup>

### The Promoting Opportunity Demonstration (POD)

#### Description of the POD

Under the POD, we will modify title II disability program rules that we currently apply to SSDI beneficiaries who work. We will test alternate rules to determine their effectiveness in encouraging SSDI beneficiaries to return to work or increase their earnings. We will test simplified work incentives and use a monthly benefit offset based on earnings. Under the benefit offset, we will reduce SSDI benefits by \$1 for every \$2 of a beneficiary's earnings that are above a certain threshold. The POD threshold is equal to the greater of (1) the applicable monthly TWP amount for the calendar year or (2) itemized IRWEs up to the SGA amount for the calendar year.

We have contracted with Abt Associates to implement the POD and Mathematica Policy Research to conduct evaluation activities. We will evaluate the impact of the benefit offset on work activity, earnings, and continued receipt of cash benefits.

#### Where will we conduct the POD?

We expect to conduct this project in eight sites across the country:

- Alabama (all counties);
- California (Los Angeles, Orange, and San Diego counties);
- Connecticut (all counties);
- Maryland (Anne Arundel, Baltimore, Harford, Howard, Montgomery, and Prince George's counties; Baltimore City);
- Michigan (Barry, Berrien, Branch, Calhoun, Cass, Kalamazoo, Kent, St. Joseph, and Van Buren counties);
- Nebraska (Adams, Buffalo, Douglas, Hall, Lancaster, and Sarpy counties);
- Texas (Bexar, Dallas, and Tarrant counties); and

- Vermont (all counties).

Abt Associates is subcontracting with the State vocational rehabilitation agencies or Work Incentive Planning and Assistance providers in each site to work directly with the beneficiaries in this project.

#### Who is eligible to participate in the POD?

To be eligible to participate in the project, a beneficiary must:

- Be at least age 20 and be under age 62 throughout the project;
- Be entitled to title II benefits based on disability as the insured worker<sup>28</sup> only;
- Receive title II disability cash benefits, unless we are not paying cash benefits because the beneficiary is engaging in SGA after the grace period and during the reentitlement period;
- Reside in one of the eight sites for the project, according to our records; and
- Not be a prior or current treatment or control group participant in any of our other demonstration projects.

#### How will we select participants and assign them to control or treatment groups?

We will select potential participants for the POD from a pool of beneficiaries who meet the requirements for participation described above. We expect to recruit about 15,000 beneficiaries to volunteer to participate in the POD. We will randomly assign the beneficiaries who have agreed to participate in the POD to a control group or one of two treatment groups, as described below.

- Control Group—We will assign approximately 5,000 SSDI beneficiaries to this group, which will continue to be subject to our usual program rules. We will not test any alternate rules with this group.
- Treatment Group 1—We will assign approximately 5,000 SSDI beneficiaries to this group, which will be eligible for the benefit offset. For any month the beneficiary's SSDI benefits are reduced to zero under the offset, benefits are suspended for that month. The beneficiary remains eligible for benefits for months that the offset does not reduce benefits to zero.
- Treatment Group 2—We will assign approximately 5,000 SSDI beneficiaries to this group, which will be eligible for the benefit offset. If a beneficiary in this group has the SSDI benefit reduced to zero under the offset for 12 consecutive

<sup>18</sup> Section 223(e) of the Act; 20 CFR 404.401a and 404.1592a(a)(2).

<sup>19</sup> 20 CFR 404.1592c.

<sup>20</sup> Section 223(i) of the Act; 20 CFR 404.1592b–404.1592f.

<sup>21</sup> Section 223(i)(7) of the Act; 20 CFR 404.1592e.

<sup>22</sup> Section 223(i)(6) of the Act; 20 CFR 404.1592f.

<sup>23</sup> Section 1148 of the Act; 20 CFR part 411.

<sup>24</sup> Section 1148(c) and (f) of the Act; 20 CFR 411.300–411.435.

<sup>25</sup> Section 1148(h) of the Act; 20 CFR part 411, subpart H.

<sup>26</sup> Section 1148(h) of the Act; 20 CFR 411.500, 411.525, and 411.575.

<sup>27</sup> 20 CFR 411.500 and 411.525.

<sup>28</sup> Individuals receiving widow's or widower's insurance benefits or childhood disability benefits based on someone else's status as an insured worker at the time of enrollment are not eligible.

months, we will terminate the beneficiary's entitlement to SSDI.

#### *How will we conduct the POD?*

The evaluation contractor, Mathematica Policy Research, will conduct outreach through mailings and phone calls to recruit and enroll beneficiaries into the POD, and randomly assign participants into the control and treatment groups. Beneficiaries we recruit and who wish to participate will sign a consent form to indicate their agreement to participate before being randomly assigned to one of the three groups described above. All enrolled beneficiaries can withdraw from the project at any time. Beneficiaries randomly assigned to the control group will receive a notice informing them of their assignment and that the usual program rules apply. Beneficiaries randomly assigned to the treatment groups will receive a notice informing them of their assignment and that alternate program rules will apply for earnings. The notice will provide contact information for Abt Associates, which will be beneficiaries' central point of contact for the POD.

The notice will also inform beneficiaries of the POD-related benefits counseling available to all treatment group members. Each site will have benefits counselors dedicated to the project who can help beneficiaries understand the alternate rules under the POD and how the offset will affect their SSDI benefit.

Participation in the POD is voluntary, and a beneficiary may withdraw the consent to participate in the POD at any time in writing. A beneficiary who wishes to withdraw consent will inform Abt Associates in writing and be offered counseling on withdrawing from the demonstration and returning to usual rules. A beneficiary in a treatment group who withdraws consent will no longer be eligible for the alternate program rules or any project services available under the POD, but will have the option to continue to participate in evaluation activities, such as follow-up surveys. If a beneficiary chooses not to participate in the evaluation activities, we will continue to track the beneficiary for the project evaluation using program data. We will apply our usual program rules to the beneficiary beginning with the month that withdrawal from the project becomes effective. We will apply our usual title II disability program rules for all participants after the end of the project, beginning July 2021.

#### *What provisions of the Act and regulations are we waiving to provide alternate rules under the POD?*

##### Alternate Title II Program Rules

The following alternate program rules will apply to an SSDI beneficiary assigned to a treatment group during participation in the POD:

- Eligibility for the benefit offset will begin after random assignment to a treatment group and end at the close of the project in June 2021;
- Payment of SSDI benefits will be subject to reduction, potentially to zero, under the benefit offset;
- Payment of benefits to any other person entitled to benefits on the earnings record of the SSDI beneficiary will continue for any month for which the beneficiary's SSDI benefit is partially reduced under the benefit offset and will stop for months for which the SSDI benefit is reduced to zero under the offset;
- For months that SSDI benefits are reduced to zero under the offset, benefits are suspended for participants in both treatment groups. If the participants' earnings decrease in a subsequent month such that the offset does not reduce the SSDI benefit to zero, the beneficiary will again receive a benefit, subject to the offset. If a participant in treatment group 2 has the SSDI benefit reduced to zero for 12 consecutive months, we will terminate entitlement to benefits;
- The TWP will not apply to the participant;
- The reentitlement period will not apply to the participant;
- If a participant has entitlement reinstated under expedited reinstatement, the IRP will not apply to the participant;
- If a participant was eligible for Medicare Part A coverage because of entitlement to SSDI and the SSDI entitlement terminates as a result of the POD's benefit offset, the participant will remain eligible for Medicare Part A coverage for 93 additional months provided that the person continues to have the same disabling impairment(s) that provided the basis for the prior SSDI entitlement and meets the other SSDI entitlement requirements;
- No work CDRs will be initiated or completed during the POD participation;
- We will continue to pay outcome payments to qualified providers under the Ticket to Work program for participants who earn above SGA, whether or not their SSDI benefit is reduced to zero; and

- Our usual program rules will apply beginning with the month after participation in the POD ends.

Applying these alternate rules involves waiving or altering certain provisions included in sections 222(c); 223(a)(1), (d)(4), (e), and (i); and 1148(h) of the Act and 20 CFR 404.316(d), 404.325, 404.401a, 404.1571 through 404.1576, 404.1590, 404.1592, 404.1592a, 404.1592f, 404.1594, 411.500(b)–(e), 411.525(a)(1)(i), and 411.575(b)(1)(i)(A).

#### *When will a participant in one of the treatment groups be eligible for the benefit offset?*

A beneficiary who is in a treatment group will be eligible for the benefit offset after random assignment and should begin to report earnings to Abt Associates the month after random assignment. Thus, if random assignment is in November, the beneficiary should report November earnings and IRWEs in December, and the benefit offset, if any, will begin with the December benefit, which is paid in January. Participants should report earnings and IRWEs information to the POD through June 2021.

#### *How will we apply the benefit offset?*

We will apply the benefit offset on a monthly basis to reduce SSDI benefits based on a beneficiary's report of monthly earnings and IRWEs. Participants who report their earnings and IRWEs information for the prior month on time in the current month will have the benefit offset calculated into the following month's benefit. For example, for a participant who reports April 2018 earnings and IRWEs in May 2018, the offset will be calculated in the May 2018 benefit, which is paid in June 2018.

In the example below, we show how we will calculate the amount by which monthly SSDI benefit payments will be reduced under the offset for a beneficiary whose earnings exceed the POD threshold. In the example, we use the POD threshold that would apply in 2017.

*Example:* A beneficiary reports monthly earnings of \$1,040. The POD threshold is \$840. The reported monthly earnings exceed the threshold by \$200. We will reduce the beneficiary's SSDI benefit payment by \$100. The calculations for this example are as follows:

First, we calculate the monthly earnings that exceed the POD threshold.

\$1,040 (monthly earnings report)	
– \$840 (2017 POD threshold)	
\$200	

\$200

Second, we calculate the \$1 for \$2 benefit offset amount by dividing the amount of earnings that exceeds the POD threshold by 2.

$\$200 \div 2 = \$100$  (monthly \$1 for \$2 benefit offset amount)

For the purposes of the POD, we will round the monthly benefit offset amount resulting from the calculations down to the nearest dime.

We consider monthly IRWEs in the calculation only when the total is greater than the POD threshold. If the total monthly amount of itemized IRWEs is greater than the POD threshold, we will use the total monthly amount of itemized IRWEs as the monthly POD threshold for the offset. However, if the total monthly amount of itemized IRWEs equals or exceeds the applicable SGA amount, we will use the SGA amount as the monthly POD threshold for the offset.

In the example below, we show how we will calculate the amount by which monthly SSDI benefit payments will be reduced under the offset for a beneficiary whose earnings and itemized IRWEs exceed the POD threshold. In the example, we use the POD threshold that would apply in 2017.

*Example:* A beneficiary reports monthly earnings of \$1,040. The beneficiary also reports monthly itemized IRWEs of \$940 and all are approved. Since the total monthly amount of itemized IRWEs is greater than \$840, we use the IRWEs amount as the POD threshold. The reported monthly earnings exceed the threshold by \$100. We will reduce the beneficiary's SSDI benefit payment by \$50. The calculations for this example are as follows:

First, we calculate the monthly earnings that exceed the POD threshold.

\$1,040 (monthly earnings report)  
– \$940 (POD threshold is equal to the total monthly itemized IRWEs)

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\$100

Second, we calculate the \$1 for \$2 benefit offset amount by dividing the amount of earnings that exceeds the POD threshold by 2.

$\$100 \div 2 = \$50$  (monthly \$1 for \$2 benefit offset amount)

For the purposes of the POD, we will round the monthly benefit offset amount resulting from the calculations down to the nearest dime.

*What happens if a beneficiary does not report earnings on a monthly basis?*

It is very important that beneficiaries in the treatment groups report earnings and IRWEs. If a beneficiary reports earnings for a month, but does not

continue to report monthly, the prior reported earnings will carry forward for subsequent months until the beneficiary reports earnings again, or until the end of the project. If the beneficiary is late in reporting earnings for a month, we will make appropriate adjustments to future benefit payments if we determine that we paid the beneficiary too much or too little in benefits under the offset for the months when we carried over prior earnings. We will send the beneficiary a written notice of our determination that will provide appeal rights.

We will perform an end-of-year reconciliation after the close of each calendar year. We will determine the actual amount of the beneficiary's earnings for each month in the calendar year to decide if the person was paid more or less in benefits than was due under the offset. We will make appropriate adjustments to future benefit payments if we determine that we paid the beneficiary too much or too little in benefits under the offset. We will send the beneficiary a written notice of our determination that will provide appeal rights.

*What happens to beneficiaries whose benefit is reduced to zero for 12 consecutive months?*

When a beneficiary's earnings are high enough that the offset amount equals or exceeds the beneficiary's SSDI monthly benefit payment, the beneficiary will not receive a benefit payment for that month. That is, the SSDI benefit is reduced to zero under the offset, and the benefit is suspended for that month. Beneficiaries in treatment group 2 only will have entitlement terminated after their benefit is reduced to zero (that is, suspended) for 12 consecutive months.

*What options do we provide to beneficiaries whose entitlement to disability benefits terminates during the POD due to work activity?*

Participants whose entitlement to disability benefits terminates due to work activity during the POD can apply for expedited reinstatement, as under current rules. Participants can request expedited reinstatement of their prior entitlement for a 60-month period. We will apply the same criteria used under current rules to determine whether a beneficiary meets the requirements for reinstatement. As under current rules, an individual may receive up to six consecutive months of provisional cash benefits while we make a determination.

Participants in treatment group 2 who are reinstated will remain in the demonstration. They will continue in

the POD treatment group 2 and will be subject to the applicable alternate rules for that treatment group. Under current rules, after we reinstate entitlement through expedited reinstatement, the IRP begins. Under POD rules, the IRP will not apply. See the following section for further details on the IRP.

A participant whose entitlement is terminated under the POD will remain in this terminated status (unless the person is reinstated as discussed above), even if the person withdraws from the project.

*What happens to the IRP of a beneficiary in the POD?*

The IRP will not apply to beneficiaries in treatment groups during POD participation. When a beneficiary in a treatment group stops participating in the POD, the status of the IRP will be the same as when the beneficiary began participating in the POD. That means that if a beneficiary enters the POD during the beneficiary's IRP, the IRP will pick up at the same point after the beneficiary's participation in the POD ends and the beneficiary returns to our usual rules. If a beneficiary in treatment group 2 has entitlement terminated because of the offset but then has entitlement reinstated under expedited reinstatement, the beneficiary will return to participation in treatment group 2. When the beneficiary's participation ends and the beneficiary returns to usual rules, the beneficiary will begin the IRP.

*What happens to the POD participation for beneficiaries whose entitlement to disability benefits terminates for any reason?*

Participants must maintain all SSDI eligibility requirements to continue receiving SSDI. For example, participants will still be subject to medical CDRs, which could result in a termination of entitlement on medical grounds. If a participant's entitlement terminates for any reason and we subsequently approve reinstatement, the participant will return to the same treatment group the participant was in before termination until the participant withdraws from the project or the project ends.

*What happens to the payment of benefits to other persons entitled on the earnings record of a beneficiary whose SSDI benefit is subject to the offset?*

If any other person is entitled to benefits on the earnings record of a beneficiary whose SSDI benefit is subject to the offset, we will pay the other person the full amount of monthly cash benefits that the person is

otherwise due for any month for which the beneficiary is eligible for payment of a reduced SSDI benefit under the offset. However, we will not pay benefits to the other person for any month for which the beneficiary's SSDI benefit is reduced to zero under the offset. For example, a beneficiary in a POD treatment group could have earnings above SGA, and if the earnings do not result in full offset, other persons entitled on the beneficiary's record will continue to receive their full amount of benefits for as long as the beneficiary is participating in the POD. By contrast, under current rules, if a beneficiary has earnings above SGA during the 36-month reentitlement period following the TWP, other persons entitled on the beneficiary's record would not continue to receive benefits.<sup>29</sup>

*What happens to the TWP of a beneficiary in the POD?*

The TWP will not apply to beneficiaries in treatment groups during their participation in the POD. A month during which the participant works and earns above the TWP amount will not be considered a trial work month for any purpose. Once the beneficiary's participation in the POD ends, the beneficiary will, from that point forward, be subject to our usual rules, but the work and earnings accumulated during the POD participation will not be counted toward a TWP. Upon return to our usual rules, the beneficiary's TWP status will be equal to the TWP status before participating in the POD. We will, however, count the period of the POD participation as part of the rolling 60-month TWP window. For example, if a beneficiary in a treatment group has completed four trial work months before enrolling in the POD, the first month the beneficiary earns above the TWP amount after the beneficiary's participation in the POD ends will be the beneficiary's fifth trial work month.

*What happens to the reentitlement period of a beneficiary in the POD?*

The reentitlement period will not apply to beneficiaries in treatment groups during POD participation. There is also no reentitlement-related assessment to determine whether a beneficiary's disability ended during a reentitlement period because the person performed SGA. Once the beneficiary's participation in the POD ends, the beneficiary will, from that point forward, be subject to our usual rules. Upon return to usual rules, the beneficiary's reentitlement status will be equal to the reentitlement status before

participating in the POD. No work or earnings during POD participation will be considered in determining the reentitlement period upon return to usual rules.

*Will we conduct work continuing disability reviews during the POD?*

We will not initiate work CDRs for participants in the POD treatment groups while they are participating in the POD. If a participant in a POD treatment group has a work CDR in progress when POD participation begins, we will not complete the work CDR while the person is participating in the POD.

*Will the alternate rules under the POD affect a beneficiary's Medicare coverage?*

A beneficiary who is under age 65 and who has been entitled to SSDI benefits for 24 months is entitled to Hospital Insurance (Medicare Part A) under the Medicare program.<sup>30</sup> Entitlement to Medicare coverage generally continues as long as a beneficiary's entitlement to SSDI benefits continues. However, a beneficiary whose entitlement to SSDI benefits terminates due to the performance of SGA may be entitled to extended Medicare coverage for a period of at least 93 months following the end of the TWP, provided that disability continues. Under the Act, the period of extended Medicare coverage is determined as if the beneficiary had a 15-month reentitlement period following the end of the TWP.<sup>31</sup>

Section 234(f)(2)(D) of the Act, created by section 823 of the BBA of 2015, provides special rules on Medicare Part A coverage for some POD participants. If a participant is entitled to Medicare Part A coverage because of entitlement to SSDI benefits and the SSDI entitlement is terminated as a result of the POD's benefit offset, the participant is entitled to extended Medicare coverage for a period of 93 months following the SSDI entitlement termination, as long as the participant continues to have the same disabling impairment(s) that provided the basis for the prior SSDI entitlement and the participant meets the other SSDI entitlement requirements.

*What are the alternate rules under the Ticket to Work program?*

We will apply an alternate rule for paying outcome payments to a qualified service provider that has been assigned a ticket by an SSDI-only or concurrent SSDI/SSI beneficiary in a POD treatment

group. As noted above, under our usual rules, we may pay outcome payments to service providers for months in which SSDI benefits are not payable to a beneficiary because earnings are at or above the SGA level. Under the POD's offset, however, a beneficiary's earnings may be at or above the SGA level and yet still not be high enough to reduce the SSDI benefit to zero. Thus, applying our normal Ticket to Work program rules could unduly burden these service providers, since they would not receive the outcome payments that they would otherwise be eligible for if the beneficiary was not participating in the POD. Therefore, for the POD, we will pay an outcome payment to the provider for each month the participant earns above SGA, whether or not the SSDI benefit is reduced to zero. This process will occur only during a beneficiary's POD participation period.

We will apply our usual rules for paying outcome payments beginning with the first month after a beneficiary's POD participation period ends. We will continue to limit the number of months for which outcome payments may be made based on the same ticket to a maximum of 36 months. We will count any month for which we pay an outcome payment under the alternate rule or our usual rule toward this 36-month limit.

*What is our authority for conducting the POD?*

Section 234 of the Act authorizes experiments and demonstration projects designed to promote attachment to the labor force, including projects that test alternative methods of treating work activity of SSDI beneficiaries and that involve the waiver of certain program rules. Section 234(f) of the Act, added by section 823 of the BBA of 2015, specifically requires that we conduct the POD. We are conducting the POD consistent with the requirements in section 234(e) of the Act that participation in a demonstration project must be voluntary and based on informed written consent, and that the voluntary agreement to participate may be withdrawn by the volunteer at any time.

**Authority:** Section 234 of the Act.

**Nancy A. Berryhill,**

*Acting Commissioner of Social Security.*

[FR Doc. 2017-23521 Filed 10-27-17; 8:45 am]

**BILLING CODE 4191-02-P**

<sup>30</sup> Section 226(b) of the Act; 42 CFR 406.12.

<sup>31</sup> *Id.*

<sup>29</sup> 20 CFR 404.1592a.



**DEPARTMENT OF STATE****[Public Notice: 10181]****Notice of Determinations; Culturally Significant Objects Imported for Exhibition Determinations: "The Silver Caesars: A Renaissance Mystery" Exhibition**

**SUMMARY:** Notice is hereby given of the following determinations: I hereby determine that certain objects to be included in the exhibition "The Silver Caesars: A Renaissance Mystery," imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Metropolitan Museum of Art, New York, New York, from on or about December 12, 2017, until on or about March 11, 2018, and at possible additional exhibitions or venues yet to be determined, is in the national interest.

**FOR FURTHER INFORMATION CONTACT:** For further information, including a list of the imported objects, contact Elliot Chiu in the Office of the Legal Adviser, U.S. Department of State (telephone: 202-632-6471; email: [section2459@state.gov](mailto:section2459@state.gov)). The mailing address is U.S. Department of State, L/PA, SA-5, Suite 5H03, Washington, DC 20522-0505.

**SUPPLEMENTARY INFORMATION:** The foregoing determinations were made pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), E.O. 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*; 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236-3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257-1 of December 11, 2015). I have ordered that Public Notice of these determinations be published in the **Federal Register**.

**Alyson Grunder,**

*Deputy Assistant Secretary for Policy, Bureau of Educational and Cultural Affairs, Department of State.*

[FR Doc. 2017-23549 Filed 10-27-17; 8:45 am]

**BILLING CODE 4710-05-P**

**SURFACE TRANSPORTATION BOARD****Release of Waybill Data**

The Surface Transportation Board has received a request from Thompson Hine LLP, on behalf of itself, Economists, and L.E. Peabody & Associates (WB17-44—

10/20/17) for permission to use certain unmasked data from the Board's 2006–2016 Carload Waybill Samples. A copy of this request may be obtained from the Office of Economics.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

*Contact:* Alexander Dusenberry, (202) 245-0319.

**Jeffrey Herzig,**  
*Clearance Clerk.*

[FR Doc. 2017-23454 Filed 10-27-17; 8:45 am]

**BILLING CODE 4915-01-P**

**SURFACE TRANSPORTATION BOARD****[Docket No. AB 6 (Sub-No. 494X)]****BNSF Railway Company—  
Abandonment Exemption—in Larimer  
County, CO.**

BNSF Railway Company (BNSF) has filed a verified notice of exemption under 49 CFR pt. 1152 subpart F—*Exempt Abandonments* to abandon 0.5 miles of rail line between milepost 74.5 and milepost 75.0, in Fort Collins, Larimer County, CO (the Line). The Line traverses United States Postal Service Zip Codes 80521 and 80524.

BNSF has certified that: (1) No local freight traffic has moved over the Line since prior to 2009; (2) no overhead traffic has been handled on the Line since prior to 2009; (3) no formal complaint filed by a user of rail service on the Line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the Line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the two-year period; and (4) the requirements at 49 CFR 1105.7(c) (environmental report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho*, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial

revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on November 29, 2017, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,<sup>1</sup> formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),<sup>2</sup> and interim trail use/rail banking requests under 49 CFR 1152.29 must be filed by November 9, 2017. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by November 20, 2017, with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423-0001.

A copy of any petition filed with the Board should be sent to Karl Morell, Karl Morell & Associates, 440 1st Street NW., Suite 440, Washington, DC 20001.

If the verified notice contains false or misleading information, the exemption is void ab initio.

BNSF has filed a combined environmental and historic report that addresses the effects, if any, of the abandonment on the environment and historic resources. OEA will issue an environmental assessment (EA) by November 3, 2017. Interested persons may obtain a copy of the EA by writing to OEA (Room 1100, Surface Transportation Board, Washington, DC 20423-0001) or by calling OEA at (202) 245-0305. Assistance for the hearing impaired is available through the Federal Information Relay Service at (800) 877-8339. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If

<sup>1</sup> The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Office of Environmental Analysis (OEA) in its independent investigation) cannot be made before the exemption's effective date. See *Exemption of Out-of-Serv. Rail Lines*, 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

<sup>2</sup> Each OFA must be accompanied by the filing fee, which is currently set at \$1,800. See *Regulations Governing Fees for Servs. Performed in Connection with Licensing & Related Servs.—2017 Update*, EP 542 (Sub-No. 25), slip op. App. C at 20 (STB served July 28, 2017).

consummation has not been effected by BNSF's filing of a notice of consummation by October 30, 2018, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at [WWW.STB.GOV](http://WWW.STB.GOV).

Decided: October 23, 2017.

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

**Kenyatta Clay,**  
Clearance Clerk.

[FR Doc. 2017-23356 Filed 10-27-17; 8:45 am]

BILLING CODE 4915-01-P

## SURFACE TRANSPORTATION BOARD

### Release of Waybill Data

The Surface Transportation Board has received a request from the Association of American Railroads. (WB17-45-10/10/17) for permission to use certain data from the Board's 2016 Carload Waybill Sample. A copy of this request may be obtained from the Office of Economics.

The waybill sample contains confidential railroad and shipper data; therefore, if any parties object to these requests, they should file their objections with the Director of the Board's Office of Economics within 14 calendar days of the date of this notice. The rules for release of waybill data are codified at 49 CFR 1244.9.

Contact: Alexander Dusenberry, (202) 245-0319.

**Jeffrey Herzig,**  
Clearance Clerk.

[FR Doc. 2017-23527 Filed 10-27-17; 8:45 am]

BILLING CODE 4915-01-P

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

[Summary Notice No. 2017-84]

### Petition for Exemption; Summary of Petition Received; Airlines for America

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

**ACTION:** Notice.

**SUMMARY:** This notice contains a summary of a petition seeking relief from specified requirements of Federal Aviation Regulations. The purpose of this notice is to improve the public's awareness of, and participation in, the FAA's exemption process. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the

legal status of the petition or its final disposition.

**DATES:** Comments on this petition must identify the petition docket number and must be received on or before November 20, 2017.

**ADDRESSES:** Send comments identified by docket number FAA-2002-12455 using any of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M-30; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE., Room W12-140, West Building Ground Floor, Washington, DC 20590-0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at 202-493-2251.

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

*Docket:* Background documents or comments received may be read at <http://www.regulations.gov> at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12-140 of the West Building Ground Floor at 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Nia Daniels, (202) 267-7626, Office of Rulemaking, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591.

This notice is published pursuant to 14 CFR 11.85.

Issued in Washington, DC.

**Lirio Liu,**  
Director, Office of Rulemaking.

### Petition for Exemption

*Docket No.:* FAA-2002-12455  
*Petitioner:* Airlines for America  
*Sections of 14 CFR Affected:* 61.3(a) and (c), 63.3(a), and 121.383(a)(2)  
*Description of Relief Sought:* Airlines for America is seeking relief to allow

each air carrier to issue to its flightcrew members, on a temporary basis, confirmation of required airman or medical certificates in either paper or electronic form based upon information contained in the air carrier's approved recordkeeping system.

[FR Doc. 2017-23486 Filed 10-27-17; 8:45 am]

BILLING CODE 4910-13-P

## DEPARTMENT OF THE TREASURY

### Bureau of the Fiscal Service

### Fee Schedule for the Transfer of U.S. Treasury Book-Entry Securities Held on the National Book-Entry System

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

**ACTION:** Notice.

**SUMMARY:** The Department of the Treasury (Treasury) is announcing a new fee schedule applicable to transfers of U.S. Treasury book-entry securities maintained on the National Book-Entry System (NBES) that occur on or after January 2, 2018.

**DATES:** Applicable January 2, 2018.

**FOR FURTHER INFORMATION CONTACT:** Brandon Taylor or Janeene Wilson, Bureau of the Fiscal Service, 202-504-3550.

**SUPPLEMENTARY INFORMATION:** Treasury has established a fee structure for the transfer of Treasury book-entry securities maintained on NBES. Treasury reassesses this fee structure periodically based on our review of the latest book-entry costs and volumes.

For each Treasury securities transfer or reversal sent or received on or after January 2, 2018, the basic fee will increase from \$0.93 to \$0.97. The Federal Reserve System also charges a funds movement fee for each of these transactions for the funds settlement component of a Treasury securities transfer.<sup>1</sup> The surcharge for an off-line Treasury book-entry securities transfer will remain at \$70.00. Off-line refers to the sending and receiving of transfer messages to or from a Federal Reserve Bank by means other than on-line access, such as by written, facsimile, or telephone voice instruction. The basic transfer fee assessed to both sends and receives is reflective of costs associated with the processing of securities transfers. The off-line surcharge, which is in addition to the basic fee and the

<sup>1</sup> The Board of Governors of the Federal Reserve System sets this fee separately from the fees assessed by Treasury. As of January 3, 2017, that fee was \$0.10 per transaction. For a current listing of the Federal Reserve System's fees, please refer to <https://www.frb-services.org/servicefees/>.

funds movement fee, reflects the additional processing costs associated with the manual processing of off-line securities transfers.

Treasury does not charge a fee for account maintenance, the stripping and reconstitution of Treasury securities, the wires associated with original issues, or interest and redemption payments. Treasury currently absorbs these costs.

The fees described in this notice apply only to the transfer of Treasury book-entry securities held on NBES. Information concerning fees for book-entry transfers of Government Agency securities, which are priced by the Federal Reserve, is set out in a separate **Federal Register** notice published by the Federal Reserve.

The following is the Treasury fee schedule that will take effect on January 2, 2018, for book-entry transfers on NBES:

**TREASURY—NBES FEE SCHEDULE:  
EFFECTIVE JANUARY 2, 2018**  
[In dollars]

Transfer type	Basic fee	Off-line surcharge
On-line transfer originated .....	0.97	N/A
On-line transfer received .....	0.97	N/A
On-line reversal transfer originated .....	0.97	N/A
On-line reversal transfer received .....	0.97	N/A
Off-line transfer originated .....	0.97	70.00
Off-line transfer received .....	0.97	70.00
Off-line account switch received .....	0.97	0.00
Off-line reversal transfer originated .....	0.97	70.00
Off-line reversal transfer received .....	0.97	70.00

**Authority:** 31 CFR 357.45.

Dated: October 18, 2017.

**David A. Lebryk,**

*Fiscal Assistant Secretary.*

[FR Doc. 2017-23311 Filed 10-27-17; 8:45 am]

**BILLING CODE 4810-AS-P**

**DEPARTMENT OF THE TREASURY**

**Office of Foreign Assets Control**

**Notice of OFAC Sanctions Actions**

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Notice.

**SUMMARY:** The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names

of nine persons that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

**DATES:** See **SUPPLEMENTARY INFORMATION** section.

**FOR FURTHER INFORMATION CONTACT:** OFAC: Associate Director for Global Targeting, tel.: 202-622-2420; Assistant Director for Sanctions Compliance & Evaluation, tel.: 202-622-2490; Assistant Director for Licensing, tel.: 202-622-2480; Assistant Director for Regulatory Affairs, tel. 202-622-4855; or the Department of the Treasury's Office of the General Counsel: Office of the Chief Counsel (Foreign Assets Control), tel.: 202-622-2410.

**SUPPLEMENTARY INFORMATION:**

**Electronic Availability**

The Specially Designated Nationals and Blocked Persons List and additional information concerning OFAC sanctions programs are available on OFAC's Web site ([www.treasury.gov/ofac](http://www.treasury.gov/ofac)).

**Notice of OFAC Action(s)**

On October 25, 2017, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons subject to U.S. jurisdiction are blocked under the relevant sanctions authority listed below.

*Individuals*

1. AL-DHUBHANI, Adil Abduh Fari Uthman (a.k.a. AL-MAKANI, Adil Abd Fari; a.k.a. AL-MALKAB, Adil Fari; a.k.a. BIN-UTHMAN, Adil Abdu Bin-Fari; a.k.a. FARI, Adil Muhammad Abdu; a.k.a. FAZI, Adil Muhammad Abdu; a.k.a. "ADIL 'ABDIH FAR'A"; a.k.a. "ABU AL-ABBAS"; a.k.a. "ADEL ABDOH FAREA'A"; a.k.a. "ADIL ABD FARI"; a.k.a. "ADIL ABDAH FARI"; a.k.a. "ADIL ABDU FAAREA"; a.k.a. "ADIL ABDU FAARI'A"; a.k.a. "ADIL ABDU FAREA"; a.k.a. "ADIL ABDU FARIA"; a.k.a. "AMIR MUMINEN"; a.k.a. "AMIR MUMININ"; a.k.a. "FARI, Abu-al-Abbas Adil Abdu"; a.k.a. "FARI, Abu-al-Abbas Adil Abduh"), Ta'izz City, Ta'izz Governorate, Yemen; Almqwat Mahtah Ahmed Sif, Taiz City, Taiz Governorate, Yemen; DOB 15 Jul 1963; alt. DOB 1971; POB Ta'izz, Yemen; nationality Yemen; Gender Male; National ID No. 01010013602 (Yemen) (individual) [SDGT] (Linked To: AL-QA'IDA IN THE ARABIAN PENINSULA; Linked To: ISIL-YEMEN).

Designated pursuant to section 1(c) of Executive Order 13224 of September 23, 2001, "Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism" (E.O. 13224), for being owned or controlled by, or acting for or on behalf of, AL-QA'IDA IN THE ARABIAN PENINSULA, a person whose property and interests in property are blocked pursuant to E.O. 13224.

Also designated pursuant to section 1(d)(ii) of E.O. 13224 for assisting in, sponsoring, or providing financial, material, or technological support for, or financial or other services to or in support of, AL-QA'IDA IN THE ARABIAN PENINSULA and ISIL-YEMEN, persons whose property and interests in property are blocked pursuant to E.O. 13224.

2. AL-ADANI, Abu Sulayman (a.k.a. ABU-SULAYMAN, Nashwan al-Adani; a.k.a. AL-ADANI, Nashwan; a.k.a. AL-ADANI, Sulayman; a.k.a. AL-HASHIMI, Abu Ma'ali; a.k.a. AL-SAY'ARI, Muhammad Ahmed; a.k.a. AL-SAY'ARI, Muhammad Qan'an; a.k.a. AL-SAY'ARI, Nashwan; a.k.a. MUTHANA, Mohsen Ahmed Saleh; a.k.a. MUTHANNA, Muhsin Ahmad Salah; a.k.a. QAN'AN, Muhammad Salih Muhammad; a.k.a. "AL-MUHAJIR, Abu Usama"), Yemen; DOB 13 Jan 1988; Gender Male; Passport 05867398 (Yemen); alt. Passport 04988639 (Jordan) (individual) [SDGT] (Linked To: ISIL-YEMEN).

Designated pursuant to section 1(c) of E.O. 13224 of September 23, 2001, for being owned or controlled by, or acting for or on behalf of, ISIL-YEMEN, a person whose property and interests in property are blocked pursuant to E.O. 13224.

3. AL-HAYASHI, Sayf Abdulrab Salem (a.k.a. AL-BAYDANI, Sayf; a.k.a. AL-BAYDANI, Sayf Husayn 'Abd-al-Rabb; a.k.a. AL-BHADANI, Saif; a.k.a. AL-BIDHANI, Sayf; a.k.a. AL-HAYASHI, Sayf 'Abd-al-Rab Salim; a.k.a. AL-HAYYASHI, Sayf 'Abd-al-wali 'Abd-al-rub), At Takhtit Ministry Marab Jawlat Ayat Street, Yemen; Azzan, Abyan Governorate, Yemen; DOB 01 Jan 1978; nationality Yemen; Gender Male; National ID No. 01010003969 (Yemen) (individual) [SDGT] (Linked To: AL-QA'IDA IN THE ARABIAN PENINSULA).

Designated pursuant to section 1(c) of E.O. 13224 for assisting in, sponsoring, or providing financial, material, or technological support for, or financial or other services to or in support of, AL-QA'IDA IN THE ARABIAN PENINSULA, a person whose property and interests in property are blocked pursuant to E.O. 13224.

4. AL-MARFADI, Khalid (a.k.a. AL-YAFI', Abu Anas; a.k.a. AL-YAFI', Khalid Abdullah Salah Ahmad Hussayn al-'Umari al-Marfadi), al-Bayda' Governorate, Yemen; al-Sharafa', al-Qurayshiyah District, al-Bayda' Governorate, Yemen; al-Wuhayshi Village, Az Zahir District, al Bayda' Governorate, Yemen; Marfad Village, Marfad District, Yafia, Yemen; DOB 1966; Gender Male (individual) [SDGT] (Linked To: ISIL-YEMEN).

Designated pursuant to section 1(c) of E.O. 13224 for being owned or controlled by, or acting for or on behalf of, ISIL-YEMEN, a person whose property and interests in property are blocked pursuant to E.O. 13224.

Also designated pursuant to section 1(d)(ii) of E.O. 13224 for assisting in, sponsoring, or providing financial, material, or technological support for, or financial or other services to or in support of, ISIL-Yemen, a person whose property and interests in property are blocked pursuant to E.O. 13224.

5. AL-YAFI', Nashwan al-Wali (a.k.a. AL-YAFI', Nishwan al-Wali; a.k.a. AL-YAFI', Wali Nashwan), Yafi' District, Lahij Governorate, Yemen; DOB 1984; Gender Male (individual) [SDGT] (Linked To: ISIL-YEMEN).

Designated pursuant to section 1(c) of E.O. 13224 for being owned or controlled by, or acting for or on behalf of, ISIL-YEMEN, a person whose property and interests in property are blocked pursuant to E.O. 13224.

6. AL-UBAYDI, Khalid Sa'id Ghabish (a.k.a. AL-UBAYDI, Khalid Sa'id Ghubaysh; a.k.a. "UBAYDI, Abu-Amr"), Hadramawt Governorate, Yemen; DOB 1984 to 1986; POB United Arab Emirates; Gender Male (individual) [SDGT] (Linked To: ISIL-YEMEN).

Designated pursuant to section 1(c) of E.O. 13224 for being owned or controlled by, or acting for or on behalf of, ISIL-YEMEN, a person whose property and interests in property are blocked pursuant to E.O. 13224.

7. AL-WAFI, Bilal Ali Muhammad (a.k.a. AL-WAFI, Bilal; a.k.a. AL-WAFI, Bilal 'Ali; a.k.a. AL-WARAFI, 'Ali 'Abbad Muhammad; a.k.a. "ABU AL-WALEED"; a.k.a. "ABU AL-WALID"), Ta'izz Governorate, Yemen; DOB 1986 to 1989; POB Ta'izz Governorate, Yemen; Gender Male (individual) [SDGT] (Linked To: AL-QA'IDA IN THE ARABIAN PENINSULA).

Designated pursuant to section 1(c) of E.O. 13224 for being owned or controlled by, or acting for or on behalf of, AL-QA'IDA IN THE ARABIAN PENINSULA, a person whose property and interests in property are blocked pursuant to E.O. 13224.

8. QANAN, Radwan Muhammad Husayn Ali (a.k.a. AL-ADANI, Abu 'Abd al-Rahman; a.k.a. AL-NAQAZ, Basil Muhsin Ahmad; a.k.a. KANAN, Radwan; a.k.a. KANNA, Radwan), Aden, Yemen; al-Tawilah, Kraytar District, Aden, Yemen; DOB 07 Sep 1975; alt. DOB 1982; POB Abyan Governorate, Khanfar, Al-Rumilah, Yemen; Gender Male (individual) [SDGT] (Linked To: ISIL-YEMEN).

Designated pursuant to section 1(c) of E.O. 13224 for being owned or controlled by, or acting for or on behalf of, ISIL-YEMEN, a person whose property and interests in property are blocked pursuant to E.O. 13224.

#### Entity

1. AL KHAYR SUPERMARKET (a.k.a. AL-KHAIR MARKET), Fuwwah, south of Mukalla, Hadramawt Governorate, Yemen [SDGT] (Linked To: AL-HAYASHI, Sayf Abdulrab Salem).

Designated pursuant to section 1(c) of E.O. 13224 for being owned or controlled by, or acting for or on behalf of, AL-HAYASHI, Sayf Abdulrab Salem, a person whose property and interests in property are blocked pursuant to E.O. 13224.

Dated: October 25, 2017.

**John E. Smith,**

*Director, Office of Foreign Assets Control.*

[FR Doc. 2017-23529 Filed 10-27-17; 8:45 am]

**BILLING CODE 4810-AL-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### Proposed Collection; Comment Request for Form 1041-N

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. The IRS is soliciting comments concerning Form 1041-N, U.S. Income Tax Return for Electing Alaska Native Settlement Trusts.

**DATES:** Written comments should be received on or before December 29, 2017 to be assured of consideration.

**ADDRESSES:** Direct all written comments to L. Brimmer, Internal Revenue Service, Room 6526, 1111 Constitution

Avenue NW., Washington, DC 20224. Requests for additional information or copies of the form and instructions should be directed to LaNita Van Dyke, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the Internet at [LaNita.VanDyke@irs.gov](mailto:LaNita.VanDyke@irs.gov).

#### SUPPLEMENTARY INFORMATION:

**Title:** U.S. Income Tax Return for Electing Alaska Native Settlement Trusts.

**OMB Number:** 1545-1776.

**Form Number:** 1041-N.

**Abstract:** An Alaska Native Settlement Trust (ANST) may elect under section 646 to have the special income tax treatment of that section apply to the trust and its beneficiaries. This one-time election is made by filing Form 1041-N which is used by the ANST to report its income, etc., and to compute and pay any income tax. Form 1041-N is also used for the special information reporting requirements that apply to ANSTs.

**Current Actions:** There are no changes being made to the form at this time.

**Type of Review:** Extension without change of a currently approved collection.

**Affected Public:** Business or other for-profit organizations.

**Estimated Number of Respondents:** 20.

**Estimated Time per Respondent:** 35 hrs.

**Estimated Total Annual Burden Hours:** 700.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

**Request for Comments:** Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of

information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: October 4, 2017.

**L. Brimmer,**

*Senior Tax Analyst.*

[FR Doc. 2017-23493 Filed 10-27-17; 8:45 am]

**BILLING CODE 4830-01-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### Advisory Council to the Internal Revenue Service; Meeting

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice.

**SUMMARY:** The Internal Revenue Service Advisory Council (IRSAC) will hold a public meeting on Wednesday, November 15, 2017.

**FOR FURTHER INFORMATION CONTACT:** Ms. Anna Millikan, IRSAC Program Manager, Office of National Public Liaison, CL:NPL:P, Room 7571, 1111 Constitution Avenue NW., Washington, DC 20224. Telephone: 202-317-6851 (not a toll-free number). Email address: [PublicLiaison@irs.gov](mailto:PublicLiaison@irs.gov).

**SUPPLEMENTARY INFORMATION:** Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), a public meeting of the IRSAC will be held on Wednesday, November 15, 2017, from 9:00 a.m. to 12:45 p.m. at the Washington Marriott Wardman Park Hotel, 2660 Woodley Road NW., Wilson Room, Washington, DC 20008. Issues to be discussed include, but are not limited to: *W-2 Verification Codes and Engaging Tax Practitioners; Taxpayer and Practitioner Concerns Regarding Private Debt Collection; The LB&I Examination Process (LEP); The Need for Express Statutory Authority to Confirm the Treasury Department's Ability to Establish, Enforce, and Require Minimum Standards of Competence for All Tax Practitioners, Including Tax Return Preparers; Third-Party Application Programming Interfaces (APIs); and The Continuing Need for the Internal Revenue Service to be Adequately Funded.* Last-minute agenda changes may preclude advanced notice. The meeting room

accommodates approximately 60 people; this number includes IRSAC members and Internal Revenue Service officials. Due to limited seating, please call Anna Millikan at 202-317-6851 to confirm your attendance. Attendees are encouraged to arrive at least 30 minutes before the meeting begins. Should you wish the IRSAC to consider a written statement, please write to Internal Revenue Service, Office of National Public Liaison, CL:NPL, Room 7559, 1111 Constitution Avenue NW, Washington, DC 20224 or email [PublicLiaison@irs.gov](mailto:PublicLiaison@irs.gov).

Dated: October 23, 2017.

**John Lipold,**

*Designated Federal Official.*

[FR Doc. 2017-23495 Filed 10-27-17; 8:45 am]

**BILLING CODE 4830-01-P**

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### Proposed Information Collection; Comment Request

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Internal Revenue Service, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. This notice provides guidance relating to the waiver of 2009 required minimum distributions, described in section 401(a)(9) of the Internal Revenue Code ("Code"), from certain plans under the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA").

**DATES:** Written comments should be received on or before December 29, 2017 to be assured of consideration.

**ADDRESSES:** Direct all written comments to L. Brimmer, Internal Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224.

Please send comments for the information collection listed below. You must reference the information collection's title, form number, reporting or record-keeping requirement number, and OMB number (if any) in your comment. To obtain additional information, or copies of the information collection and instructions, or copies of any comments received, contact LaNita Van Dyke, at Internal

Revenue Service, Room 6526, 1111 Constitution Avenue NW., Washington, DC 20224, or through the internet, at [Lanita.VanDyke@irs.gov](mailto:Lanita.VanDyke@irs.gov).

#### SUPPLEMENTARY INFORMATION:

*Title:* IRA Required Minimum Distribution Reporting.

*OMB Number:* 1545-1779.

*Notice Number:* Notice 2002-27.

*Abstract:* Notice 2002-27 (Notice 2003-2, Notice 2003-3 & Notice 2009-9) provides guidance with respect to the reporting requirements, that is, data that custodians and trustees of IRAs must furnish IRA owners in those instances where there must be a minimum distribution from an individual retirement arrangement.

*Current Actions:* There are no changes being made to the notice at this time.

*Type of Review:* Extension of a currently approved collection.

*Affected Public:* Business or other for-profit organizations, and not-for-profit institutions.

*Estimated Number of Respondents:* 78,000.

*Estimated Average Time per Respondent:* 15 hours.

*Estimated Total Annual Burden Hours:* 1,170,000.

*Request for Comments:* Comments submitted in response to this notice will be summarized and/or included in our request for Office of Management and Budget (OMB) approval of the relevant information collection. All comments will become a matter of public record. Please do not include any confidential or inappropriate material in your comments.

*We invite comments on:* (a) Whether the collection of information is necessary for the proper performance of the agency's functions, including whether the information has practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide the requested information.

Currently, the IRS is seeking comments concerning the following forms, and reporting and record-keeping requirements:

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to

respond to, a collection of information, unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Dated: October 4, 2017.

**Tuawana Pinkston,**  
Supervisory, Tax Analyst.

[FR Doc. 2017-23494 Filed 10-27-17; 8:45 am]

BILLING CODE 4830-01-P

## DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900-0188]

### Agency Information Collection Activity Under OMB Review: Claim, Authorization & Invoice for Prosthetic Items & Services

**AGENCY:** Veterans Health Administration, Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995, this notice announces that the Veterans Health Administration, Department of Veterans Affairs, will submit the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden and it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before November 29, 2017.

**ADDRESSES:** Submit written comments on the collection of information through [www.Regulations.gov](http://www.Regulations.gov), or to Office of Information and Regulatory Affairs, Office of Management and Budget, Attn: VA Desk Officer; 725 17th St. NW., Washington, DC 20503 or sent through electronic mail to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov). Please refer to "OMB Control No. 2900-0188" in any correspondence.

#### FOR FURTHER INFORMATION CONTACT:

Cynthia Harvey-Pryor, Office of Quality, Privacy and Risk (OQPR), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420, (202) 461-5870 or email [cynthia.harvey-pryor@va.gov](mailto:cynthia.harvey-pryor@va.gov). Please refer to "OMB Control No. 2900-0188" in any correspondence.

#### SUPPLEMENTARY INFORMATION:

*Authority:* U.S.C. 3901-3904 and 1701(6).

*Title:* Claim, Authorization & Invoice for Prosthetic Items & Services.

*OMB Control Number:* 2900-0188.

*Type of Review:* Revision of a currently approved collection.

*Abstract:* The Department of Veterans Affairs (VA), through its Veterans Health Administration (VHA), administers medical services established by law. Title 38 U.S.C. Section 1701(6) includes prosthetic items within the scope of medical services. Title 38 U.S.C. Section 3901, 3902, 3903, 3904, and 1162 authorize the Secretary to provide each person eligible for an automobile grant the adaptive equipment deemed necessary to insure that the person will be able to operate the automobile safely, in a manner consistent with the safety of others and to satisfy the applicable

standards of licensure established by the state of residency.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published at 82 FR 39951 on August 22, 2017; page 39951.

*Affected Public:* Individuals and households.

#### *Estimated Annual Burden:*

10-0103—583 hours.  
10-1394—1,000 hours.  
10-2421—67 hours.  
10-2520—47 hours.  
10-2914—3,333 hours.  
FL 10-90—708 hours.

#### *Estimated Average Burden per Respondent:*

10-0103—5 minutes.  
10-1394—15 minutes.  
10-2421—4 minutes.  
10-2520—4 minutes.  
10-2914—4 minutes.  
FL 10-90—5 minutes.

#### *Frequency of Response:* Annually.

#### *Estimated Number of Respondents:*

10-0103—7,000.  
10-1394—4,000.  
10-2421—1,000.  
10-2520—700.  
10-2914—50,000.  
FL 10-90—8,500.

By direction of the Secretary.

**Cynthia Harvey-Pryor,**

Department Clearance Officer, Office of Quality, Privacy and Risk, Department of Veterans Affairs.

[FR Doc. 2017-23538 Filed 10-27-17; 8:45 am]

BILLING CODE 8320-01-P



# FEDERAL REGISTER

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Part II

## Federal Deposit Insurance Corporation

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12 CFR Parts 324, 329, and 382

Restrictions on Qualified Financial Contracts of Certain FDIC-Supervised Institutions; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions; Final Rule

## FEDERAL DEPOSIT INSURANCE CORPORATION

### 12 CFR Parts 324, 329, and 382

RIN 3064-AE46

#### Restrictions on Qualified Financial Contracts of Certain FDIC-Supervised Institutions; Revisions to the Definition of Qualifying Master Netting Agreement and Related Definitions

**AGENCY:** Federal Deposit Insurance Corporation (FDIC).

**ACTION:** Final rule.

**SUMMARY:** The FDIC is adding regulations to improve the resolvability of systemically important U.S. banking organizations and systemically important foreign banking organizations and enhance the resilience and the safety and soundness of certain State savings associations and State-chartered banks that are not members of the Federal Reserve System (“State non-member banks” or “SNMBs”) for which the FDIC is the primary Federal regulator (together, “FSIs” or “FDIC-supervised institutions”). This final rule requires that FSIs and their subsidiaries (“covered FSIs”) ensure that covered qualified financial contracts (QFCs) to which they are a party provide that any default rights and restrictions on the transfer of the QFCs are limited to the same extent as they would be under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and the Federal Deposit Insurance Act (FDI Act). In addition, covered FSIs are generally prohibited from being party to QFCs that would allow a QFC counterparty to exercise default rights against the covered FSI based on the entry into a resolution proceeding under the FDI Act, or any other resolution proceeding of an affiliate of the covered FSI. The final rule also amends the definition of “qualifying master netting agreement” in the FDIC’s capital and liquidity rules, and certain related terms in the FDIC’s capital rules. These amendments are intended to ensure that the regulatory capital and liquidity treatment of QFCs to which a covered FSI is party would not be affected by the restrictions on such QFCs.

**DATES:** The final rule is effective on January 1, 2018, except for amendatory instruction #6 which is delayed indefinitely. Once OCC adopts its related final rule, FDIC will publish a document announcing the effective date of the amendatory instruction.

**FOR FURTHER INFORMATION CONTACT:** Ryan Billingsley, Acting Associate Director, [rbillingsley@fdic.gov](mailto:rbillingsley@fdic.gov), Capital

Markets Branch, Division of Risk Management and Supervision; Alexandra Steinberg Barrage, Senior Resolution Policy Specialist, Office of Complex Financial Institutions, [abarrage@fdic.gov](mailto:abarrage@fdic.gov); David N. Wall, Assistant General Counsel, [dwall@fdic.gov](mailto:dwall@fdic.gov); Cristina Regojo, Counsel, [cregojo@fdic.gov](mailto:cregojo@fdic.gov); Phillip Sloan, Counsel, [psloan@fdic.gov](mailto:psloan@fdic.gov); Michael Phillips, Counsel, [mphillips@fdic.gov](mailto:mphillips@fdic.gov); Greg Feder, Counsel, [gfeder@fdic.gov](mailto:gfeder@fdic.gov), or Francis Kuo, Counsel, [fkuo@fdic.gov](mailto:fkuo@fdic.gov), Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

#### SUPPLEMENTARY INFORMATION:

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#### I. Introduction

##### A. Background

This final rule addresses one of the ways the failure of a major financial firm could destabilize the financial system. The disorderly failure of a large, interconnected financial company could cause severe damage to the U.S. financial system and, ultimately, to the economy as a whole, as illustrated by the failure of Lehman Brothers in September 2008. Protecting the financial stability of the United States is a core objective of the Dodd-Frank Act,<sup>1</sup> which

<sup>1</sup> The Dodd-Frank Act was enacted on July 21, 2010 (Pub. L. 111–203). According to its preamble, the Dodd-Frank Act is intended “[t]o promote the financial stability of the United States by improving accountability and transparency in the financial

Congress passed in response to the 2007–2009 financial crisis and the ensuing recession. One way the Dodd-Frank Act helps to protect the financial stability of the United States is by reducing the damage that such a company’s failure would cause to the financial system if it were to occur. This strategy centers on measures designed to help ensure that a failed company’s resolution proceeding—such as bankruptcy or the special resolution process created by the Dodd-Frank Act—would be more orderly, thereby helping to mitigate destabilizing effects on the rest of the financial system.<sup>2</sup>

##### The 2016 Notices of Proposed Rulemaking

On May 3, 2016, the FRB issued a Notice of Proposed Rulemaking, (the FRB NPRM), pursuant to section 165 of the Dodd-Frank Act.<sup>3</sup> The FRB’s proposed rule stated that it is intended as a further step to increase the resolvability of U.S. global systemically important banking organizations (GSIBs)<sup>4</sup> and global systemically important foreign banking organizations (foreign GSIBs) that operate in the United States (collectively, “covered entities”).<sup>5</sup> Subsequent to the FRB NPRM, the OCC issued the OCC Notice of Proposed Rulemaking (OCC NPRM),<sup>6</sup> which applies the same QFC

system, to end ‘too big to fail’, [and] to protect the American taxpayer by ending bailouts.”

<sup>2</sup> The Dodd-Frank Act itself pursues this goal through numerous provisions, including by requiring systemically important financial companies to develop resolution plans (also known as “living wills”) that lay out how they could be resolved in an orderly manner under bankruptcy if they were to fail and by creating a new back-up resolution regime, the Orderly Liquidation Authority, applicable to systemically important financial companies. 12 U.S.C. 5365(d), 5381–5394.

<sup>3</sup> 81 FR 29169 (May 11, 2016).

<sup>4</sup> Under the GSIB surcharge rule’s methodology, there are currently eight U.S. GSIBs: Bank of America Corporation, The Bank of New York Mellon Corporation, Citigroup Inc., Goldman Sachs Group, Inc., JPMorgan Chase & Co., Morgan Stanley Inc., State Street Corporation, and Wells Fargo & Company. See FRB NPRM, 81 FR 29169, 29175 (May 11, 2016). This list may change in the future in light of changes to the relevant attributes of the current U.S. GSIBs and of other large U.S. bank holding companies.

<sup>5</sup> See FRB NPRM at § 252.82(a) (defining “covered entity” to include: (1) A bank holding company that is identified as a global systemically important [bank holding company] pursuant to 12 CFR 217.402; (2) A subsidiary of a company identified in paragraph (a)(1) of § 252.82 (other than a subsidiary that is a covered bank); or (3) A U.S. subsidiary, U.S. branch, or U.S. agency of a global systemically important foreign banking organization (other than a U.S. subsidiary, U.S. branch, or U.S. agency that is a covered bank, section 2(h)(2) company or a DPC branch subsidiary)). In its final rule, the FRB also excluded entities supervised by the FDIC from the definition of a “covered entity.” 82 FR 42882 (September 12, 2017).

<sup>6</sup> 81 FR 55,381 (Aug. 19, 2016).



requirements to “covered banks” within the OCC’s jurisdiction. The FDIC issued a parallel proposal (FDIC NPRM, also referred to as “the proposal” or “the proposed rule”) applicable to FSIs that are subsidiaries of a “covered entity” as defined in the FRB NPRM and to subsidiaries of such FSIs (collectively, “covered FSIs”).<sup>7</sup> After considering the comments received on the FDIC NPRM, the FDIC is now finalizing its rule (“FDIC FR”). The final rule is intended to work in tandem with the FRB’s final rule adopted on September 1, 2017 (“FRB FR”) and the OCC’s expected final rule (“OCC FR”).

The policy objective of this final rule is to improve the orderly resolution of a GSIB by limiting disruptions to a failed GSIB through its FSI subsidiaries’ financial contracts with other companies. The FRB FR, the OCC FR, and FDIC FR complement the ongoing work of the FRB and the FDIC on resolution planning requirements for GSIBs.

The FDIC has a strong interest in preventing a disorderly termination of covered FSIs’ QFCs upon a GSIB’s entry into resolution proceedings. In fulfilling the FDIC’s responsibilities as (i) the primary Federal supervisor for SNMBs and State savings associations;<sup>8</sup> (ii) the insurer of deposits and manager of the Deposit Insurance Fund (DIF); and (iii) the resolution authority for all FDIC-insured institutions under the FDI Act and, if appointed by the Secretary of the Treasury, for large complex financial institutions under Title II of the Dodd-Frank Act, the FDIC’s interests include ensuring that large complex financial institutions are resolvable in an orderly manner, and that FDIC-insured institutions operate safely and soundly.<sup>9</sup>

The final rule specifically addresses QFCs, which are typically entered into by various operating entities in a GSIB group, including covered FSIs. These covered FSIs are affiliates of U.S. GSIBs or foreign GSIBs that have OTC derivatives exposure. The exercise of default rights against an otherwise healthy covered FSI resulting from the failure of its affiliate—e.g., its top-tier U.S. holding company—may cause it to weaken or fail. Accordingly, FDIC-supervised affiliates of U.S. or foreign

GSIBs are exposed, through the interconnectedness of their QFCs and their affiliates’ QFCs, to destabilizing effects if their counterparties or the counterparties of their affiliates exercise default rights upon the entry into resolution of the covered FSI itself or its GSIB affiliate.<sup>10</sup>

These potentially destabilizing effects are best addressed by requiring all GSIB entities to amend their QFCs to include contractual provisions aimed at avoiding such destabilization. It is imperative that all entities within the GSIB group amend their QFCs in a similar way, thereby eliminating an incentive for counterparties to concentrate QFCs in entities subject to fewer restrictions. Therefore, the application of this final rule to the QFCs of covered FSIs is not only necessary for the safety and soundness of covered FSIs individually and collectively, but also to avoid potential destabilization of the overall banking system.

The FDIC received a total of 14 comment letters in response to the FDIC NPRM from trade groups representing GSIBs or GSIB groups, buy-side and end-users of derivatives, individuals and community advocates. There was substantial overlap in the comments received by the FRB, OCC and FDIC regarding the NPRMs. Notably, a copy of comments the commenter had already sent to the FRB or the OCC generally accompanied the comments received by the FDIC and were incorporated therein by reference. Commenters requested that the agencies coordinate in developing final rules and consider comments submitted to the other agencies regarding their NPRMs.

All comments were considered in developing the final rule. Comments are discussed in the relevant sections that follow. The FDIC consulted with the FRB and the OCC in developing the final rule.

*Qualified financial contracts, default rights, and financial stability.* Like the FDIC NPRM, this final rule pertains to several important classes of financial transactions that are collectively known as QFCs.<sup>11</sup> QFCs include swaps, other derivatives contracts, repurchase agreements (also known as “repos”) and reverse repos, and securities lending and borrowing agreements.<sup>12</sup> Financial

institutions enter into QFCs for a variety of purposes, including to borrow money to finance their investments, to lend money, to manage risk, and to enable their clients and counterparties to hedge risks, make markets in securities and derivatives, and take positions in financial investments.

QFCs play a role in economically valuable financial intermediation when markets are functioning normally. But they are also a major source of financial interconnectedness, which can pose a threat to financial stability in times of market stress. The final rule focuses on a context in which that threat is especially great: The failure of a GSIB that is an affiliate of a covered FSI that is party to large volumes of QFCs, which are likely to include QFCs with counterparties that are themselves systemically important.

QFC continuity is important for the orderly resolution of a GSIB because it helps to ensure that the GSIB entities remain viable and to avoid instability caused by asset fire sales. Together, the FRB and FDIC have identified the exercise of certain default rights in financial contracts as a potential obstacle to orderly resolution in the context of resolution plans filed pursuant to section 165(d) of the Dodd-Frank Act,<sup>13</sup> and have instructed systemically important firms to demonstrate that they are “amending, on an industry-wide and firm-specific basis, financial contracts to provide for a stay of certain early termination rights of external counterparties triggered by insolvency proceedings.”<sup>14</sup> More recently, in April 2016,<sup>15</sup> the FRB and FDIC noted the important changes that have been made to the structure and operations of the largest financial firms, including the adherence by all U.S. GSIBs and their affiliates to the ISDA 2015 Universal Resolution Stay Protocol.<sup>16</sup>

<sup>13</sup> 12 U.S.C. 5365(d).

<sup>14</sup> FRB and FDIC, “Agencies Provide Feedback on Second Round Resolution Plans of ‘First-Wave’ Filers” (Aug. 5, 2014), available at <https://www.fdic.gov/news/news/press/2014/pr14067.html>. See also FRB and FDIC, “Agencies Provide Feedback on Resolution Plans of Three Foreign Banking Organizations” (Mar. 23, 2015), available at <https://www.fdic.gov/news/news/press/2015/pr15027.html>; FRB and FDIC, “Guidance for 2013 165(d) Annual Resolution Plan Submissions by Domestic Covered Companies that Submitted Initial Resolution Plans in 2012” 5–6 (Apr. 15, 2013), available at <https://www.fdic.gov/news/news/press/2013/pr13027.html>.

<sup>15</sup> See <https://www.fdic.gov/news/news/press/2016/pr16031a.pdf>, at 13.

<sup>16</sup> International Swaps and Derivatives Association, Inc., “ISDA 2015 Universal Resolution Stay Protocol” (November 4, 2015), available at <http://assets.isda.org/media/ac6b533f-3/5a7c32f8.pdf>.

<sup>7</sup> 81 FR 74,326 (Oct. 26, 2016).

<sup>8</sup> Although the FDIC is the insurer for all insured depository institutions in the United States, it is the primary Federal supervisor only for State-chartered banks that are not members of the Federal Reserve System, State-chartered savings associations, and insured State-licensed branches of foreign banks. As of June 30, 2017, the FDIC had primary supervisory responsibility for 3,711 SNMBs and State-chartered savings associations.

<sup>9</sup> See <https://www.fdic.gov/about/strategic/strategic-supervision.html>.

<sup>10</sup> For additional background regarding the interconnectivity of the largest financial firms, see FRB NPRM, 81 FR 29175–29176 (May 11, 2016).

<sup>11</sup> The final rule adopts the definition of “qualified financial contract” set out in section 210(c)(8)(D) of the Dodd-Frank Act, 12 U.S.C. 5390(c)(8)(D). See final rule § 382.1.

<sup>12</sup> The definition of “qualified financial contract” is broader than this list of examples, and the default rights discussed are not common to all types of QFCs. See final rule § 382.1.

*Direct defaults and cross-defaults.* This rule focuses on two distinct scenarios in which a party to a QFC is commonly able to exercise default rights. These two scenarios involve a default that occurs when either the GSIB entity that is a direct party<sup>17</sup> to the QFC or an affiliate of that entity enters a resolution proceeding.<sup>18</sup> The first scenario occurs when a GSIB entity that is itself a direct party to the QFC enters a resolution proceeding and such event gives rise to default rights under the QFC it is a party to; this preamble refers to such a scenario as a “direct default” and refers to the default rights that arise from a direct default as “direct default rights.” The second scenario occurs when an affiliate of the GSIB entity that is a direct party to the QFC (such as the direct party’s parent holding company) enters a resolution proceeding and such event gives rise to default rights under the QFC it is a party to; this preamble refers to such a scenario as a “cross-default” and refers to default rights that arise from a cross-default as “cross-default rights.” A GSIB parent entity will often guarantee the derivatives transactions of its subsidiaries and those derivatives contracts could contain cross-default rights against a subsidiary of the GSIB that would be triggered by the bankruptcy filing of the GSIB parent entity even though the subsidiary continues to meet all of its financial obligations.

Importantly, the final rule does not affect all types of default rights, and, where it affects a default right, the rule does so only temporarily for the purpose of allowing the relevant resolution authority to take action to continue to provide for continued performance on the QFC or to transfer the QFC. Moreover, the final rule is concerned

<sup>17</sup>In general, a “direct party” refers to a party to a financial contract other than a credit enhancement (such as a guarantee). The definition of “direct party” and related definitions are discussed in more detail below.

<sup>18</sup>This preamble uses phrases such as “entering a resolution proceeding” and “going into resolution” to encompass the concept of “becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding.” These phrases refer to proceedings established by law to deal with a failed legal entity. In the context of the failure of a systemically important banking organization, the most relevant types of resolution proceedings include the following: For most U.S.-based legal entities, the bankruptcy process established by the U.S. Bankruptcy Code (Title 11, United States Code); for U.S. insured depository institutions, a receivership administered by the FDIC under the FDI Act (12 U.S.C. 1821); for companies whose “resolution under otherwise applicable Federal or State law would have serious adverse effects on the financial stability of the United States,” the Dodd-Frank Act’s Orderly Liquidation Authority (12 U.S.C. 5383(b)(2)); and, for entities based outside the United States, resolution proceedings created by foreign law.

only with default rights that run *against* a GSIB entity—that is, direct default rights and cross-default rights that arise from the entry into resolution of a GSIB entity. The final rule does not affect default rights that a GSIB entity (or any other entity) may have against a counterparty that is not a GSIB entity. This limited scope is appropriate because, as described above, the risk posed to financial stability by the exercise of QFC default rights is greatest when the defaulting counterparty is a GSIB entity.

#### Resolution Strategies

*Single-point-of-entry resolution.* Cross-default rights are especially significant in the context of a GSIB failure because GSIBs and their affiliates often enter into large volumes of QFCs. For example, a U.S. GSIB is made up of a U.S. bank holding company and numerous operating subsidiaries that are owned, directly or indirectly, by the bank holding company. From the standpoint of financial stability, the most important of these operating subsidiaries are generally a U.S. insured depository institution, a U.S. broker-dealer, or similar entities organized in other countries.

Many complex GSIBs have developed resolution strategies that rely on the single-point-of-entry (SPOE) resolution strategy. In an SPOE resolution of a GSIB, only a single legal entity—the GSIB’s top-tier bank holding company—would enter a resolution proceeding. The effect of losses that led to the GSIB’s failure would pass up from the operating subsidiaries that incurred the losses to the holding company and would then be imposed on the equity holders and unsecured creditors of the holding company through the resolution process. This strategy is designed to help ensure that the GSIB subsidiaries remain adequately capitalized, and that operating subsidiaries of the GSIB are able to stabilize and continue meeting their financial obligations without immediately defaulting or entering resolution themselves. The expectation that the holding company’s equity holders and unsecured creditors would absorb the GSIB’s losses in the event of failure would help to maintain the confidence of the operating subsidiaries’ creditors and counterparties (including their QFC counterparties), reducing their incentive to engage in potentially destabilizing funding runs or margin calls and thus lowering the risk of asset fire sales. A successful SPOE resolution would also avoid the need for separate resolution proceedings for separate legal entities run by separate authorities across multiple jurisdictions, which

would be more complex and could therefore destabilize the resolution of a GSIB. An SPOE resolution can also avoid the need for insured bank subsidiaries, including covered FSIs, to be placed into receivership or similar proceedings as the likelihood of their continuing to operate as going concerns will be significantly enhanced if the parent’s entry into resolution proceedings does not trigger the exercise of cross-default rights. Accordingly, this final rule, by limiting such cross-default rights in covered QFCs based on an affiliate’s entry into resolution proceedings, assists in stabilizing both the covered FSIs and the larger banking system.

*Multiple-Point-of-Entry Resolution.* This final rule is also intended to yield benefits for other approaches to resolution. For example, preventing early terminations of QFCs would increase the prospects for an orderly resolution under a multiple-point-of-entry (MPOE) strategy involving a foreign GSIB’s U.S. intermediate holding company going into resolution or a resolution plan that calls for a GSIB’s U.S. insured depository institution to enter resolution under the FDI Act. As discussed above, the final rule should help support the continued operation of one or more affiliates of an entity that has entered resolution to the extent the affiliate continues to perform on its QFCs.

*U.S. Bankruptcy Code.* While insured depository institutions are not subject to resolution under the U.S. Bankruptcy Code, if a bank holding company were to fail, it would likely be resolved under the U.S. Bankruptcy Code. When an entity goes into resolution under the U.S. Bankruptcy Code, attempts by the debtor’s creditors to enforce their debts through any means other than participation in the bankruptcy proceeding (for instance, by suing in another court, seeking enforcement of a preexisting judgment, or seizing and liquidating collateral) are generally blocked by the imposition of an automatic stay.<sup>19</sup> A key purpose of the automatic stay, and of bankruptcy law in general, is to maximize the value of the bankruptcy estate and the creditors’ ultimate recoveries by facilitating an orderly liquidation or restructuring of the debtor. The automatic stay thus solves a collective action problem in which the creditors’ individual incentives to become the first to recover as much from the debtor as possible, before other creditors can do so,

<sup>19</sup> See 11 U.S.C. 362.

collectively cause a value-destroying disorderly liquidation of the debtor.<sup>20</sup>

However, the U.S. Bankruptcy Code largely exempts QFC,<sup>21</sup> counterparties of the debtor from the automatic stay through special “safe harbor” provisions.<sup>22</sup> Under these provisions, any rights that a QFC counterparty has to terminate the contract, set-off obligations, or liquidate collateral in response to a direct default are not subject to the stay and may be exercised against the debtor immediately upon default. (The U.S. Bankruptcy Code does not itself confer default rights upon QFC counterparties; it merely permits QFC counterparties to exercise certain rights created by other sources, such as contractual rights created by the terms of the QFC.)

The U.S. Bankruptcy Code’s automatic stay also does not prevent the exercise of cross-default rights against an affiliate of the party entering resolution. The stay generally applies only to actions taken against the party entering resolution or the bankruptcy estate,<sup>23</sup> whereas a QFC counterparty exercising a cross-default right is instead acting against a distinct legal entity that is not itself in resolution: The debtor’s affiliate.

*Title II of the Dodd-Frank Act and the Orderly Liquidation Authority.* Title II of the Dodd-Frank Act (Title II) imposes stay requirements on QFCs of financial companies that enter resolution under that back-up resolution authority. In general, a U.S. bank holding company (such as the top-tier holding company of a U.S. GSIB) that fails would be resolved under the U.S. Bankruptcy Code. With Title II of the Dodd-Frank Act, Congress recognized, however, that a financial company might fail under extraordinary circumstances in which an attempt to resolve it through the bankruptcy process would have serious adverse effects on financial stability in the United States. Title II of the Dodd-Frank Act establishes the Orderly Liquidation Authority, an alternative resolution framework intended to be used rarely to manage the failure of a firm that poses a significant risk to the financial

stability of the United States in a manner that mitigates such risk and minimizes moral hazard.<sup>24</sup> Title II of the Dodd-Frank Act authorizes the Secretary of the Treasury, upon the recommendation of other government agencies and a determination that several preconditions are met, to place a financial company into a receivership conducted by the FDIC as an alternative to bankruptcy.<sup>25</sup>

Title II of the Dodd-Frank Act empowers the FDIC to transfer QFCs to a bridge financial company or some other financial company that is not in a resolution proceeding and should therefore be capable of performing under the QFCs.<sup>26</sup> To give the FDIC time to effect this transfer, Title II of the Dodd-Frank Act temporarily stays QFC counterparties of the failed entity from exercising termination, netting, and collateral liquidation rights “solely by reason of or incidental to” the failed entity’s entry into Title II resolution, its insolvency, or its financial condition.<sup>27</sup> Once the QFCs are transferred in accordance with the statute, Title II of the Dodd-Frank Act permanently stays the exercise of default rights for those reasons.<sup>28</sup>

Title II of the Dodd-Frank Act addresses cross-default rights through a similar procedure. It empowers the FDIC to enforce contracts of subsidiaries or affiliates of the failed covered financial company that are “guaranteed or otherwise supported by or linked to the covered financial company, notwithstanding any contractual right to cause the termination, liquidation, or acceleration of such contracts based solely on the insolvency, financial condition, or receivership of” the failed company, so long as, if such contracts are guaranteed or otherwise supported by the covered financial company, the FDIC takes certain steps to protect the QFC counterparties’ interests by the end of the business day following the company’s entry into Title II resolution.<sup>29</sup>

These stay-and-transfer provisions of the Dodd-Frank Act are intended to mitigate the threat posed by QFC default rights. At the same time, the provisions allow appropriate protections for QFC counterparties of the failed financial

company. The provisions stay the exercise of default rights based on the failed company’s entry into resolution, the fact of its insolvency, or its financial condition. Further, the stay period is temporary, unless the FDIC transfers the QFCs to another financial company that is not in resolution (and should therefore be capable of performing under the QFCs) or, in the case of cross-default rights relating to guaranteed or supported QFCs, the FDIC takes the action required in order to continue to enforce those contracts.<sup>30</sup>

*The Federal Deposit Insurance Act.* Under the FDI Act, a failing insured depository institution would generally enter a receivership administered by the FDIC.<sup>31</sup> The FDI Act addresses direct default rights in the failed bank’s QFCs with stay-and-transfer provisions that are substantially similar to the provisions of Title II of the Dodd-Frank Act discussed above.<sup>32</sup> However, the FDI Act does not address cross-default rights, leaving the QFC counterparties of the failed depository institution’s affiliates free to exercise any contractual rights they may have to terminate, net, or liquidate QFCs with such affiliates based on the depository institution’s entry into resolution. Moreover, as with Title II, there is a possibility that a court of a foreign jurisdiction might decline to enforce the FDI Act’s stay-and-transfer provisions under certain circumstances.

#### *B. Notice of Proposed Rulemaking and General Summary of Comments*

The proposal was intended to increase GSIB resolvability and resiliency by addressing two QFC-related issues. First, the proposal sought to address the risk that a court in a foreign jurisdiction may decline to enforce the QFC stay-and-transfer provisions of Title II and the FDI Act discussed above. Second, the proposal sought to address the potential disruptions that may occur if a counterparty to a QFC with an affiliate of a GSIB entity that goes into resolution under the Bankruptcy Code or the FDI Act is provided cross-default rights.

*Scope of application.* The proposal’s requirements would have applied to all “covered FSIs.” “Covered FSIs” include: Any State savings associations (as defined in 12 U.S.C. 1813(b)(3)) or State non-member bank (as defined in 12 U.S.C. 1813(e)(2)) that is a direct or indirect subsidiary of (i) a global systemically important bank holding company that has been designated pursuant to § 252.82(a)(1) of the FRB’s

<sup>20</sup> See, e.g., *Aiello v. Provident Financial Corp.*, 239 F.3d 876, 879 (7th Cir. 2001).

<sup>21</sup> The U.S. Bankruptcy Code does not use the term “qualified financial contract,” but the set of transactions covered by its safe harbor provisions closely tracks the set of transactions that fall within the definition of “qualified financial contract” used in Title II of the Dodd-Frank Act and in this final rule.

<sup>22</sup> 11 U.S.C. 362(b)(6), (7), (17), (27), 362(o), 555, 556, 559, 560, 561. The U.S. Bankruptcy Code specifies the types of parties to which the safe harbor provisions apply, such as financial institutions and financial participants. *Id.*

<sup>23</sup> See 11 U.S.C. 362(a).

<sup>24</sup> Section 204(a) of the Dodd-Frank Act, codified at 12 U.S.C. 5384(a).

<sup>25</sup> See section 203 of the Dodd-Frank Act, codified at 12 U.S.C. 5383.

<sup>26</sup> See 12 U.S.C. 5390(c)(9).

<sup>27</sup> 12 U.S.C. 5390(c)(10)(B)(i)(I). This temporary stay generally lasts until 5 p.m. eastern time on the business day following the appointment of the FDIC as receiver.

<sup>28</sup> 12 U.S.C. 5390(c)(10)(B)(i)(II).

<sup>29</sup> 12 U.S.C. 5390(c)(16); 12 CFR 380.12.

<sup>30</sup> See *id.*

<sup>31</sup> 12 U.S.C. 1821(c).

<sup>32</sup> See 12 U.S.C. 1821(e)(8)–(10).

Regulation YY (12 CFR 252.82); or (ii) a global systemically important foreign banking organization<sup>33</sup> that has been designated pursuant to § 252.87 of the FRB's Regulation YY (12 CFR 252.87). This final rule also makes clear that the mandatory contractual stay requirements apply to the subsidiaries of any covered FSI. Under the final rule, the term "covered FSI" also includes "any subsidiary of a covered FSI." For the reasons noted above, all subsidiaries of covered FSIs should also be subject to mandatory contractual stay requirements—*e.g.*, to avoid concentrating QFCs in entities subject to fewer restrictions.

In the proposal, "qualified financial contract" or "QFC" was defined to have the same meaning as in section 210(c)(8)(D) of the Dodd-Frank Act,<sup>34</sup> and included, among other arrangements, derivatives, repos, and securities borrowing and lending agreements. Subject to the exceptions discussed below, the proposal's requirements would have applied to any QFC to which a covered FSI is party (covered QFC).<sup>35</sup> Under the proposal, a covered FSI would have been required to conform pre-existing QFCs if a covered FSI entered into a new QFC with a counterparty or its affiliate.

**Required contractual provisions related to the U.S. special resolution regimes.** Under the proposal, covered FSIs would have been required to ensure that covered QFCs include contractual terms explicitly providing that any default rights or restrictions on the transfer of the QFC are limited to at

least the same extent as they would be pursuant to the U.S. Special Resolution Regimes—that is, Title II and the FDI Act.<sup>36</sup> The proposed requirements were not intended to imply that the statutory stay-and-transfer provisions would not in fact apply to a given QFC, but rather to help ensure that all covered QFCs would be treated the same way in the context of an FDIC receivership under the Dodd-Frank Act or the FDI Act. This section of the proposal was also consistent with analogous legal requirements that have been imposed in other national jurisdictions<sup>37</sup> and with the Financial Stability Board's "Principles for Cross-border Effectiveness of Resolution Actions."<sup>38</sup>

**Prohibited cross-default rights.** Under the proposal, a covered FSI would generally have been prohibited from entering into covered QFCs that would allow the exercise of cross-default rights—that is, default rights related, directly or indirectly, to the entry into resolution of an affiliate of the direct party—against it.<sup>39</sup> Covered FSIs would generally have been similarly prohibited from entering into covered QFCs that included a restriction on the transfer of a credit enhancement supporting the QFC from the covered FSI's affiliate to a transferee upon or following the entry into resolution of the affiliate.

The FDIC did not propose to prohibit covered FSIs from entering into QFCs that allow its counterparties to exercise direct default rights against the covered FSI.<sup>40</sup> Under the proposal, a covered FSI also could, to the extent not inconsistent with Title II or the FDI Act, enter into a QFC that grants its counterparty the right to terminate the QFC if the covered FSI fails to perform its obligations under the QFC.

As an alternative to bringing their covered QFCs into compliance with the requirements set out in the proposed rule, covered FSIs would have been permitted to comply by adhering to the International Swaps and Derivatives Association (ISDA) 2015 Universal Resolution Stay Protocol, including the Securities Financing Transaction Annex

and the Other Agreements Annex (together, the "Universal Protocol").<sup>41</sup> The preamble to the proposal explained that the FDIC viewed the Universal Protocol as achieving an outcome consistent with the outcome intended by the requirements of the proposed rule by similarly limiting direct default rights and cross-default rights.

**Process for approval of enhanced creditor protection conditions.** As noted above, in the context of addressing the potential disruption that may occur if a counterparty to a QFC with an affiliate of a GSIB entity that goes into resolution under the Bankruptcy Code or the FDI Act is allowed to exercise cross-default rights, the proposed rule would have generally restricted the exercise of cross-default rights by counterparties against a covered FSI. The proposal also would have allowed the FDIC, at the request of a covered FSI, to approve as compliant with the requirements of § 382.5 proposed creditor protection provisions for covered QFCs.<sup>42</sup>

The FDIC would have been permitted to approve such a request if, in light of several enumerated considerations,<sup>43</sup> the alternative creditor protections would mitigate risks to the financial stability of the United States presented by a GSIB's failure to at least the same extent as the proposed requirements.<sup>44</sup>

**Amendments to certain definitions in the FDIC's capital and liquidity rules.** The proposal would have amended certain definitions in the FDIC's capital and liquidity rules to help ensure that the regulatory capital and liquidity treatment of QFCs to which a covered FSI is party would not be affected by the proposed restrictions on such QFCs. Specifically, the proposal would have amended the definition of "qualifying master netting agreement" in the FDIC's regulatory capital and liquidity rules and would have similarly amended the definitions of the terms "collateral agreement," "eligible margin loan," and "repo-style transaction" in the FDIC's regulatory capital rules.<sup>45</sup>

**Comments on the Proposal.** The FDIC received 14 comments on the proposed rule from banking organizations, trade associations, public interest advocacy groups, and private individuals. FDIC staff also met with some commenters at

<sup>33</sup> The definition of covered FSI does not include insured State-licensed branches of FBOs. Any insured State-licensed branches of global systemically important FBOs would be covered by the FRB FR. Therefore, unlike the FRB FR, the FDIC is not including in the rule any special provisions relating to multi-branch netting arrangements.

<sup>34</sup> 12 U.S.C. 5390(c)(8)(D). See proposed rule § 382.1.

<sup>35</sup> In addition, the proposed rule states at § 382.2(d) that it does not modify or limit, in any manner, the rights and powers of the FDIC as receiver under the FDI Act or Title II of the Dodd-Frank Act, including, without limitation, the rights of the receiver to enforce provisions of the FDI Act or Title II of the Dodd-Frank Act that limit the enforceability of certain contractual provisions. For example, the suspension of payment and delivery obligations to QFC counterparties during the stay period as provided under the FDI Act and Title II when an entity is in receivership under the FDI Act or Title II remains valid and unchanged irrespective of any contrary contractual provision and may continue to be enforced by the FDIC as receiver. Similarly, the use by a counterparty to a QFC of a contractual provision that allows the party to terminate a QFC on demand, or at its option at a specified time, or from time to time, for any reason, as a basis for termination of a QFC on account of the appointment of the FDIC as receiver (or the insolvency or financial condition of the company) remains unenforceable. This provision is retained in the final rule.

<sup>36</sup> See proposed rule § 382.3.

<sup>37</sup> See, *e.g.*, Bank of England Prudential Regulation Authority, Policy Statement, "Contractual stays in financial contracts governed by third-country law" (Nov. 2015), available at <http://www.bankofengland.co.uk/pr/Documents/publications/ps/2015/ps2515.pdf>.

<sup>38</sup> Financial Stability Board, "Principles for Cross-border Effectiveness of Resolution Actions" (Nov. 3, 2015), available at <http://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf>.

<sup>39</sup> See proposed rule § 382.4(b).

<sup>40</sup> However, those default rights would nonetheless have been subject to Title II and FDI Act.

<sup>41</sup> ISDA, "Attachment to the ISDA 2015 Universal Resolution Stay Protocol," (Nov. 4, 2015), available at <http://assets.isda.org/media/ac6b533f-3/5a7c32f8-pdf/>. See proposed rule § 382.5(a).

<sup>42</sup> See proposed rule § 382.5(c).

<sup>43</sup> See proposed rule § 382.5(c).

<sup>44</sup> This provision is retained in the final rule and the FDIC expects to consult with the FRB and OCC during its consideration of a request under this section.

<sup>45</sup> See proposed rule §§ 324.2 and 329.3.

their request to discuss their comments on the proposal, and summaries of these meetings may be found on the FDIC's public Web site.

A number of commenters including GSIBs that would be subject to the proposed requirements included in the proposal expressed strong support for the proposed rule as a well-considered effort to reduce systemic risk with minimal burden and as an important step to ensure a more efficient and orderly resolution process for GSIB entities and thereby to protect the stability of the U.S. financial system. Other commenters, however, expressed concern with the proposed rule. These commenters generally argued that the proposal should not restrict contractual rights of GSIB counterparties and contended that the proposal would have shifted the costs of resolving the covered FSIs, covered entities, and covered banks to non-defaulting counterparties. Some commenters argued that the proposal would not assuredly mitigate systemic risk, as the requirements could result in increased market and credit risk for QFC counterparties of a GSIB. Commenters also argued that it would be more appropriate for Congress to impose the proposal's restrictions on contractual rights through the legislative process rather than through a regulation.

As described above, the proposal applied to "covered FSIs." A covered FSI included any subsidiary of a covered FSI. The proposal defined "subsidiary of a covered FSI" as an entity owned or controlled directly or indirectly by a covered FSI. "Control" was defined by reference to the Bank Holding Company Act of 1956, as amended ("BHC Act"). The other NPRMs similarly used the definition of control from the BHC Act for purposes of determining the entities that would have been subject to the requirements of the NPRMs. Commenters urged the agencies to move to a financial consolidation standard to define the subsidiaries of covered FSIs, arguing that the concept of control under the BHC Act includes entities (1) that are not under the operational control of the GSIB entity and (2) over whom the GSIB may not have the practical ability to require remediation. Furthermore, commenters urged that non-financial consolidated subsidiaries are unlikely to raise the types of concerns for the orderly resolution of GSIBs targeted by the proposal. For similar reasons, these commenters argued that, for purposes of the requirement that a covered FSI conform existing QFCs if a covered FSI enters into a new QFC with a counterparty or its affiliate, a

counterparty's "affiliate" should also be defined by reference to financial consolidation rather than BHC Act control. Commenters also expressed concern that the definition of "covered QFCs" under the proposal was overly broad. The proposal required a covered QFC to explicitly provide that it is subject to the stay-and-transfer provisions of Title II and the FDI Act and generally prohibited a covered FSI from being a party to a QFC that would allow the exercise of cross-default rights. Commenters argued that the final rule should exclude QFCs that do not contain any contractual transfer restrictions, direct default rights, or cross-default rights, as these QFCs do not give rise to the risk that counterparties will exercise their contractual rights in a manner that is inconsistent with the provisions of the U.S. Special Resolution Regimes. Commenters also urged the FDIC to exclude QFCs governed by U.S. law from the requirement that QFCs explicitly "opt in" to the U.S. Special Resolution Regimes since it is already clear that such QFCs are subject to the stay-and-transfer provisions of Title II and the FDI Act. With respect to the proposal's prohibition against provisions that would allow the exercise of cross-default rights in covered QFCs of a GSIB, commenters argued that the final rule should clarify that QFCs that do not contain such cross-default rights or transfer restrictions regarding related credit enhancements are not within the scope of the prohibition.

Commenters also requested that certain types of contracts that may include transfer or default rights subject to the proposal's requirements (*e.g.*, warrants; certain commodity contracts including commodity swaps; certain utility and gas supply contracts; certain retail customer and investment advisory agreements; securities underwriting agreements; securities lending authorization agreements) be excluded from all requirements of the final rule because these types of contracts do not raise the risks to the resolution of a covered FSI or financial stability that are the target of this final rule and because certain existing contracts of these types would be difficult, if not impossible, to amend. Commenters also requested that securities contracts that typically settle in the short term or that typically include only transfer restrictions and not default rights similarly be excluded from all requirements of the final rule because they do not impose ongoing or continuing obligations on either party after settlement. In all of the above

cases, commenters argued that remediation of such outstanding contracts would be burdensome with no meaningful resolution benefits. Certain commenters also urged that the final rule apply only to contracts entered into after the final rule's effective date and not to contracts existing as of the final rule's effective date.

As noted above, the proposal would have deemed compliant covered QFCs amended by the existing Universal Protocol (which allows for creditor protections in addition to those otherwise permitted by the proposed rule). Commenters generally supported this aspect of the proposal, although they requested express clarification that adherence to the existing Universal Protocol would satisfy all of the requirements of the final rule. Commenters urged that the final rule should also provide a safe harbor for a future ISDA protocol that would be substantially similar to the existing Universal Protocol except that it would seek to address the specific needs of buy-side market participants, such as asset managers, insurance companies, and pension funds who are counterparties to QFCs with GSIBs, to allow, for example, entity-by-entity adherence and the exclusion of certain foreign special resolution regimes.

Commenters expressed support for the exemption in the proposal for cleared QFCs but requested that this exemption be broadened to extend to the client leg of a cleared back-to-back transaction and also to exclude any contract cleared, processed, or settled on a financial market utility (FMU) as well as any QFC conducted according to the rules of an FMU. Commenters also requested an exemption for QFCs with sovereign entities and central banks. Commenters further requested a longer period of time for covered FSIs, entities, and banks to conform covered QFCs with certain types of counterparties to the requirements of the final rule. Commenters also requested that the FDIC coordinate with other regulatory agencies, consider comments submitted to the OCC and the FRB regarding their proposals and from entities not regulated by the FDIC, and finalize a rule with conformance periods consistent with the OCC's and FRB's final rules. In addition, commenters requested confirmation that modifications to contracts to comply with this rule would not trigger other regulatory requirements (*e.g.*, margin requirements for non-cleared swaps) or impact the enforceability of QFCs. The FDIC has considered the comments received on the proposal, including those of entities not regulated by the

FDIC, as well as the comments submitted to the OCC and FRB regarding their respective proposals, and these comments and any corresponding changes in the final rule are described in more detail throughout the remainder of this **SUPPLEMENTARY INFORMATION**.

### C. Overview of Final Rule

The FDIC is adopting this final rule to improve the resolvability of GSIBs and thereby furthering financial stability and enhancing the resilience, and the safety and soundness of covered FSIs. The FDIC has made a number of changes to the proposal in response to concerns raised by commenters, as further described below.

The final rule is intended to protect covered FSIs and to facilitate the orderly resolution of the most systemically important banking firms—GSIBs—by limiting the ability of the counterparties of the firms' FSI subsidiaries to terminate qualified financial contracts upon the entry of the GSIB or one or more of its affiliates into resolution. The rule requires the inclusion of contractual restrictions on the exercise of certain default rights in those QFCs. In particular, the final rule requires the QFCs of covered FSIs to contain contractual provisions that opt into the stay-and-transfer provisions of the FDI Act and the Dodd-Frank Act to reduce the risk that the stay-and-transfer related actions by the receiver would be successfully challenged by a QFC counterparty or a court in a foreign jurisdiction. The final rule also prohibits covered FSIs from entering into QFCs that contain cross-default rights, subject to certain creditor protection exceptions that would not be expected to interfere with an orderly resolution.

The final rule also furthers the implementation of the Universal Protocol, which extends, through contractual agreement, the application of the resolution frameworks of the FDI Act and the Dodd-Frank Act to all QFCs entered into by an adhering GSIB and its adhering subsidiaries, including QFCs entered into outside of the United States, and establishes restrictions on cross-default rights that are similar to those in the final rule. The final rule is necessary to implement the Universal Protocol provisions regarding the resolution of a GSIB under the U.S. Bankruptcy Code, as these provisions do not become effective until implemented by U.S. regulations. To support further adherence to the Universal Protocol, the final rule creates a safe harbor allowing covered FSIs to sign up to the Universal Protocol and thereby amend their QFCs

pursuant to the Universal Protocol as an alternative to implementing the restrictions of the final rule on a counterparty-by-counterparty basis. In addition, the final rule provides that covered QFCs amended pursuant to adherence of a covered FSI to a new protocol (the "U.S. Protocol") would be deemed to conform to the requirements of the final rule. The U.S. Protocol may differ (and is required to differ) from the Universal Protocol in certain respects discussed below, but otherwise must be substantively identical to the Universal Protocol.

The final rule requires covered FSIs to conform certain covered QFCs to the requirements of the final rule beginning one year after the effective date of the final rule (first compliance date) and phases in conformance requirements with respect to all covered QFCs over a two-year period depending on the type of counterparty. As explained below, a covered FSI generally is required to conform pre-existing QFCs only if the covered FSI or an affiliate of the covered FSI enters into a new QFC with the same counterparty or a consolidated affiliate of the counterparty on or after the first compliance date.

#### Covered FSIs

The final rule, like the proposal, applies to "covered FSIs," which generally are State savings associations and State non-member banks and their subsidiaries. "Subsidiary" continues to be defined in the final rule by reference to BHC Act control. As discussed below, certain other types of subsidiaries, including a subsidiary that is owned in satisfaction of debt previously contracted in good faith, a portfolio concern controlled by a small business investment company, or a subsidiary that promotes the public welfare, are excluded from the definition of covered FSI and therefore not required to conform any QFCs.

#### Covered Qualified Financial Contracts

The final rule like the proposal defines "qualified financial contract" or "QFC" to have the same meaning as in section 210(c)(8)(D) of the Dodd-Frank Act<sup>46</sup> and would include, among other things, derivatives, repos, and securities lending agreements.<sup>47</sup> Subject to the exceptions discussed below, the final rule's requirements apply to any QFC to which a covered FSI is party (covered QFC). The final rule makes clear that covered FSIs do not need to conform QFCs that have no transfer restrictions,

direct default rights, or cross-default rights as these QFCs have no provisions that the rule is intended to address.<sup>48</sup> The final rule also excludes certain retail investment advisory agreements, and certain existing warrants. It also provides the FDIC with authority to exempt one or more covered FSIs from conforming certain contracts or types of contracts to the one or more of the requirements of the final rule after considering, in addition to any other factor the FDIC deems relevant, the burden the exemption would relieve and the potential impact of the exemption on the resolvability of the covered FSI or its affiliates.<sup>49</sup>

The final rule also makes clear that a covered FSI must conform existing QFCs with a counterparty if the GSIB group (*i.e.*, the covered FSI or its affiliates that are covered FSIs or covered banks or covered entities) enters into a new QFC with that counterparty or its consolidated affiliate, defined by reference to financial consolidation principles. In particular, the final rule provides that a covered QFC includes a QFC that the covered FSI entered, executed, or otherwise became a party to before the first compliance date of this final rule if the covered FSI or any affiliate that is a covered FSI, covered entity or covered bank also enters, executes, or otherwise becomes a party to a QFC with the same person or a consolidated affiliate of that person on or after the first compliance date.<sup>50</sup> "Consolidated affiliate" is a defined term in the final rule that is defined by reference to financial consolidation principles.<sup>51</sup>

#### Required Contractual Provisions Related to the U.S. Special Resolution Regimes

Under the final rule, covered FSIs are required to ensure that covered QFCs include contractual terms explicitly providing that any default rights or restrictions on the transfer of the QFC are limited to the same extent as they would be pursuant to the U.S. Special Resolution Regimes.<sup>52</sup> However, any covered QFC that is governed under U.S. law and involves only parties (other than the covered FSI) that are domiciled (in the case of individuals), incorporated in, organized under, the laws of the United States or any State, or whose principal place of business is located in the United States, including any State, or that is a U.S. branch or U.S. agency (U.S. counterparties) is also

<sup>48</sup> See final rule § 382.2.

<sup>49</sup> See final rule § 382.7.

<sup>50</sup> See final rule § 382.2(c).

<sup>51</sup> See final rule § 382.1.

<sup>52</sup> See final rule § 382.3.

<sup>46</sup> 12 U.S.C. 5390(c)(8)(D). See proposed rule § 382.1.

<sup>47</sup> See final rule § 382.1.

excluded from the requirements of the final rule relating to Title II of the Dodd-Frank Act and the FDI Act because it is clear that in these circumstances the stay-and-transfer provisions of those acts would be enforceable in a U.S. forum.<sup>53</sup>

#### Prohibited Cross-Default Rights

Under the final rule, a covered FSI is prohibited from entering into covered QFCs that would allow the exercise of cross-default rights—that is, default rights related, directly or indirectly, to the entry into resolution of an affiliate of the direct party—against it.<sup>54</sup> Covered FSIs are similarly prohibited from entering into covered QFCs that would restrict the transfer of a credit enhancement supporting the QFC from the covered FSI's affiliate to a transferee upon the entry into resolution of the affiliate.<sup>55</sup>

The final rule does not prohibit covered FSIs from entering into QFCs that provide their counterparties with direct default rights against the covered FSI. Under the final rule, a covered FSI may be a party to a QFC that provides the counterparty with the right to terminate the QFC if the covered FSI fails to perform its obligations under the QFC.<sup>56</sup>

#### Industry-Developed Protocol

As an alternative to bringing their covered QFCs into compliance with the requirements of the final rule, the final rule allows covered FSIs to comply with the rule by adhering to the Universal Protocol.<sup>57</sup> The final rule also permits compliance with the final rule through adherence to a new protocol (the U.S. Protocol) that is the same as the existing Universal Protocol but for minor changes intended to encourage a broader range of QFC counterparties to adhere only with respect to covered FSIs, covered entities, and covered banks. The Universal Protocol and the U.S. Protocol differ from the requirements of this final rule in certain respects. Nevertheless, as described in greater detail below, the final rule allows compliance through adherence to these protocols in light of the fact that the protocols contain certain desirable features that the final rule lacks and produce outcomes substantially similar to this final rule.

#### Process for Approval of Enhanced Creditor Protection Conditions

The final rule also allows the FDIC, at the request of a covered FSI, to approve as compliant with the final rule covered QFCs with creditor protections other than those that would otherwise be permitted under § 382.4 of the final rule.<sup>58</sup> The FDIC could approve such a request if, in light of several enumerated considerations, the alternative approach would prevent or mitigate risks to the financial stability of the United States presented by a GSIB's failure and would protect the safety and soundness of covered FSIs to at least the same extent as the final rule's requirements.<sup>59</sup>

#### Amendments to Certain Definitions in the FDIC's Capital and Liquidity Rules

The final rule also amends certain definitions in the FDIC's capital and liquidity rules to help ensure that the regulatory capital and liquidity treatment of QFCs to which a covered FSI is party is not affected by the proposed restrictions on such QFCs. Specifically, the final rule amends the definition of "qualifying master netting agreement" in the FDIC's regulatory capital and liquidity rules and similarly amends the definitions of the terms "collateral agreement," "eligible margin loan," and "repo-style transaction" in the FDIC's regulatory capital rules.

#### D. Consultation With U.S. Financial Regulators

In developing this final rule, the FDIC consulted with the FRB and the OCC as a means of promoting alignment across regulations and avoiding redundancy. Furthermore, the FDIC has consulted with and expects to continue to consult with foreign financial regulatory authorities regarding the implementation of this final rule and the establishment of other standards that would maximize the prospects for the cooperative and orderly cross-border resolution of a failed GSIB on an international basis.<sup>60</sup>

The FRB has finalized a rulemaking that would subject entities to requirements substantially identical to those finalized here for covered FSIs. Similarly, the OCC is expected to finalize a rulemaking that would subject covered banks, including the national banks of GSIBs, to requirements substantially identical to those proposed

here for covered FSIs. The FDIC has consulted with the OCC and the FRB in the development of their respective final rules. The banking agencies have endeavored to harmonize their respective rules to the extent possible and to provide specificity and clarity in the final rule to minimize the possibility of conflicting interpretations or uncertainty in their application. Moreover, the banking agencies intend to consult with each other and coordinate as needed regarding implementation of the final rule.

#### E. Overview of Statutory Authority and Purpose

The FDIC is issuing this final rule under its authorities under the FDI Act (12 U.S.C. 1811 *et seq.*), including its general rulemaking authorities.<sup>61</sup> The FDIC views the final rule as consistent with its overall statutory mandate.<sup>62</sup> An overarching purpose of the final rule is to limit disruptions to an orderly resolution of a GSIB and its subsidiaries, thereby furthering financial stability generally. Another purpose is to enhance the safety and soundness of covered FSIs by addressing the two main issues raised by covered QFCs (noted above): Cross-border recognition and cross-default rights.

As discussed above, the exercise of default rights by counterparties of a failed GSIB can have significant impacts on financial stability. These financial stability concerns are necessarily intertwined with the safety and soundness of covered FSIs and the banking system—the disorderly exercise of default rights can produce a sudden, contemporaneous threat to the safety and soundness of individual institutions, including insured depository institutions, throughout the system, which in turn threatens the system as a whole.<sup>F</sup> Furthermore, the failure of multiple insured depository institutions in the same time period could stress the DIF, which is managed by the FDIC.

While a covered FSI may not itself be considered systemically important, as part of a GSIB, the disorderly resolution of the covered FSI could result in a significant negative impact on the GSIB. Additionally, the application of the final rule to the QFCs of covered FSIs should avoid creating what may otherwise be

<sup>61</sup> See 12 U.S.C. 1819.

<sup>62</sup> The FDIC is (i) the primary Federal supervisor for SNMBs and State savings associations; (ii) insurer of deposits and manager of the DIF; and (iii) the resolution authority for all FDIC-insured institutions under the Federal Deposit Insurance Act and for large complex financial institutions under Title II of the Dodd-Frank Act. See 12 U.S.C. 1811, 1816, 1818, 1819, 1820(g), 1828, 1828m, 1831p–1, 1831u, 5301 *et seq.*

<sup>53</sup> See final rule § 382.3.

<sup>54</sup> See final rule § 382.4(b).

<sup>55</sup> See *id.*

<sup>56</sup> These rights may nonetheless be subject to limitations governing their exercise in a resolution under Title II or the FDI Act.

<sup>57</sup> See final rule § 382.5(a).

<sup>58</sup> See final rule § 382.5(c).

<sup>59</sup> See final rule § 382.5(c) and (d).

<sup>60</sup> Several commenters requested that the FDIC consult with the FRB and the OCC in developing its final rule and coordinate its final rule with that of the FRB and OCC. Certain commenters also requested that the FDIC consult with foreign regulatory authorities in developing its final rule.

an incentive for GSIBs and their counterparties to concentrate QFCs in entities that are subject to fewer counterparty restrictions.

## II. Restrictions on QFCs of Covered FSIs

### A. Covered FSIs (Section 382.2(a) of the Proposed Rule)

The proposed rule applied to “covered FSIs.” The term “covered FSI” included: Any State savings associations (as defined in 12 U.S.C. 1813(b)(3)) or State non-member bank (as defined in 12 U.S.C. 1813(e)(2)) that is a direct or indirect subsidiary of (i) a global systemically important bank holding company that has been designated pursuant to § 252.82(a)(1) of the FRB’s Regulation YY (12 CFR 252.82); or (ii) a global systemically important foreign banking organization that has been designated pursuant to § 252.87 of the FRB’s Regulation YY (12 CFR 252.87). Under the proposed rule, the term “covered FSI” included any “subsidiary of covered FSI.”

The definition of “subsidiary” under the proposal included any company that is owned or controlled directly or indirectly by another company where the term “control” was defined by reference to the BHC Act.<sup>63</sup> The BHC Act definition of control includes ownership, control or the power to vote 25 percent of any class of voting securities; control in any manner of the election of a majority of the directors or trustees of; or exercise of a controlling influence over the management or policies.<sup>64</sup>

Commenters noted that covered FSIs are not excluded from the definition of covered entities in the FRB NPRM. They urged the FDIC to coordinate with the FRB and the OCC to ensure that only a single set of rules applies to a GSIB entity. As discussed above, the banking agencies have coordinated and the FRB final rule excludes covered FSIs from the scope of entities covered by that rule.<sup>65</sup>

A number of commenters urged the agencies to move to a financial consolidation standard to define a “subsidiary” of a covered entity,

covered bank or covered FSI instead of by reference to BHC Act control.<sup>66</sup> These commenters argued that, under Generally Accepted Accounting Principles, a company generally would consolidate an entity in which it holds a majority voting interest or over which it has the power to direct the most significant economic activities, to the extent it also holds a variable interest in the entity. In addition, commenters asserted that financially consolidated subsidiaries are often subject to operational control and generally fully integrated into the parent’s enterprise-wide governance, policies, procedures, control frameworks, business strategies, information technology systems, and management systems. These commenters noted that the concept of BHC Act control was designed to serve other policy purposes (e.g., separation between banking and commercial activities). A number of commenters argued that BHC Act control may include an entity that is not under the day-to-day operational control of the GSIB and over whom the GSIB does not have the practical ability to require remediation of that entity’s QFCs to comply with the proposed rule. Moreover, commenters contended that entities that are not consolidated with a GSIB for financial reporting purposes are unlikely to raise the types of concerns for the orderly resolution of GSIBs targeted by the proposal. Commenters also noted that the Universal Protocol and, generally, the standard forms of ISDA master agreements define “affiliate” by reference to ownership of a majority of the voting power of an entity or person. For these reasons, commenters urged that the term “subsidiary” of a covered FSI should be based on financial consolidation under the final rule.

Commenters urged that regardless of whether financial consolidation standard is adopted for the purpose of defining “subsidiary,” the final rule should exclude from the definition of “covered FSI, covered bank, or covered entity” entities over which the GSIB does not exercise operational control, such as merchant banking portfolio companies, section 2(h)(2) companies, joint ventures, sponsored funds as distinct from their sponsors or investment advisors, securitization vehicles, entities in which the GSIB holds only a minority interest and does not exert a controlling influence, and

subsidiaries held pursuant to provisions for debt previously contracted in good faith (DPC subsidiaries).<sup>67</sup> Further, commenters asked the FDIC to coordinate with the FRB and the OCC to ensure the scope of entities covered under the terms “subsidiary” and “affiliate” is consistent. Consistent with the FRB and the OCC, the FDIC is excluding from the definition of “covered FSI” subsidiaries that are portfolio concerns, as defined under 13 CFR 107.50, that is controlled by a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that is owned pursuant to paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24) and designed to promote the public welfare, and companies owned in satisfaction of debt previously contracted in good faith.

Certain commenters requested other exclusions from the definition of “covered entity” that are not applicable to the FDIC’s final rule. For example, certain commenters argued that subsidiaries of foreign GSIBs for which the foreign GSIB has been given special relief by an FRB order not to hold the subsidiary under an intermediate holding company (IHC) should not be included in the definition of covered entity, even if such entities would be consolidated under financial consolidation principles. The FDIC is not addressing these comments.

Under the final rule, a “covered FSI” is generally any State savings associations (as defined in 12 U.S.C. 1813(b)(3)) or State non-member bank (as defined in 12 U.S.C. 1813(e)(2)) that is a direct or indirect subsidiary of (i) a global systemically important bank holding company that has been designated pursuant to § 252.82(a)(1) of the FRB’s Regulation YY (12 CFR 252.82); or (ii) a global systemically important foreign banking organization that has been designated pursuant to § 252.87 of the FRB’s Regulation YY (12 CFR 252.87), and any subsidiary of a covered FSI, other than a portfolio concern, as defined under 13 CFR 107.50 that is controlled by a small business investment company as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662) or owned pursuant to paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24).

*U.S. GSIB subsidiaries.* Covered FSI would also generally include all subsidiaries of a covered FSI other than

<sup>63</sup> See 12 CFR 252.2.

<sup>64</sup> 12 U.S.C. 1841(a).

<sup>65</sup> Commenters requested further clarification on the interaction between the final rules of the banking agencies to avoid legal uncertainty. As noted above, each banking agency either has already or is in the process of finalizing rules that are substantially identical to this final rule, and the banking agencies are expected to coordinate in the interpretation of the rules. Section 382.7(b) of the final rule, which addresses potential overlap between the agencies’ final rules, has been clarified in response to commenters’ requests. Section 382.7(b) is discussed in more detail below.

<sup>66</sup> Commenters generally expressed a similar view with respect to the definition of “affiliate” of a covered FSI as the term is used in §§ 382.3 and 382.4 of the proposed rule. That term which was similarly defined by reference to BHC Act control under the proposal.

<sup>67</sup> See, e.g., 12 U.S.C. 1842(a)(A)(ii), 1843(c)(2); 12 CFR 225.12(b), 225.22(d)(1).



the exceptions noted above.<sup>68</sup> Therefore, in order to increase the resilience and resolvability of the FSI and the entire GSIB entity of which it is a part by addressing the potential obstacles to orderly resolution posed by QFCs, it is necessary to apply the restrictions to the subsidiaries. In particular, to facilitate the resolution of a GSIB under an SPOE strategy, in which only the top-tier holding company would enter a resolution proceeding while its subsidiaries would continue to meet their financial obligations, or an MPOE strategy where an affiliate of an entity that is otherwise performing under a QFC enters resolution, it is necessary to ensure that those subsidiaries or affiliates do not enter into QFCs that contain cross-default rights that the counterparty could exercise based on the holding company's or an affiliate's entry into resolution (or that any such cross-default rights are stayed when the holding company enters resolution). Moreover, including U.S. and non-U.S. entities as covered FSIs should help ensure that such cross-default rights do not affect the ability of performing and solvent entities—regardless of jurisdiction—to remain outside of resolution proceedings.

“Subsidiary” in the final rule continues to be defined by reference to BHC Act control as does the definition of “affiliate.”<sup>69</sup> The final rule does not limit the definition of covered FSIs to only those subsidiaries of GSIBs that are financially consolidated as requested by certain commenters. Defining “subsidiary” and “affiliate” by reference to BHC Act control is consistent with the definitions of those terms in the FDI Act and Title II of the Dodd-Frank Act. Specifically, Title II permits the FDIC, as receiver of a covered financial company or as receiver for its subsidiary, to enforce QFCs and other contracts of subsidiaries and affiliates, defined by reference to the BHC Act, notwithstanding cross-default rights based solely on the insolvency, financial condition, or receivership of the covered financial company.<sup>70</sup> Therefore, maintaining consistent definitions of subsidiary and affiliate with Title II should better ensure that QFC stays may be effected in resolution under a U.S. Special Resolution Regime. As covered FSIs are subsidiaries of GSIBs that are already subject to the requirements of the BHC Act, they should already know all of their BHC Act controlled

subsidiaries and be familiar with BHC Act control principles.

#### *B. Covered QFCs (Section 382.2 of the Final Rule)*

*General definition.* The proposal applied to any “covered QFC,” generally defined as any QFC that a covered FSI enters into, executes, or otherwise becomes party to with the person or an affiliate of the same person.<sup>71</sup> Under the proposal, “qualified financial contract” or “QFC” was defined as in section 210(c)(8)(D) of Title II of the Dodd-Frank Act and included swaps, repo and reverse repo transactions, securities lending and borrowing transactions, commodity contracts, securities contracts, and forward agreements.<sup>72</sup>

The application of the rule's requirements to a “covered QFC” was one of the most commented upon aspects of the proposal. Certain commenters argued that the definition of QFC in Title II of the Dodd-Frank Act was overly broad and imprecise and could include agreements that market participants may not expect to be subject to the stay-and-transfer provisions of the U.S. Special Resolution Regimes. More generally, commenters argued that the proposed definition of QFC was too broad and would capture contracts that do not present any obstacles to an orderly resolution. Commenters advocated for the exclusion of a variety of types of QFCs from the requirements of the final rule. In particular, a number of commenters requested the exclusion of QFCs that do not contain any transfer restrictions or default rights, because these types of QFCs do not give rise to the risk that counterparties will exercise their contractual rights in a manner that is inconsistent with the provisions of the U.S. Special Resolution Regimes. Commenters provided several examples of contracts that they asserted fall into this category, including cash market securities transactions, certain spot FX transactions (including securities conversion transactions), retail brokerage agreements, retirement/IRA account agreements, margin agreements, options agreements, FX forward master agreements, and delivery versus payment client agreements. Commenters contended that these types of QFCs number in the millions at some firms and that remediating these contracts to

include the express provisions required by the final rule would require an enormous client outreach effort that would be extremely burdensome and costly while providing no meaningful resolution benefits. For example, commenters indicated that for certain types of transactions, such as cash securities transactions, FX spot transactions, and retail QFCs, such a requirement could require an overhaul of existing market practice and documentation that affects hundreds of thousands, if not millions, of transactions occurring on a daily basis and significant education of the general market.

Commenters also requested the exclusion of QFCs that do not contain any default or cross-default rights but that may contain transfer restrictions. Commenters contended that examples of these types of agreements included investment advisory account agreements with retail customers, which contain transfer restrictions as required by section 205(a)(2) of the Investment Advisers Act of 1940, but no direct default or cross-default rights; underwriting agreements;<sup>73</sup> and client onboarding agreements. A few commenters provided prime brokerage or margin loan agreements as examples of transactions that generally do not have default or cross-default rights but may have transfer restrictions. Another commenter also requested the exclusion of securities market transactions that generally settle in the short term, do not impose ongoing or continuing obligations on either party after settlement, and do not typically include default rights.<sup>74</sup> In these cases, commenters contended that remediation of these agreements would be burdensome with no meaningful resolution benefits.

Commenters also argued for the exclusion of a number of other types of contracts from the definition of covered QFC in the final rule. In particular, a number of commenters urged that contracts issued in the capital markets or related to a capital market issuance like warrants or a certificate representing a call option, typically on

<sup>73</sup> However, certain commenters noted that underwriting, purchase, subscription or placement agency agreements may contain rights that could be construed as cross-default rights or default rights.

<sup>74</sup> In the alternative, the commenter requested that such securities market transactions be excluded to the extent they are cleared, processed, and settled through (or subject to the rules of) FMUs through expansion of the proposed exemption for transactions with central counterparties. This aspect of the comment is addressed in the subsequent section discussing requests for expansion of the proposed exemption for transactions with central counterparties.

<sup>68</sup> See final rule § 382.2(b).

<sup>69</sup> See final rule § 382.1.

<sup>70</sup> 12 U.S.C. 5390(c)(16).

<sup>71</sup> See proposed rule §§ 382.1 and 382.3(a). For convenience, this preamble generally refers to “a covered FSI's QFCs” or “QFCs to which a covered FSI is party” as shorthand to encompass the definition of “covered QFC.”

<sup>72</sup> See proposed rule § 382.1. See also 12 U.S.C. 5390(c)(8)(D).

a security or a basket of securities be excluded. Although warrants issued in capital markets may contain direct default and cross-default rights as well as transfer restrictions, commenters argued that remediation of outstanding warrant agreements would be difficult, if not impossible, since remediation would require the affirmative vote of a substantial number of separate voting groups of holders to amend the terms of the instruments and that obtaining such consent could be expensive due to “hold-out” premiums. Commenters also argued that since these instruments are traded in the markets, it is not possible for an issuer to ascertain whether a particular investor in such instruments has also entered into other QFCs with the dealer or any of its affiliates (or vice versa) for purposes of complying with the proposed mechanism for remediation of existing QFCs. Commenters argued that issuers would be able to comply if the final rule’s requirements applied only on a prospective basis with respect to new issuances since new investors could be informed of the terms of the warrant at the time of purchase and no after-the-fact consent would be required as is the case with existing outstanding warrants. Commenters expressed the view that prospective application of the final rule’s requirements to warrants would allow time for firms to develop new warrant agreements and warrant certificates, to engage in client outreach efforts, and to make any appropriate public disclosures. Commenters suggested that the requirements of the final rule should only apply to such instruments issued after the effective date of the final rule and that the compliance period for such new issuances be extended to allow time to establish new issuance programs that comply with the final rule’s requirements. Other examples of contracts in this category given by commenters include contracts with special purpose vehicles that are multi-issuance note platforms, which commenters urged would be difficult to remediate for similar reasons to warrants other than on a prospective basis.

Commenters also urged the exclusion of contracts for the purchase of commodities in the ordinary course of business (e.g., utility and gas energy supply contracts) or physical delivery commodity contracts more broadly.<sup>75</sup> In

<sup>75</sup> For example, some commenters urged the exclusion of all contracts requiring physical delivery between commercial entities in the course of regulatory business such as (i) contracts subject to a Federal Energy Regulatory Commission-filed tariff; (ii) contracts that are traded in markets

general, commenters argued that exempting these contracts would not increase systemic risk but would help ensure the smooth operation of utilities and the physical commodities markets.<sup>76</sup> Commenters indicated that failure to make commodity deliveries on time can result in the accrual of damages and penalties beyond the accrual of interest (e.g., demurrage and other fines in shipping) and that counterparties may not be able to obtain appropriate compensation for amendment of default rights due to the difficulty of pricing the risk associated with an operational failure due to the failure to deliver a commodity on time. Commenters also contended that agreements with power operators governed by regulatory tariffs would be difficult, if not impossible, to remediate.<sup>77</sup>

The final rule applies to any “covered QFC,” which generally is defined as any “in-scope QFC” that a covered FSI enters into, executes, or to which the

overseen by independent system operators or regional transmission operators; (iii) retail electric contracts; (iv) contracts for storage or transportation of commodities; (v) contracts for financial services with regulated financial entities (e.g., brokerage agreements and futures account agreements); and (vi) public utility contracts.

<sup>76</sup> One commenter also argued that utility and gas supply contracts are covered sufficiently in section 366 of the U.S. Bankruptcy Code. This section of the U.S. Bankruptcy Code places restrictions on the ability of a utility to “alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under [the U.S. Bankruptcy Code] or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.” 11 U.S.C. 366. The purpose and effect of § 382.44 of the final rule and section 366 of the U.S. Bankruptcy Code are different and therefore do not serve as substitutes. Section 366 of the U.S. Bankruptcy Code does not address cross-defaults or provide additional clarity regarding the application of the U.S. Special Resolution Regimes. Similarly, § 382.4 of the final rule does not prevent a covered FSI from entering into a covered QFC that allows the counterparty to exercise default rights once a non-bank covered FSI that is a direct party enters bankruptcy or fails to pay or perform under the QFC.

<sup>77</sup> One commenter also requested exclusion of overnight transactions, particularly overnight repurchase agreements, arguing that such transactions present little risk of creating negative liquidity effects and that an express exclusion for such transactions may increase the likelihood that such contracts would remain viable funding sources in times of liquidity stress. Although the final rule does not exempt overnight repo transactions, the final rule may have limited if any effect on such transactions. As described below, the final rule provides a number of exemptions that may apply to overnight repo and similar transactions. Moreover, the restrictions on default rights in § 382.4 of the final rule do not apply to any right under a contract that allows a party to terminate the contract on demand or at its option at a specified time, or from time to time, without the need to show cause. See final rule § 382.1 (defining “default right”). Therefore, § 382.4 does not restrict the ability of QFCs, including overnight repos, to terminate at the end of the term of the contract.

covered FSI otherwise becomes a party.<sup>78</sup> As under the proposal, “qualified financial contract” or “QFC” is defined in the final rule as in section 210(c)(8)(D) of Title II of the Dodd-Frank Act and includes swaps, repo and reverse repo transactions, securities lending and borrowing transactions, commodity contracts, and forward agreements.<sup>79</sup> Parties that enter into contracts with covered FSIs have been potentially subject to the stay-and-transfer provisions of Title II of the Dodd-Frank Act since its enactment. Consistent with Title II of the Dodd-Frank Act, the final rule does not exempt QFCs involving physical commodities. However as explained below, the final rule responds to concerns regarding the smooth operation of physical commodities end users and markets by allowing counterparties to terminate QFCs based on the failure to pay or perform.<sup>80</sup>

In response to concerns raised by commenters, the final rule exempts QFCs that have no transfer restrictions or default rights, as these QFCs have no provisions that the rule is intended to address. The final rule effects this exemption by limiting the scope of QFCs potentially subject to the rule to those QFCs that explicitly restrict the transfer of a QFC from a covered FSI or explicitly provide default rights that may be exercised against a covered FSI (in-scope QFCs).<sup>81</sup> This change addresses a major concern raised by commenters regarding the overbreadth of the definition of “covered QFC” in the proposal. The change also mitigates the burden of complying with the rule without undermining its purpose by not requiring covered FSIs to conform contracts that do not contain the types of default rights and transfer restrictions that the final rule is intended to address. The final rule does not, however, exclude QFCs that have transfer restrictions (but no default rights or cross-default rights) as requested by certain commenters, as such QFCs would have provisions (i.e., transfer restrictions) that are subject to the requirements of the final rule and could otherwise impede the orderly resolution of a covered FSI or its affiliate.

The final rule provides that a covered FSI is not required to conform certain investment advisory contracts described

<sup>78</sup> See final rule § 382.2(c).

<sup>79</sup> See 12 U.S.C. 5390(c)(8)(D); final rule § 382.1.

<sup>80</sup> However, those default rights remain subject to Title II and FDI Act.

<sup>81</sup> See final rule § 382.2(d). The final rule includes as an in-scope QFC a QFC that contains a restriction on the transfer of a QFC from a covered FSI. This would include any QFC that restricts the transfer of that QFC or any other QFC.

by commenters (*i.e.*, investment advisory contracts with retail advisory customers<sup>82</sup> of the covered FSI that only contain transfer restrictions necessary to comply with section 205(a) of the Investment Advisers Act). The final rule also exempts any existing warrant evidencing a right to subscribe or to otherwise acquire a security of a covered FSI or its affiliate.<sup>83</sup> The final rule excludes these types of agreements because there is persuasive evidence that these types of contracts would be burdensome to conform and that it is unlikely that excluding such contracts from the requirements of the final rule would impair the orderly resolution of a GSIB.<sup>84</sup> The final rule also provides the FDIC with authority to exempt one or more covered FSIs from conforming certain contracts or types of contracts to the final rule after considering, in addition to any other factor the FDIC deems relevant, the burden the exemption would relieve and the potential impact of the exemption on the resolvability of the covered FSI or its affiliates.<sup>85</sup> Covered FSIs that request that the FDIC exempt additional contracts from the final rule should be prepared to provide information in support of their requests. The FDIC expects to consult as appropriate with the FRB and the OCC during its consideration of any such request.

**Definition of covered QFC.** As noted above, the proposal applied to any “covered QFC,” generally defined as a QFC that a covered FSI enters into, after the effective date and a QFC entered earlier, but only if the covered FSI or its affiliate enters into a new QFC with the same person or an affiliate of the same person.<sup>86</sup> “Affiliate” in the proposal was defined in the same manner as under the BHC Act to mean any company that controls, is controlled by, or is under common control with another company.<sup>87</sup> As noted above, “control” under the BHC Act means the power to vote 25 percent or more of any class of

voting securities; control in any manner the election of a majority of the directors or trustees; or exercise of a controlling influence over the management or policies.<sup>88</sup>

Commenters argued that requiring remediation of existing QFCs of a person if the GSIB entered into a new QFC with an affiliate of the person would make compliance with the proposed rule overly burdensome.<sup>89</sup> These arguments were similar to commenters’ arguments regarding the definition of “subsidiary” of a covered FSI, which were discussed above. Commenters asserted that this requirement would demand that the GSIB track each counterparty’s organizational structure by relying on information provided by counterparties, which would subject counterparties to enhanced tracking and reporting burdens. Commenters requested that the phrase “or affiliate of the same person” be deleted from the definition of covered QFC and argued that such a modification would not undermine the ultimate goals of the rule since existing QFCs with the counterparty’s affiliate would still have to be remediated if the covered FSI or its affiliate enters into a new QFC with that counterparty affiliate. In the alternative, commenters argued that an affiliate of a counterparty be established by reference to financial consolidation principles rather than BHC Act control since counterparties may not be familiar with BHC Act control. Commenters argued that many counterparties are not regulated bank holding companies and would be unfamiliar with BHC Act control. Certain commenters also argued that a new QFC with one fund in a fund family should not result in other funds in the fund family being required to conform their pre-existing QFCs with the covered FSI or an affiliate.

The final rule’s definition of “covered QFC” has been modified to address the concerns raised by commenters. In particular, the final rule provides that a covered QFC includes a QFC that the covered FSI entered, executed, or otherwise became a party to before January 1, 2019, if the covered FSI or any affiliate that is a covered FSI, covered entity, or covered bank also enters, executes, or otherwise becomes a party to a QFC with the same person or a consolidated affiliate of the same

person on or after January 1, 2019.<sup>90</sup> The final rule defines “consolidated affiliate” by reference to financial consolidation principles.<sup>91</sup> As commenters indicated, counterparties will already track and monitor financially consolidated affiliates. Moreover, exposures to a non-consolidated affiliate may be captured as a separate counterparty (*e.g.*, when the non-consolidated affiliate enters a new QFC with the covered FSI). As a consequence, modifying the coverage of affiliates in this manner addresses concerns raised by commenters regarding burden.

The definition of “covered QFC” is intended to limit the restrictions of the final rule to those financial transactions whose disorderly unwind has substantial potential to frustrate the orderly resolution of a GSIB, as discussed above. By adopting the Dodd-Frank Act’s definition of QFC, with the modifications described above, the final rule generally extends stay-and-transfer protections to the same types of transactions as Title II of the Dodd-Frank Act. In this way, the final rule enhances the prospects for an orderly resolution in bankruptcy and under the U.S. Special Resolution Regimes.

**Exclusion of cleared QFCs.** The proposal excluded from the definition of “covered QFC” all QFCs that are cleared through a central counterparty.<sup>92</sup> Commenters generally expressed support for this exclusion but some commenters requested that the agencies broaden this exclusion in the final rule. In particular, a number of commenters urged the agencies to exclude the “client-facing leg” of a cleared swap where a clearing member faces a CCP on one leg of the transaction and faces the client on an otherwise identical offsetting transaction.<sup>93</sup> One commenter

<sup>90</sup> See final rule § 382.2(c).

<sup>91</sup> See final rule § 382.1.

<sup>92</sup> See proposed rule § 382.7(a).

<sup>93</sup> Commenters argued that in the European-style principal-to-principal clearing model, the clearing member faces the CCP on one swap (the “CCP-facing leg”), and the clearing member, frequently a GSIB, faces the client on an otherwise identical, offsetting swap (the “client-facing leg”). Under the proposed rule, only the CCP-facing leg of the transaction was excluded even though the client-facing leg relates to the mechanics of clearing and is only entered into by the clearing member to effectuate the cleared transaction. Commenters argued that the proposed rule thus treated two pieces of the same transaction differently, which could result in an imbalance in insolvency or resolution and that the possibility of such an imbalance for the clearing member could expose the clearing member to unnecessary and undesired market risk. Commenters urged the agencies to adopt the same approach taken under Section 2 of the Universal Protocol, which allows the client-facing leg of the cleared swap with the clearing

<sup>82</sup> See final rule § 382.7(c)(1). The final rule defines retail customers or counterparty by reference to the FDIC’s rule relating to the liquidity coverage ratio, 12 CFR part 329. Covered FSIs should be familiar with this definition and its application.

<sup>83</sup> See final rule § 382.7(c)(2). Warrants issued after the effective date of the final rule are not excluded from the requirements of the final rule.

<sup>84</sup> The exclusions for investment advisory agreements and existing warrants set forth in the final rule are included to address commenters’ concerns as to the scope and potential compliance burden of the final rule. These exemptions are not interpretations of the definition of QFC and should not be construed as indicating that the FDIC has determined such contracts are necessarily QFCs.

<sup>85</sup> See final rule § 382.7(d).

<sup>86</sup> See proposed rule §§ 382.3(a); 382.4(a).

<sup>87</sup> See proposed rule § 382.1 (defining “affiliate”).

<sup>88</sup> See 12 U.S.C. 1841(k).

<sup>89</sup> One commenter believed that the burden of conforming contracts with all affiliates of a counterparty would be too great, whether defined in terms of BHC Act control or financial consolidation principles, even though the burden would be reduced by definition in terms of financial consolidation principles.

requested the agencies confirm its understanding that “FCM agreements,” which the commenter defined as futures and cleared swaps agreements with a futures commission merchant, are excluded because FCM agreements “are only QFCs to the extent that they relate to futures and swaps and, since futures and cleared swaps are excluded, the FCM Agreements are also excluded.”<sup>94</sup> The commenter requested, in the alternative, that the final rule expressly exclude such agreements.

A few commenters requested that the FDIC modify the definition of “central counterparty,” which was defined to mean “a counterparty (for example, a clearing house) that facilitates trades between counterparties in one or more financial markets by either guaranteeing trades or novating trades” in the proposal.<sup>95</sup> These commenters argued that a CCP does far more than “facilitate” or “guarantee” trades and that a CCP “interposes itself between counterparties to contracts traded in one or more financial markets, becoming the buyer to every seller and the seller to every buyer and thereby ensuring the performance of open contracts.”<sup>96</sup> As an alternative definition of CCP, these commenters suggested the final rule should define central counterparty to mean: “an entity (for example, a clearinghouse or similar facility, system, or organization) that, with respect to an agreement, contract, or transaction: (i) Enables each party to the agreement, contract, or transaction to substitute, through novation or otherwise, the

member that is a covered entity, covered bank or covered FSI to be closed out substantially contemporaneously with the CCP-facing leg in the event the CCP were to take action to close out the CCP-facing leg.

Some commenters requested clarification that transactions between a covered entity, covered bank, or covered FSI client and its clearing member (as opposed to transactions where the covered entity, covered bank, or covered FSI is the clearing member) would be subject to the rule’s requirements, since this would be consistent with the Universal Protocol. As explained in this section, the exemption in the final rule regarding CCPs does not depend on whether the covered entity, covered bank, or covered FSI is a clearing member or a client. A covered QFC—generally a QFC to which a covered entity, covered bank, or covered FSI is a party—is exempted from the requirements of the final rule if a CCP is also a party.

<sup>94</sup> Letter to Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, from James M. Cain, Sutherland Asbill & Brennan LLP, writing on behalf of the eleven Federal Home Loan Banks, at 2 (Dec. 12, 2016).

<sup>95</sup> 12 CFR 324.2.

<sup>96</sup> Letter to Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, from Walt L. Lukken, President and CEO, Futures Industry Association, at 8–9 (Nov. 1, 2016) (citing Principles of Financial Market Infrastructures (Apr. 2012), published by the Committee on Payment and Settlement Systems and the International Organization of Securities Commissions, at 9).

credit of the CCP for the credit of the parties; and (ii) arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such agreements, contracts, or transactions executed by participants in the CCP.”<sup>97</sup>

Commenters also urged the FDIC to exclude from the requirements of the final rule all QFCs that are cleared, processed, or settled through the facilities of an FMU as defined in section 803(6) of the Dodd-Frank Act<sup>98</sup> or that are entered into subject to the rules of an FMU.<sup>99</sup> For example, commenters argued that QFCs with FMUs such as the provision of an extension of credit by a central securities depository (CSD) to a GSIB entity that is a member of the CSD in connection with the settlement of securities transactions, should be excluded from the requirements of the final rule. Commenters contended that, similar to CCPs, the relationship between a covered FSI and FMU is governed by the rules of the FMU and that there are no market alternatives to continuing to transact with FMUs. Commenters argued that FMUs generally should be excluded for the same reasons as CCPs and that a broader exemption to cover FMUs would serve to mitigate the systemic risk of a GSIB in distress, an underlying objective of the rule’s requirements. Commenters contended that such an exclusion would be consistent with the treatment of FMUs under U.K. regulations and German law. Some commenters also requested that related or underlying agreements to CCP-cleared QFCs and QFCs entered into with other FMUs also be excluded, since such agreements “form an integrated whole with [those] QFCs” and such an exemption would facilitate the continued expansion of the clearing and settlement framework and the benefits of such a framework.<sup>100</sup> One commenter urged that the final rule should not in any manner restrict an

<sup>97</sup> *Id.* at 9.

<sup>98</sup> 12 U.S.C. 5462(6). In general, Title VIII of the Dodd-Frank Act defines “financial market utility” to mean 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. *Id.*

<sup>99</sup> As discussed above, one commenter who recommended an exclusion of securities market transactions that generally settle in the short term, do not impose ongoing or continuing obligations on either party after settlement, and do not typically include the default rights targeted by this rule, requested this treatment in the alternative.

<sup>100</sup> Letter to Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, from Larry E. Thompson, Vice Chairman and General Counsel, The Depository Trust & Clearing Corporation, at 6 (Dec. 12, 2016).

FMU’s ability to close out a defaulting clearing member’s portfolio, including potential liquidation of cleared contracts.

The issues that the final rule is intended to address with respect to non-cleared QFCs may also exist in the context of centrally cleared QFCs. However, clearing through a CCP provides unique benefits to the financial system while presenting unique issues related to the cancellation of cleared contracts. Accordingly, it is appropriate to exclude centrally cleared QFCs, in light of differences between cleared and non-cleared QFCs with respect to contractual arrangements, counterparty credit risk, default management, and supervision. The FDIC has not extended the exclusion for CCPs to the client-facing leg of a cleared transaction because bilateral trades between a GSIB and a non-CCP counterparty are the types of transactions that the final rule intends to address and because nothing in the final rule would prohibit a covered FSI clearing member and a client from agreeing to terminate or novate a trade to balance the clearing member’s exposure. The final rule continues to define central counterparty as a counterparty that facilitates trades between counterparties in one or more financial markets by either guaranteeing trades or novating trades, which is a broad definition that should be familiar to market participants as it is used in the regulatory capital rules and does not sweep in entities that market participants would not normally recognize as clearing organizations.<sup>101</sup>

The final rule also makes clear that, if one or more FMUs are the only counterparties to a covered QFC, the covered FSI is not required to conform the covered QFC to the final rule.<sup>102</sup> Therefore, an FMU’s default rights and transfer restrictions under the covered QFC are not affected by the final rule. However, this exclusion would not include a covered QFC with a non-FMU counterparty, even if the QFC is settled by an FMU or if the FMU is a party to such QFC, because the final rule is

<sup>101</sup> See final rule § 382.1. See also 12 CFR 324.2.

<sup>102</sup> See final rule § 382.7(a)(2). In response to commenters, the final rule uses the definition of FMU in Title VIII of the Dodd-Frank Act and may apply, for purposes of the final rule, to entities regardless of jurisdiction. The definition of FMU in the final rule includes a broader set of entities, in addition to CCPs. However, the definition in the final rule does not include depository institutions that are engaged in carrying out banking-related activities, including providing custodial services for tri-party repurchase agreements. The definition also explicitly excludes certain types of entities (e.g., registered futures associations, swap data repositories) and other types of entities that perform certain functions for or related to FMUs (e.g., futures commission merchants).

intended to address default rights of non-FMU parties. For example, if two covered FSIs engage in a bilateral QFC that is facilitated by an FMU and in the course of this facilitation each covered FSI maintains a QFC solely with the FMU then the final rule would not apply to each QFC between the FMU and each covered FSI but the requirements of the final rule would apply to the bilateral QFC between the two covered FSIs. This approach ensures that QFCs that are directly with FMUs are treated in a manner similar to transactions between covered FSIs and CCPs but also ensures that QFCs conducted by covered FSIs that are related to the direct QFC with the FMU remain subject to the final rule's requirements.

The final rule does not explicitly exclude futures and cleared swaps agreements with a futures commission merchant, as requested by a commenter. The nature and scope of the requested exclusion is unclear, and, therefore, it is unclear whether the exclusion would be necessary, on the one hand, or overbroad, on the other hand. However, the final rule makes a number of clarifications and exemptions that may help address the commenter's concern regarding FCM agreements.

*QFCs with Central Banks and Sovereign Entities.* The proposal included covered QFCs with sovereign entities and central banks, consistent with Title II of the Dodd-Frank Act and the FDI Act. Commenters urged the FDIC to exclude QFCs with central bank and sovereign counterparties from the final rule. Commenters argued that sovereign entities might not be willing to agree to limitations on their QFC default rights and noted that other countries' measures such as those of the United Kingdom and Germany, consistent with their governing laws, exclude central banks and sovereign entities. Commenters contended that central banks and sovereign entities are sensitive to financial stability concerns and resolvability goals, thus reducing the concern that they would exercise default rights in a way that would undermine resolvability of a GSIB or financial stability. Commenters indicated it was unclear whether central banks or sovereign entities would be permitted under applicable statutes to enter into QFCs with limited default rights, but did not provide specific examples of such statutes.<sup>103</sup>

<sup>103</sup> These commenters argued that, to the extent central banks and sovereign entities are unable or unwilling to agree to limitations on their QFC default rights, application of the rule's requirements to QFCs with these entities creates a significant disincentive for these entities to enter into QFCs

Commenters further noted that these entities did not participate in the development of the Universal Protocol and that the Universal Protocol does not provide a viable mechanism for compliance with the final rule by these entities.

The FDIC continues to believe that covering QFCs with sovereigns and central banks under the final rule is an important requirement and has not modified the final rule to address the requests made by commenters. Excluding QFCs with sovereigns and central banks would be inconsistent with Title II of the Dodd-Frank Act and the FDI Act. Moreover, the mass termination of such QFCs has the potential to undermine the resolution of a GSIB and the financial stability of the United States. The final rule provides covered FSIs two years to conform covered QFCs with central banks and sovereigns (as well as certain other counterparties, as discussed below). This additional time should provide covered FSIs sufficient time to develop separate conformance mechanisms for sovereigns and central banks, if necessary.

#### *C. Definition of "Default Right" (Section 382.1 of the Final Rule)*

As discussed above, a party to a QFC generally has a number of rights that it can exercise if its counterparty defaults on the QFC by failing to meet certain contractual obligations. These rights are generally, but not always, contractual in nature. One common default right is a setoff right: The right to reduce the total amount that the non-defaulting party must pay by the amount that its defaulting counterparty owes. A second common default right is the right to liquidate pledged collateral and use the proceeds to pay the defaulting party's net obligation to the non-defaulting party. Other common rights include the ability to suspend or delay the non-defaulting party's performance under the contract or to accelerate the obligations of the defaulting party. Finally, the non-defaulting party typically has the right to terminate the QFC, meaning that the parties would not make payments that would have been required under the QFC in the future.<sup>104</sup> The phrase "default right" in the proposed rule was broadly defined to include these common rights as well as "any similar rights."<sup>105</sup> Additionally, the definition included all such rights

with covered FSIs, resulting in the loss of valuable counterparties in a way that will hinder market liquidity and covered FSI risk management.

<sup>104</sup> *But see* 12 U.S.C. 1821(e)(8)(G); 12 U.S.C. 5390(c)(8)(F).

<sup>105</sup> *See* proposed rule § 382.1.

regardless of source, including rights existing under contract, statute, or common law.

However, the proposed definition of default right excluded two rights that are typically associated with the business-as-usual functioning of a QFC. First, same-day netting that occurs during the life of the QFC in order to reduce the number and amount of payments each party owes the other was excluded from the definition of "default right."<sup>106</sup> Second, contractual margin requirements that arise solely from the change in the value of the collateral or the amount of an economic exposure were also excluded from the definition.<sup>107</sup> The reason for these exclusions was to leave such rights unaffected by the proposed rule. The proposal's preamble explained that such exclusions were appropriate because the proposal was intended to improve resolvability by addressing default rights that could disrupt an orderly resolution, not to interrupt the parties' business-as-usual interactions under a QFC.<sup>108</sup>

However, certain QFCs are also commonly subject to rights that would increase the amount of collateral or margin that the defaulting party (or a guarantor) must provide upon an event of default. The financial impact of such default rights on a covered FSI could be similar to the impact of the liquidation and acceleration rights discussed above. Therefore, the proposed definition of "default right" included such rights (with the exception discussed in the previous paragraph for margin requirements based solely on the value of collateral or the amount of an economic exposure).<sup>109</sup>

Finally, contractual rights to terminate without the need to show cause, including rights to terminate on demand and rights to terminate at contractually specified intervals, were excluded from the definition of "default right" under the proposal for purposes of the proposed rule's restrictions on cross-default rights.<sup>110</sup> This exclusion was consistent with the proposal's objective of restricting only default rights that are related, directly or indirectly, to the entry into resolution of an affiliate of the covered FSI, while leaving other default rights unrestricted.<sup>111</sup>

<sup>106</sup> *See* proposed rule § 382.1.

<sup>107</sup> *See id.* These rights are nonetheless subject to the stay provisions of the FDIA and Title II.

<sup>108</sup> *See* 81 FR 74333.

<sup>109</sup> *See id.*

<sup>110</sup> *See* proposed rule §§ 382.1, 382.4.

<sup>111</sup> The definition of "default right" parallels the definition contained in the ISDA Protocol.

Commenters expressed support for a number of aspects of the definition of default rights. For example, a number of commenters supported the proposed exclusion from the definition of “default right” of contractual rights to terminate without the need to show cause, noting that such rights exist for a variety of reasons and that reliance on these rights is unlikely to result in a fire sale of assets during a GSIB resolution. At least one commenter requested that this exclusion be expanded to include force majeure events. Commenters also expressed support for the exclusion for what commenters referred to as “business-as-usual” payments associated with a QFC. However, these commenters requested clarification that certain “business-as-usual” actions would not be included in the definition of default right, such as payment netting, posting and return of collateral, procedures for the substitution of collateral and modification to the terms of the QFC, and also requested clarification that the definition of “default right” would not include off-setting transactions to third parties by the non-defaulting counterparty. One commenter to the FRB and the OCC’s proposal urged that if the FRB’s and OCC’s goal is to provide that a party cannot enforce a provision that requires more margin because of a credit downgrade but may demand more margin for market price changes, the rule should state so explicitly. Another commenter expressed concern that the definition of default right in the proposal would permit a defaulting covered FSI to demand collateral from its QFC counterparty as margin due to a market price change, but would not allow the non-covered FSI to demand collateral from the covered FSI.

The final rule retains the same definition of “default right” as that of the proposal. The FDIC believes that the definition of default right is sufficiently clear and that additional modifications are not needed to address the concerns raised by commenters. The final rule does not adopt a particular exclusion for force majeure events as requested by certain commenters as it is not clear without reference to particular contractual provisions what this term would encompass. Moreover, it should be clear that events typically considered to be captured by force majeure clauses (e.g., natural disasters) would not be

related, directly or indirectly, to the resolution of an affiliate.<sup>112</sup>

“Business as usual” rights regarding changes in collateral or margin would not be included within the definition of default right to the extent that the right or operation of a contractual provision arises solely from either a change in the value of collateral or margin or a change in the amount of an economic exposure.<sup>113</sup> In response to commenters’ requests for clarification, this exception includes changes in margin due to changes in market price, but does not include changes due to counterparty credit risk (e.g., credit rating downgrades). Therefore, the right of either party to a covered QFC to require margin due to changes in market price would be unaffected by the definition of default right. Moreover, default rights that are exercised before a covered FSI or its affiliate enter resolution and that would not be affected by the stay-and-transfer provisions of the U.S. Special Resolution Regimes also would not be affected.

Regarding transactions with third parties, the final rule, like the proposal, does not require covered FSIs to address default rights in QFCs solely between parties that are not covered FSIs (e.g., off-setting transactions to third parties by the non-GSIB counterparty, to the extent none are covered FSIs).

#### *D. Required Contractual Provisions Related to the U.S. Special Resolution Regimes (Section 382.3 of the Proposed Rule)*

The proposed rule generally would have required a covered QFC to explicitly provide both (a) that the transfer of the QFC (and any interest or obligation in or under it and any property securing it) from the covered FSI to a transferee will be effective to the same extent as it would be under the U.S. Special Resolution Regimes if the covered QFC were governed by the laws of the United States or of a State of the United States and (b) that default rights with respect to the covered QFC that could be exercised against a covered FSI could be exercised to no greater extent than they could be exercised under the U.S. Special Resolution Regimes if the covered QFC were governed by the laws of the United States or of a State of the United States.<sup>114</sup> The final rule contains these same provisions.<sup>115</sup>

A number of commenters noted that the wording of these requirements in

proposed § 382.3(b) was confusing and could be read to be inconsistent with the intent of the section. In response to comments, the final rule makes clearer that the substantive restrictions apply only in the event the covered FSI (or, in the case of the requirement regarding default rights, its affiliate) becomes subject to a proceeding under a U.S. Special Resolution Regime.<sup>116</sup>

A number of commenters argued that QFCs should be exempt from the requirements of proposed § 382.3 if the QFC is governed by U.S. law. An example of such a QFC provided by commenters includes the standard form repurchase and securities lending agreement published by the Securities Industry and Financial Markets Association. These commenters argued that counterparties to such agreements are already required to observe the stay-and-transfer provisions of the FDI Act and Title II of the Dodd-Frank Act, as mandatory provisions of U.S. Federal law, and that requiring an amendment of these types of QFCs to include the express provisions required under § 382.3 would be redundant and would not provide any material resolution benefit, but would significantly increase the remediation burden on covered FSIs.

Other commenters proposed a three-prong test of “nexus with the United States” for purposes of recognizing an exclusion from the express acknowledgment of the requirements of proposed § 382.3. In particular, these commenters argued that the presence of two factors, in addition to the contract being governed by U.S. law, would provide greater certainty that courts would apply the stay-and-transfer provisions of the FDI Act and Title II of the Dodd-Frank Act: (1) If a contract is entered into between entities organized in the United States; and (2) to the extent the GSIB’s obligations under the QFC are collateralized, if the collateral is held with a U.S. custodian or depository pursuant to an account agreement governed by U.S. law.<sup>117</sup> Other commenters contended that only whether the contract is under U.S. law, and not the location of the counterparty or the collateral, is relevant to the analysis of whether the FDI Act and the Dodd-Frank Act would govern the

<sup>116</sup> See final rule § 382.3. The proposal defined the term “U.S. special resolution regimes” to mean the FDI Act and Title II of the Dodd-Frank Act, along with regulations issued under those statutes. 12 U.S.C. 1811–1835a; 12 U.S.C. 5381–5394. See final rule § 382.1.

<sup>117</sup> These commenters stated that it would be unlikely that any court interpreting a QFC governed by U.S. law could have a reasonable basis for disregarding the stay-and-transfer provisions of the FDI Act or Title II of the Dodd-Frank Act.

However, certain rights not included as such “default rights” are nonetheless subject to the stay and other provisions of the FDI Act and the Dodd-Frank Act. The final rule does not modify or limit the FDIC’s powers in its capacity as receiver under the FDI Act or the Dodd-Frank Act with respect to a counterparties’ contractual or other rights.

<sup>112</sup> See final rule § 382.4(b).

<sup>113</sup> However, as noted previously, such rights are subject to the provisions of the FDI Act and Title II.

<sup>114</sup> See proposed rule § 382.3.

<sup>115</sup> See final rule § 382.3(b).

contract. Commenters also requested that if the first additional factor (*i.e.*, that the QFC be entered into between entities organized in the United States) were to be included within the exception, it should be broadened to include counterparties that have principal places of business or that are otherwise domiciled in the United States.

The requirements of the final rule (in conjunction with those of the FRB FR and the expected OCC FR) seek to provide certainty that all covered QFCs would be treated the same way in the context of a resolution of a covered entity, covered bank or covered FSI under the Dodd-Frank Act or the FDI Act. The stay-and-transfer provisions of the U.S. Special Resolution Regimes should be enforced with respect to all contracts of any U.S. GSIB entity that enters resolution under a U.S. Special Resolution Regime, as well as all transactions of the subsidiaries of such an entity. Nonetheless, it is possible that a court in a foreign jurisdiction would decline to enforce those provisions. In general, the requirement that the effect of the statutory stay-and-transfer provisions be incorporated directly into the QFC contractually helps to ensure that a court in a foreign jurisdiction would enforce the effect of those provisions, regardless of whether the court would otherwise have decided to enforce the U.S. statutory provisions.<sup>118</sup> Further, the knowledge that a court in a foreign jurisdiction would reject the purported exercise of default rights in violation of the required contractual provisions should deter covered FSIs' counterparties from attempting to exercise such rights.

In response to comments, the final rule exempts from the requirements of § 382.3 a covered QFC that meets two requirements.<sup>119</sup> First, the covered QFC must state that it is governed by the laws of the United States or a State of the United States.<sup>120</sup> It has long been

clear that the laws of the United States and the laws of a State of the United States both include U.S. Federal law, such as the U.S. Special Resolution Regimes.<sup>121</sup> Therefore, this requirement ensures that contracts that meet this exemption also contain language that helps ensure that foreign courts will enforce the stay-and-transfer provisions of the U.S. Special Resolution Regimes. Second, the counterparty to the covered FSI must be organized under the laws of the United States or a State,<sup>122</sup> have its principal place of business<sup>123</sup> located in the United States, or be a U.S. branch or U.S. agency.<sup>124</sup> Similarly, a counterparty that is an individual must be domiciled in the United States.<sup>125</sup> This requirement helps ensure that the FDIC will be able to quickly and easily enforce the stay-and-transfer provisions of the U.S. Special Resolution Regimes.<sup>126</sup> This exemption is expected to significantly reduce the burden associated with complying with the final rule while continuing to provide assurance that the stay-and-transfer provisions of the U.S. Special Resolution Regimes may be enforced.

This section of the final rule is consistent with efforts by regulators in other jurisdictions to address similar risks by requiring that financial firms within their jurisdictions ensure that the effect of the similar provisions under these foreign jurisdictions' respective special resolution regimes would be enforced by courts in other jurisdictions, including the United States. For example, the U.K.'s Prudential Regulation Authority (PRA) recently required certain financial firms

(*e.g.*, the Federal Arbitration Act) would meet this exemption. *Cf. Volt Info. Scis. v. Bd. Of Trs.*, 489 U.S. 468 (1989).

<sup>121</sup> Although many QFCs only explicitly state that the contract is governed by the laws of a specific State of the United States, it has been made clear on numerous occasions that the laws of each State include Federal law. *See e.g., Hauenstein v. Lynham*, 100 U.S. 483, 490 (1979) (stating that Federal law is "as much a part of the law of every State as its own local laws and the Constitution"); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 (1982) (same); *Testa v. Katt*, 330 U.S. 386, 393 (1947) ("For the policy of the Federal Act is the prevailing policy in every state.").

<sup>122</sup> For purposes of this requirement of the exemption, "State" means any State, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

<sup>123</sup> *See Hertz Corp. v. Friend*, 559 U.S. 77 (2010) (describing the appropriate test for principal place of business).

<sup>124</sup> *See* final rule § 382.3(a)(1)(ii).

<sup>125</sup> *See id.*

<sup>126</sup> *See e.g., Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

to ensure that their counterparties to newly created obligations agree to be subject to stays on early termination that are similar to those that would apply upon a U.K. firm's entry into resolution if the financial arrangements were governed by U.K. law.<sup>127</sup> Similarly, the German parliament passed a law in November 2015 requiring German financial institutions to have provisions in financial contracts that are subject to the law of a country outside of the European Union that acknowledge the provisions regarding the temporary suspension of termination rights and accept the exercise of the powers regarding such temporary suspension under the German special resolution regime.<sup>128</sup> Additionally, the Swiss Federal Council requires that banks "ensure at both the individual institution and group level that new agreements or amendments to existing agreements which are subject to foreign law or envisage a foreign jurisdiction are agreed only if the counterparty recognises a postponement of the termination of agreements in accordance with" the Swiss special resolution regime.<sup>129</sup> Japan's Financial Services Agency also revised its supervisory guidelines for major banks to require those banks to ensure that the effect of the statutory stay decision and statutory special creditor protections under

<sup>127</sup> *See* PRA Rulebook: CRR Firms and Non-Authorised Persons: Stay in Resolution Instrument 2015 (Nov. 12, 2015), available at <http://www.bankofengland.co.uk/pr/Documents/publications/ps/2015/ps2515app1.pdf>; *see also* Bank of England, Prudential Regulation Authority, "Contractual stays in financial contracts governed by third-country law" (PS25/15) (Nov. 2015), available at <http://www.bankofengland.co.uk/pr/Documents/publications/ps/2015/ps2515.pdf>. These PRA rules apply to PRA-authorized banks, building societies, PRA-designated investment firms, and their qualifying parent undertakings, including UK financial holding companies and U.K. mixed financial holding companies.

<sup>128</sup> *See* Gesetz zur Sanierung und Abwicklung von Instituten und Finanzgruppen, Sanierungs- und Abwicklungsgesetz [SAG] [German Act on the Reorganisation and Liquidation of Credit Institutions], Dec. 10, 2014, § 60a, <https://www.gesetze-im-internet.de/bundesrecht/sag/gesamt.pdf>, as amended by Gesetz zur Anpassung des nationalen Bankenabwicklungsrechts an den Einheitlichen Abwicklungsmechanismus und die europäischen Vorgaben Zur Bankenabgabe, Nov. 2, 2015, Artikel 1(17).

<sup>129</sup> *See* Verordnung über die Finanzmarktinfrastrukturen und das Marktverhalten im Effekten- und Derivatehandel [FinfraV] [Ordinance on Financial Market Infrastructures and Market Conduct in Securities and Derivatives Trading] Nov. 25, 2015, amending Bankenverordnung vom 30. April 2014 [BankV] [Banking Ordinance of 30 April 2014] Apr. 30, 2014, SR 952.02, art. 12 paragraph 2<sup>bis</sup>, *translation at* <http://www.news.admin.ch/NSBSubscriber/message/attachments/42659.pdf>; *see also* Erläuterungsbericht zur Verordnung über die Finanzmarktinfrastrukturen und das Marktverhalten im Effekten- und Derivatehandel (Nov. 25, 2015) (providing commentary).

<sup>118</sup> *See generally* Financial Stability Board, "Principles for Cross-border Effectiveness of Resolution Actions" (Nov. 3, 2015), available at <http://www.fsb.org/wp-content/uploads/Principles-for-Cross-border-Effectiveness-of-Resolution-Actions.pdf>.

<sup>119</sup> *See* final rule § 382.3(a).

<sup>120</sup> However, a contract that explicitly provides that one or both of the U.S. Special Resolution Regimes, including a broader set of laws that includes a U.S. special resolution regime, is excluded from the laws governing the QFC would not meet this exemption under the final rule. For example, a covered QFC would not meet this exemption if the contract stated that it was governed by the laws of the State of New York but also stated that it was not governed by U.S. Federal law. In contrast, a contract that stated that it was governed by the laws of the State of New York but opted out of a specific non-mandatory Federal law

Japanese resolution regimes extends to contracts governed by foreign laws.<sup>130</sup>

Commenters also argued that it would be more appropriate for Congress to act to obtain cross-border recognition of U.S. Special Resolution Regimes, rather than for the FDIC to do so through this final rule. The FDIC believes it is appropriate to adopt this final rule in order to ensure the safety and soundness of covered FSIs and, to that end, to improve the resolvability and resilience of U.S. GSIBs and foreign GSIB parents of covered FSIs. Because of the current risk that the stay-and-transfer provisions of U.S. Special Resolution Regimes may not be recognized by courts of other jurisdictions, § 382.3 of the final rule requires contractual recognition to help ensure that courts in foreign jurisdictions will recognize these provisions.

This requirement would advance the goal of the final rule of removing QFC-related obstacles to the orderly resolution of a GSIB. As discussed above, restrictions on the exercise of QFC default rights are an important prerequisite for an orderly GSIB resolution. Congress recognized the importance of such restrictions when it enacted the stay-and-transfer provisions of the U.S. Special Resolution Regimes. As demonstrated by the 2007–2009 financial crisis, the modern financial system is global in scope, and covered FSIs and their affiliates are party to large volumes of QFCs with connections to foreign jurisdictions. The stay-and-transfer provisions of the U.S. Special Resolution Regimes would not achieve their purpose of facilitating orderly resolution in the context of the failure of a GSIB with large volumes of QFCs if such QFCs could escape the effect of those provisions. To remove doubt about the scope of coverage of these provisions, the requirements of § 382.3 of the final rule would ensure that the stay-and-transfer provisions apply as a matter of contract to all non-exempted covered QFCs, whatever the transaction.

#### *E. Prohibited Cross-Default Rights (Section 382.4 of the Final Rule)*

**Definitions.** Section 382.4 of the final rule, like the proposal, applies in the context of insolvency proceedings<sup>131</sup>

<sup>130</sup> See section III–11 of Comprehensive Guidelines for Supervision of Major Banks, etc., available at <http://www.fsa.go.jp/common/law/guide/city.pdf>.

<sup>131</sup> See proposed rule § 382.4 (noting that section does not apply to proceedings under Title II of the Dodd-Frank Act). As noted in final rule § 382.4, the final rule does not modify or limit, in any manner, the rights and powers of the FDIC as receiver under the FDI Act or Title II of the Dodd-Frank Act, including, without limitation, the rights of the

and pertains to cross-default rights in QFCs between covered FSIs and their counterparties, many of which are subject to credit enhancements (such as a guarantee) provided by an affiliate of the covered FSI. Because credit enhancements of QFCs are themselves “qualified financial contracts” under the Dodd-Frank Act’s definition of that term (which this final rule adopts), the final rule includes the following additional definitions in order to facilitate a precise description of the relationships to which it would apply. These additional definitions are the same as under the proposal as no comments were received on these definitions.

First, the final rule distinguishes between a credit enhancement and a “direct QFC,” defined as any QFC that is not a credit enhancement.<sup>132</sup> The final rule also defines “direct party” to mean a covered FSI that is itself a party to the direct QFC, as distinct from an entity that provides a credit enhancement.<sup>133</sup> In addition, the final rule defines “affiliate credit enhancement” to mean “a credit enhancement that is provided by an affiliate of a party to the direct QFC that the credit enhancement supports,” as distinct from a credit enhancement provided by either the direct party itself or by an unaffiliated party.<sup>134</sup> Moreover, the final rule defines “covered affiliate credit enhancement” to mean an affiliate credit enhancement provided by a covered entity, covered bank, or covered FSI, and defines “covered affiliate support provider” to mean the affiliate of the covered entity, covered bank, or covered FSI that provides the covered affiliate credit enhancement.<sup>135</sup> Finally, the final rule defines the term “supported party” to mean any party that is the beneficiary of the covered affiliate support provider’s obligations under a covered affiliate credit enhancement (that is, the QFC counterparty of a direct party, assuming that the direct QFC is subject to a covered affiliate credit enhancement).<sup>136</sup>

**General prohibitions.** The final rule, like the proposal, prohibits a covered FSI from being party to a covered QFC that allows for the exercise of any default right that is related, directly or indirectly, to the entry into resolution of an affiliate of the covered FSI, subject to

receiver to enforce provisions of the FDI Act or Title II of the Dodd-Frank Act that limit the enforceability of certain contractual provisions.

<sup>132</sup> See final rule § 382.4(c)(2).

<sup>133</sup> See final rule § 382.4(c)(1).

<sup>134</sup> See final rule § 382.4(c)(3).

<sup>135</sup> See final rule §§ 382.4(e)(2) and (3).

<sup>136</sup> See final rule § 382.4(e)(4).

the exceptions discussed below.<sup>137</sup> The final rule also generally prohibits a covered FSI from being party to a covered QFC that would prohibit the transfer of any covered affiliate credit enhancement applicable to the QFC (such as another entity’s guarantee of the covered FSI’s obligations under the QFC), along with associated obligations or collateral, upon the entry into resolution of an affiliate of the covered FSI.<sup>138</sup>

One commenter expressed strong support for these provisions.<sup>139</sup> Another commenter expressed support for this provision as currently limited in scope under the proposal to prohibited cross-default rights and requested that the scope not be expanded. The FDIC’s final rule retains the same scope as the proposal.

A number of commenters representing counterparties to covered FSIs objected to § 382.4 of the proposal and requested the elimination of this provision. These commenters expressed concern about limitations on counterparties’ exercise of default rights during insolvency proceedings and argued that rights should not be taken away from

<sup>137</sup> See final rule § 382.4(b)(1). A few commenters requested that the FDIC clarify that covered QFCs that do not contain the cross-default rights or transfer restrictions on credit enhancement that are prohibited by § 382.4 would not be required to be remediated. This reading of § 382.4 of the final rule is correct. In addition, § 382.4(a) of the final rule provides the requested clarity.

<sup>138</sup> See final rule § 382.4(b)(2). This prohibition is subject to an exception that would allow supported parties to exercise default rights with respect to a QFC if the supported party would be prohibited from being the beneficiary of a credit enhancement provided by the transferee under any applicable law, including the Employee Retirement Income Security Act of 1974 and the Investment Company Act of 1940. This exception is substantially similar to an exception to the transfer restrictions in section 2(f) of the ISDA 2014 Resolution Stay Protocol (2014 Protocol) and the Universal Protocol, which was added to address concerns expressed by asset managers during the drafting of the 2014 Protocol.

One commenter requested that the exception be broadened to include transfers that would result in the supported party being unable, without further action, to satisfy the requirements of any law applicable to the supported party. As an example of a type of transfer that the commenter intended to be included within the broadened exception, the commenter stated that the supported party would be able to prevent the transfer if it would result in less favorable tax treatment. The exception would seem to also include filing requirements that may arise as a result of transfer or other requirements that could be satisfied with minimal “action” by, or cost to, the supported party. More generally, the scope of the laws that supported parties deem themselves to satisfy and the method of such satisfaction is unclear and potentially very broad.

The final rule retains the exception as proposed. The requested exception would add uncertainty as to how the contractual provisions relate to transfers made during the stay period and potentially unduly limit the restrictions on transfer prohibitions.

<sup>139</sup> This commenter also expressed support for parallel Congressional amendment of the U.S. Bankruptcy Code.



contracting parties other than where limitation of such rights is necessary for public policy reasons and the resolution process is controlled by a regulatory authority with particular expertise in the resolution of the type of entity subject to the proceedings. Certain commenters argued that eliminating cross-default termination rights undermines the ability of QFC counterparties to effectively manage and mitigate their exposure to market and credit risk to a GSIB and interferes with market forces. One commenter similarly argued that, unless the FDIC takes appropriate measures to strengthen the financial condition and creditworthiness of a failing GSIB during and after the temporary stay, the stay will only expose QFC counterparties to an additional 48 hours of credit risk exposure without achieving the orderly resolution goals of the rule. Another commenter argued that non-defaulting counterparties should not be prevented from filing proofs of claim or other pleadings in a bankruptcy case during the stay period, since bankruptcy deadlines might pass and leave the counterparty unable to collect the unsecured creditor dividend. Commenters contended that restrictions on cross-default rights may lead to pro-cyclical behavior with asset managers moving funds away from covered entities, covered FSIs, or covered banks as soon as those entities show signs of distress, and perhaps even in normal situations, and would disadvantage non-GSIB parties (e.g., end users who rarely receive initial margin from GSIB counterparties and are less well protected against a GSIB default).<sup>140</sup>

Some commenters argued that if these rights must be restricted by law, Congress should impose such restrictions and that the requirements of the proposed rule circumvented the legislative process by creating a de facto amendment to the U.S. Bankruptcy Code that forecloses countless QFC counterparties from exercising their rights of cross-default protection under section 362 of the U.S. Bankruptcy Code. Some of these commenters argued that parties cannot by contract alter the U.S. Bankruptcy Code's provisions, such as the administrative priority of a claim in bankruptcy, and one

<sup>140</sup> One commenter stated that, to the extent the final rule prevents an insurer from terminating QFC transactions upon the credit rating downgrade of a GSIB counterparty, the insurer may be in violation of State insurance laws that typically impose strict counterparty credit rating guidelines and limits. This commenter did not give any specific examples of such laws. Counterparties including insurance companies should evaluate and comply with all relevant applicable requirements.

commenter suggested that non-covered FSI counterparties may challenge the legality of contractual stays on the exercise of default rights if a GSIB becomes distressed. Other commenters, however, argued that the provisions of the proposed rule were necessary to address systemic risks posed by the exemption for QFCs in the U.S. Bankruptcy Code.

As an alternative to eliminating these requirements, these commenters expressed the view that if the FDIC moves forward with these provisions, the final rule should include at least those minimum creditor protections established by the Universal Protocol. Certain commenters also argued that this provision was overly broad in that it covered not only U.S. Federal resolution and insolvency proceedings but also State and foreign resolution and insolvency proceedings.<sup>141</sup> Certain commenters also urged the FDIC to provide a limited exception to these restrictions, if retained in the final rule, to help ensure the continued functioning of physical commodities markets.<sup>142</sup>

<sup>141</sup> Certain commenters also indicated that these provisions should only apply to U.S. Special Resolution Regimes, which provide certain protections for counterparties, or, at most, to U.S. Special Resolution Regimes, resolution under the Securities Investor Protection Act, and insolvency under Chapter 11 of the U.S. Bankruptcy Code. That commenter noted that liquidation and insolvency under Chapter 7 of the Bankruptcy Code do not seek to preserve the GSIB as a viable entity, which is an objective of the final rule. As discussed later, among the goals of the rule is the facilitation of the resolution of a GSIB outside of U.S. Special Resolution Regimes, including under the U.S. Bankruptcy Code. Therefore, the final rule applies these provisions in the same way as the proposal. In addition, the additional creditor protections for supported parties under the final rule permit contractual requirements that any transferee not be in bankruptcy proceedings and that the credit support provider not be in bankruptcy proceedings other than a Chapter 11 proceeding. See final rule § 382.4(f).

<sup>142</sup> In particular, these commenters requested that, when a covered FSI defaults on any physical delivery obligation to any counterparty following the insolvency of an affiliate of a covered FSI, its counterparties with obligations to deliver or take delivery of physical commodities within a short time frame after the default should be able to immediately terminate all trades (both physical and financial) with the covered FSI. The final rule, like the proposal, allows covered QFCs to permit a counterparty to exercise its default rights under a covered QFC if the covered FSI not subject to Title II or FDI Act proceedings has failed to pay or perform its obligations under the covered QFC. See final rule § 382.4(d). The final rule, like the proposal, also allows covered QFCs to permit a counterparty to exercise its default rights under a covered QFC if the covered FSI has failed to pay or perform on other contracts between the same parties and the failure gives rise to a default right in the covered QFC. See *id.* These exceptions should help reduce credit risk and ensure the smooth operation of the physical commodities markets without permitting one failure to pay or perform by a covered FSI to allow a potentially

Some commenters argued that the FDIC should eliminate the stay on default rights that are related "indirectly" to an affiliate of the direct party becoming subject to insolvency proceedings, claiming it is unclear what constitutes a right related "indirectly" to insolvency and noting that any default right exercised by a counterparty after an affiliate of that counterparty enters resolution could arguably be motivated by the affiliate's entry into resolution.

A primary purpose of these restrictions is to facilitate the orderly resolution of a GSIB outside of Title II of the Dodd-Frank Act, including under the U.S. Bankruptcy Code. As discussed above, the potential for mass exercises of QFC default rights is one reason why a GSIB's failure could cause severe damage to financial stability. In the context of an SPOE resolution, if the GSIB parent's entry into resolution led to the mass exercise of cross-default rights by the subsidiaries' QFC counterparties, then the subsidiaries could themselves fail or experience financial distress. Moreover, the mass exercise of QFC default rights could entail asset fire sales, which likely would affect other financial companies and undermine financial stability. Similar disruptive results can occur with an MPOE resolution of a GSIB affiliate if an otherwise performing GSIB entity is subject to having its QFCs terminated or accelerated as a result of the default of its affiliate.

In an SPOE resolution, this damage could be avoided if actions of the following two types are prevented: The exercise of direct default rights against the top-tier holding company that has entered resolution, and the exercise of cross-default rights against the operating subsidiaries based on their parent's entry into resolution. (Direct default rights against the subsidiaries would not be exercisable because the subsidiaries would not enter resolution.) In an MPOE resolution, this damage could occur from exercise of default rights against a performing entity based on the failure of an affiliate.

The stay-and-transfer provisions of Title II of the Dodd-Frank Act would address both direct default rights and cross-default rights. But, as explained above, no similar statutory provisions apply in a resolution under the U.S. Bankruptcy Code. This final rule attempts to address these obstacles to orderly resolution by extending

large number of its counterparties that are not directly affected by the failure to exercise their default rights and thereby endanger the viability of the covered FSI.

provisions similar to the stay-and-transfer provisions to any type of resolution of an affiliate of a covered FSI that is not an insured depository institution. Similarly, the final rule would facilitate a transfer of the GSIB parent's interests in its subsidiaries, along with any credit enhancements it provides for those subsidiaries, to a solvent financial company by prohibiting covered FSIs from having QFCs that would allow the QFC counterparty to prevent such a transfer or to use it as a ground for exercising default rights.<sup>143</sup>

The final rule also is intended to facilitate other approaches to GSIB resolution. For example, it would facilitate a similar resolution strategy in which a U.S. depository institution subsidiary of a GSIB enters resolution under the FDI Act while its subsidiaries continue to meet their financial obligations outside of resolution.<sup>144</sup> Similarly, the final rule, along with the FRB and OCC final rules, would facilitate the orderly resolution of a foreign GSIB under its home jurisdiction resolution regime by preventing the exercise of cross-default rights against the foreign GSIB's U.S. operations. The final rules would also facilitate the resolution of an IHC of a foreign GSIB, and the recapitalization of its U.S. operating subsidiaries, as part of a broader MPOE resolution strategy under which the foreign GSIB's operations in other regions would enter separate resolution proceedings. Finally, the final rules will help to prevent the unanticipated failure of any one GSIB entity from bringing about the disorderly failures of its affiliates by preventing the affiliates' QFC counterparties from using the first entity's failure as a ground for exercising default rights against those affiliates that continue meet to their obligations.

The final rule is intended to enhance the potential for orderly resolution of a GSIB under the U.S. Bankruptcy Code, the FDI Act, or a similar resolution regime. The risks to an orderly resolution under the U.S. Bankruptcy Code include separate resolution insolvency proceedings, including proceedings in non-U.S. jurisdictions. Therefore, by staying default rights arising from affiliates entering into such

proceedings, the final rule will advance the Dodd-Frank Act's goal of making orderly GSIB resolution workable under the Bankruptcy Code.<sup>145</sup>

Likewise, the final rule retains the prohibition against contractual provisions that permit the exercise of default rights that are indirectly related to the resolution of an affiliate. QFCs may include a number of default rights triggered by an event that is not the resolution of an affiliate but is caused by the resolution, such as a credit rating downgrade in response to the resolution. A primary purpose of the final rule is to prevent early terminations caused by the resolution of an affiliate. A regulation that specifies each type of early termination provision that should be stayed would be over-inclusive or under-inclusive, and easy to evade. Similarly, a stay of default rights that are only directly related to the resolution of an affiliate could increase the likelihood of litigation to determine the relationship between the default right and the affiliate resolution was sufficient to be considered "directly" related. The final rule attempts to decrease such uncertainty and litigation risk by including default rights that are related (*i.e.*, directly or indirectly) to the resolution of an affiliate.

Moreover, the final rule does not affect parties' direct default rights under the U.S. Bankruptcy Code. As explained above, the regulation does not prohibit a covered QFC from permitting the exercise of default rights against a non-bank covered FSI that has entered bankruptcy proceedings.<sup>146</sup> Therefore, counterparties to a non-bank covered FSI in bankruptcy would be able to exercise their existing default rights to the full extent permitted under any applicable safe harbor to the automatic stay of the U.S. Bankruptcy Code.

The final rule should also benefit the counterparties of a subsidiary of a failed GSIB by preventing the severe stress or disorderly failure of an otherwise-solvent subsidiary and allowing it to continue to meet its obligations. While it may be in the individual interest of any given counterparty to exercise any available rights against a subsidiary of a failed GSIB, the mass exercise of such rights could harm the counterparties' collective interest by causing an otherwise-solvent subsidiary to fail. Therefore, like the automatic stay in bankruptcy, which serves to maximize creditors' ultimate recoveries by preventing a disorderly liquidation of the debtor, the final rule seeks to

mitigate this collective action problem to the benefit of the failed firm's creditors and counterparties by preventing a disorderly resolution. And because many creditors and counterparties of GSIBs are themselves systemically important financial firms, improving outcomes for those creditors and counterparties should further protect the financial stability of the United States.

*General creditor protections.* While the restrictions of the final rule are intended to facilitate orderly resolution, they may also diminish the ability of covered FSI's QFC counterparties to include certain protections for themselves in covered QFCs, as noted by certain commenters. In order to reduce this effect, the final rule like the proposal includes several substantive exceptions to the restrictions.<sup>147</sup> These permitted creditor protections are intended to allow creditors to exercise cross-default rights outside of an orderly resolution of a GSIB (as described above) and therefore would not be expected to undermine such a resolution.

First, in order to ensure that the prohibitions would apply only to cross-default rights (and not direct default rights), the final rule provides that a covered QFC may permit the exercise of default rights based on the direct party's entry into a resolution proceeding.<sup>148</sup>

<sup>147</sup> See final rule § 382.4(d).

<sup>148</sup> See final rule § 382.4(d)(1).

The proposal exempted from this creditor protection provision proceedings under a U.S. or foreign special resolution regime. As explained in the proposal, special resolution regimes typically stay direct default rights, but may not stay cross-default rights. For example, as discussed above, the FDI Act stays direct default rights, *see* 12 U.S.C. 1821(e)(10)(B), but does not stay cross-default rights, whereas the Dodd-Frank Act's OLA stays direct default rights and cross-defaults arising from a parent's receivership, *see* 12 U.S.C. 5390(c)(10)(B) and 5390(c)(16). The proposed exemption of special resolution regimes from the creditor protection provisions was intended to help ensure that special resolution regimes that do not stay cross-defaults, such as the FDI Act, would not disrupt the orderly resolution of a GSIB under the U.S. Bankruptcy Code or other ordinary insolvency proceedings.

One commenter requested the FDIC revise this provision to clarify that default rights based on a covered FSI or an affiliate entering resolution under the FDI Act or Title II of the Dodd-Frank Act are not prohibited but instead are merely subject to the terms of such regimes. The commenter requested the FDIC clarify that such default rights are permitted so long as they are subject to the provisions of the FDI Act or Title II of the Dodd-Frank Act as required under § 385.3. The final rule eliminates this proposed exemption for special resolution regimes because the rule separately addresses cross-defaults arising from the FDI Act and because foreign special resolution regimes, along with efforts in other jurisdictions to contractually recognize stays of default rights under those regimes, should reduce the risk that such a regime should pose to the orderly resolution of a GSIB under the U.S. Bankruptcy Code or other ordinary insolvency proceedings.

<sup>143</sup> See final rule § 382.4(b).

<sup>144</sup> As discussed above, the FDI Act limits the exercise of direct default rights against the depository institution, but it does not address the threat posed to orderly resolution by cross-default rights in the QFCs of the depository institution's subsidiaries. The final rule would facilitate orderly resolution under the FDI Act by filling that gap. *See* final rule § 382.4(b).

<sup>145</sup> See 12 U.S.C. 5365(d).

<sup>146</sup> See final rule § 382.4(d)(1).

This provision helps to ensure that, if the direct party to a QFC were to enter bankruptcy, its QFC counterparties could exercise any relevant direct default rights. Thus, direct QFC counterparties of a covered FSI's subsidiaries would not risk the delay and expense associated with becoming involved in a bankruptcy proceeding, and would be able to take advantage of default rights that would fall within the U.S. Bankruptcy Code's safe harbor provisions.

The final rule also allows, in the context of an insolvency proceeding, and subject to the statutory requirements and restrictions thereunder, covered QFCs to permit the exercise of default rights based on (i) the failure of the direct party; (ii) the direct party not satisfying a payment or delivery obligation; or (iii) a covered affiliate support provider or transferee not satisfying its payment or delivery obligations under the direct QFC or credit enhancement.<sup>149</sup> Moreover, the final rule allows covered QFCs to permit the exercise of a default right in one QFC that is triggered by the direct party's failure to satisfy its payment or delivery obligations under another contract between the same parties.<sup>150</sup> This exception takes appropriate account of the interdependence that exists among the contracts in effect between the same counterparties.

As explained in the proposal, the exceptions in the final rule for the creditor protections described above are intended to help ensure that the final rule permits a covered FSI's QFC counterparties to protect themselves from imminent financial loss and does not create a risk of delivery gridlocks or daisy-chain effects, in which a covered FSI's failure to make a payment or delivery when due leaves its counterparty unable to meet its own payment and delivery obligations (the daisy-chain effect would be prevented because the covered FSI's counterparty would be permitted to exercise its default rights, such as by liquidating collateral). These exceptions are generally consistent with the treatment of payment and delivery obligations, following the applicable stay period, under the U.S. Special Resolution Regimes.

These exceptions also help to ensure that counterparties of a covered FSI's

<sup>149</sup> See final rule § 382.4(d)(1) through (3). These provisions should respond to comments requesting that the final rule confirm the ability of a covered FSI's counterparty to exercise default rights arising from the failure of a direct party to satisfy a payment or delivery obligation during the stay period. But see final rule § 382.3(c).

<sup>150</sup> See final rule § 382.4(d)(2).

non-IDI subsidiaries or affiliates would not risk the delay and expense associated with becoming involved in a bankruptcy proceeding, since, unlike a typical creditor of an entity that enters bankruptcy, the QFC counterparty would retain its ability under the U.S. Bankruptcy Code's safe harbors to exercise direct default rights. This should further reduce the counterparty's incentive to run. Reducing incentives to run in the period leading up to resolution promotes orderly resolution, since a QFC creditor run (such as a mass withdrawal of repo funding) could lead to a disorderly resolution and pose a threat to financial stability.

*Additional creditor protections for supported QFCs.* The final rule, like the proposal, allows the inclusion of additional creditor protections for a non-defaulting counterparty that is the beneficiary of a credit enhancement from an affiliate of the covered FSI that is a covered entity, covered bank, or covered FSI.<sup>151</sup> The final rule allows these creditor protections in recognition of the supported party's interest in receiving the benefit of its credit enhancement.

Where a covered QFC is supported by a covered affiliate credit enhancement,<sup>152</sup> the covered QFC and the credit enhancement are permitted to allow the exercise of default rights under the circumstances discussed below after the expiration of a stay period.<sup>153</sup> Under the final rule, the applicable stay period would begin at the commencement of the proceeding and would end at the later of 5 p.m. (eastern time) on the next business day and 48 hours after the entry into resolution.<sup>154</sup> This portion of the final rule is similar to the stay treatment provided in a resolution under Title II of the Dodd-Frank Act or the FDI Act.<sup>155</sup>

Under the final rule, contractual provisions may permit the exercise of default rights at the end of the stay period if the covered affiliate credit

<sup>151</sup> See final rule § 382.4(f).

<sup>152</sup> Note that the exception in § 382.4(f) of the final rule would not apply with respect to credit enhancements that are not covered affiliate credit enhancements. In particular, it would not apply with respect to a credit enhancement provided by a non-U.S. entity of a foreign GSIB, which would not be a covered entity, covered FSI, or covered bank under the proposal. See final rule § 382.4(e)(2) (defining "covered affiliate credit enhancement").

<sup>153</sup> See 12 U.S.C. 1821(e)(8)(G)(ii), 5390(c)(8)(F)(ii) (suspending payment and delivery obligations for one business day or less).

<sup>154</sup> See final rule § 382.4(g)(1).

<sup>155</sup> See 12 U.S.C. 1821(e)(10)(B)(I), 5390(c)(10)(B)(i), 5390(c)(16)(A). While the final rule's stay period is similar to the stay periods that would be imposed by the U.S. Special Resolution Regimes, it could run longer than those stay periods under some circumstances.

enhancement has not been transferred away from the covered affiliate support provider and that support provider becomes subject to a resolution proceeding other than a proceeding under Chapter 11 of the U.S. Bankruptcy Code or the FDI Act.<sup>156</sup> QFCs may also permit the exercise of default rights at the end of the stay period if the transferee (if any) of the credit enhancement enters an insolvency proceeding, protecting the supported party from a transfer of the credit enhancement to a transferee that is unable to meet its financial obligations.<sup>157</sup>

QFCs may also permit the exercise of default rights at the end of the stay period if the original credit support provider does not remain, and no transferee becomes, obligated to the same (or substantially similar) extent as the original credit support provider was obligated immediately prior to entering a resolution proceeding (including a Chapter 11 proceeding) with respect to (a) the covered affiliate credit enhancement (b) all other covered affiliate credit enhancements provided by the credit support provider on any other covered QFCs between the same parties, and (c) all credit enhancements provided by the credit support provider between the direct party and affiliates of the direct party's QFC counterparty.<sup>158</sup> Such creditor protections are permitted in order to prevent the support provider or the transferee from "cherry picking" by assuming only those QFCs of a given counterparty that are favorable to the support provider or transferee. Title II of the Dodd-Frank Act and the FDI Act also contain provisions to prevent cherry picking.

Finally, if the covered affiliate credit enhancement is transferred to a transferee, the QFC may permit non-defaulting counterparty to exercise default rights at the end of the stay period unless either (a) all of the covered affiliate support provider's ownership interests in the direct party are also transferred to the transferee or (b) reasonable assurance is provided that substantially all of the covered affiliate support provider's assets (or the net proceeds from the sale of those assets) will be transferred or sold to the

<sup>156</sup> See final rule § 382.4(f)(1). Chapter 11 (11 U.S.C. 1101–1174) is the portion of the U.S. Bankruptcy Code that provides for the reorganization of the failed company, as opposed to its liquidation, and, relative to special resolution regimes, is generally well-understood by market participants.

<sup>157</sup> See final rule § 382.4(f)(2).

<sup>158</sup> See final rule § 382.4(f)(3).

transferee in a timely manner.<sup>159</sup> These conditions will help to assure the supported party that the transferee would be providing substantively the same credit enhancement as the covered affiliate support provider.<sup>160</sup> Title II of the Dodd-Frank Act also requires that certain conditions be met with respect to affiliate credit enhancements.<sup>161</sup>

Commenters generally expressed strong support for these exclusions but also requested that these exclusions be broadened in a number of ways. Certain commenters urged the FDIC to broaden the exclusions to permit, after the trigger of the stay-and-transfer provisions, the exercise of default rights by a counterparty against a direct counterparty or covered support provider with respect to any default right under the QFC (other than a default right explicitly based on the failure of an affiliate) and not just with respect to defaults resulting from payment or delivery failure or the direct party becoming subject to certain resolution or insolvency proceedings (e.g., failure to maintain a license or certain capital level, materially breaching its representations under the QFC). Certain commenters contended that at a minimum the final rule should provide for creditor protections that meet the minimum standards set forth by the Universal Protocol. One commenter specifically identified three creditor protections found in the Universal Protocol that it argued the FDIC should include in § 382.4: (1) Priority rights in a bankruptcy proceeding against the transferee or original credit support provider (if the QFC providing credit support was not transferred); (2) a right to submit claims in the insolvency proceeding of the insolvent credit support provider if the transferee becomes insolvent; and (3) the ability to declare a default and close out of both the original QFC with the direct counterparty as well as QFCs with the transferee if the transferee defaults under the transferred QFC or under any other QFC with the non-defaulting counterparty, subject to the contractual terms and consistent with applicable law. Another commenter argued for creditor protections not found in the Universal Protocol, including that the transferee be required to be a U.S. person and be registered with and licensed by the primary regulator of either the direct counterparty or transferor entity. Certain commenters also asked for the right to exercise direct default rights and general

creditor protections even if the exercise occurs during the stay period. Commenters also asked the FDIC to delete the phrases “or after” in § 382.4(b) regarding the restrictions on transfers of affiliate credit enhancements, as neither the FRB’s nor the OCC’s rules have that phrase. These commenters asserted that, when coupled with the definition of “transferee” in § 382.4(g)(3), § 382.4(b) could be read as overriding transfers indefinitely, even with respect to subsequent transfers following the initial transfer to a bridge financial company or a third party transferee.

The final rule does not include the additional creditor protections of the Universal Protocol or other creditor protections requested by commenters. As explained in the proposal and below, the additional creditor protections of the Universal Protocol do not appear to materially diminish the prospects for an orderly resolution of a GSIB because the Universal Protocol includes a number of desirable features that the final rule otherwise lacks.<sup>162</sup> Providing additional circumstances under which default rights may be exercised during and immediately after the stay period, in the absence of any counterbalancing benefits to resolution, would increase the risk of a disorderly resolution of a GSIB in contravention of the purposes of the rule.

Additionally, in response to commenters, the definition of “transferee” in § 382.4(g)(3) of the final rule has been changed to define a “transferee” as a person to whom a covered affiliate credit enhancement is transferred upon the covered affiliate credit support provider entering a receivership, insolvency, liquidation, resolution, or similar proceeding or thereafter as part of the resolution, restructuring or reorganization involving the covered affiliate support provider. The provisions of the FRB final rule are consistent with this final rule.

One commenter also argued that transfer should be limited to a bridge bank under the FDI Act or a bridge financial company under Title II of the Dodd-Frank Act to ensure that the transferee is more likely to be able to satisfy the obligations of a credit support provider and is subject to regulatory oversight. Section 382.4 of the final rule does not apply in situations where the covered affiliate support provider is in Title II of the Dodd-Frank Act. Furthermore, this section is limited in its application to the FDI Act as well, limiting the

exercise of cross-default rights as contemplated by § 382.4(h) of the final rule. Therefore, the FDIC is not adopting the proposed additional creditor protection because it would defeat in large part the purpose of § 382.4 and potentially create confusion regarding the requirements and purposes of §§ 382.3 and 382.4 of the final rule.<sup>163</sup>

A few commenters expressed concern that the additional creditor protections applied only to QFCs supported by a credit enhancement provided by a “covered affiliate support provider” (i.e., an affiliate that is a covered entity, covered bank, or covered FSI) and noted that foreign GSIBs often will have their QFCs supported by a non-U.S. affiliate that is not a covered entity, covered bank, or covered FSI. Such non-U.S. affiliate credit supporter providers would not be able to rely on the additional creditor protections for supported QFCs. Such credit enhancements are excluded in order to help ensure that the resolution of a non-U.S. entity would not negatively affect the financial stability of the United States.<sup>164</sup>

One commenter requested clarification that the creditors of a non-U.S. credit support provider are permitted to exercise any and all rights against that non-U.S. credit support provider that they could exercise under the non-U.S. resolution regime applicable to that non-U.S. credit support provider. The final rule, like the proposal, is limited to QFCs to which a covered FSI is a party. Section 382.4 of the final rule generally prohibits QFCs to which a covered FSI is a party from allowing the exercise of cross-default rights of the covered QFC, regardless of whether the affiliate entering resolution and/or the credit support provider is organized or operates in the United States.

Another commenter expressed concern that the proposed § 382.4(g)(3) (§ 382.4(f)(3) of the final rule) would provide a right without a remedy because if the covered affiliate credit

<sup>163</sup> To the extent the commenter’s reference to “bridge financial company” was not only to a bridge financial company under Title II of the Dodd-Frank Act, the requested amendment would not appear to provide a meaningful reduction in credit risk to counterparties compared to the creditor protections permitted under § 382.84 of the final rule and those available under the Universal Protocol and U.S. Protocol, discussed below.

<sup>164</sup> See generally 81 FR 74326, 74335 (Oct. 26, 2016) (“Note that the exception in § 382.4(g) of the proposed rule would not apply with respect to credit enhancements that are not covered affiliate credit enhancements. In particular, it would not apply with respect to a credit enhancement provided by a non-U.S. entity of a foreign GSIB, which would not be a covered entity under the proposal.”). See also final rule § 382.4(f).

<sup>159</sup> See final rule § 382.4(f)(4).

<sup>160</sup> See 12 U.S.C. 5390(c)(16)(A).

<sup>161</sup> See 12 U.S.C. 5390(c)(16)(A).

<sup>162</sup> See 81 FR 74326 (Oct. 26, 2016).

support provider is no longer obligated and no transferee has taken on the obligation, the non-covered FSI counterparty may have only a breach of contract claim against an entity that has transferred all of its assets to a third party. The creditor protections of § 382.4, if triggered, permit contractual provisions allowing the exercise of existing default rights against the direct party to the covered QFC, as well as any existing rights against the credit enhancement provider.

Another commenter suggested revising § 382.4(g) (§ 382.4(f) of the final rule) to clarify that, for a covered direct QFC supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right after the stay period that is related, directly or indirectly, to the covered affiliate support provider entering into resolution proceedings. This reading is incorrect and revising the rule as requested would largely defeat the purpose of § 382.4 of the final rule by merely delaying QFC termination en masse.

Some commenters also requested specific provisions related to physical commodity contracts, including a provision that would allow regulators to override a stay if necessary to avoid disruption of the supply or prevent exacerbation of price movements in a commodity or a provision that would allow the exercise of default rights of counterparties delivering or taking delivery of physical commodities if a GSIB entity defaults on any physical delivery obligation to any counterparty. As noted above, QFCs may permit a counterparty to exercise its default rights immediately, even during the stay period, if the direct party fails to pay or perform on the covered QFC with the counterparty (or another contract between the same parties that gives rise to a default under the covered QFC).

*Creditor protections related to FDI Act proceedings.* In the case of a covered QFC that is supported by a covered affiliate credit enhancement, both the covered QFC and the credit enhancement would be permitted to allow the exercise of default rights related to the credit support provider's entry into resolution proceedings under the FDI Act<sup>165</sup> only under the following circumstances: (a) After the FDI Act stay period,<sup>166</sup> if the credit enhancement is

not transferred under the relevant provisions of the FDI Act<sup>167</sup> and associated regulations, and (b) during the FDI Act stay period, to the extent that the default right permits the supported party to suspend performance under the covered QFC to the same extent as that party would be entitled to do if the covered QFC were with the credit support provider itself and were treated in the same manner as the credit enhancement.<sup>168</sup> This provision is intended to ensure that a QFC counterparty of a subsidiary of a covered FSI that goes into FDI Act receivership can receive the equivalent level of protection that the FDI Act provides to QFC counterparties of the covered FSI itself.<sup>169</sup> No comments were received on this aspect of the proposal and the final rule contains no substantive changes from the proposal.

*Prohibited terminations.* In case of a legal dispute as to a party's right to exercise a default right under a covered QFC, the final rule, like the proposal, requires that a covered QFC must provide that, after an affiliate of the direct party has entered a resolution proceeding, (a) the party seeking to exercise the default right bears the burden of proof that the exercise of that right is indeed permitted by the covered QFC; and (b) the party seeking to exercise the default right must meet a "clear and convincing evidence" standard, a similar standard,<sup>170</sup> or a more demanding standard.<sup>171</sup>

The purpose of this requirement is to deter the QFC counterparty of a covered FSI from thwarting the purpose of the final rule by exercising a default right because of an affiliate's entry into resolution under the guise of other default rights that are unrelated to the affiliate's entry into resolution.

A few commenters requested guidance on how to satisfy the burden of proof of clear and convincing evidence so that they may avoid seeking such clarity through litigation. Other commenters urged that this standard was not appropriate and should be eliminated. In particular, a number of

commenters expressed concern that the burden of proof requirements, which are more stringent than the burden of proof requirements for typical contractual disputes adjudicated in a court, unduly hamper the creditor protections of counterparties and impose a burden directly on non-covered FSIs, who should be able to exercise default rights if it is commercially reasonable in the context. One commenter contended that this burden, combined with the stay on default rights related "indirectly" to an affiliate entering insolvency proceedings effectively prohibits counterparties from exercising any default rights during the stay period. These commenters argued that it is inappropriate for the rulemaking to alter the burden of proof for contractual disputes. One commenter suggested that, in a scenario involving a master agreement with some transactions out of the money and others in the money, the defaulting GSIB will have a lower burden of proof for demonstrating that it is owed money than for demonstrating that it owes money, should the non-GSIB counterparty exercise its termination rights. Certain commenters suggested instead that the final rule shift the burden and instead adopt a rebuttable presumption that the non-defaulting counterparty's exercise of default rights is permitted under the QFC unless the defaulting covered FSI demonstrates otherwise. One commenter requested that the burden of proof not apply to the exercise of direct default rights. Another commenter suggested that the burden of proof provision imposes a higher burden of proof on counterparties affected by the rule than domestic and foreign GSIBs and that the requirements for satisfying this burden should be clarified and any case law or statutory standard that a Federal judge would apply in this instance be provided.

The final rule retains the proposed burden of proof requirements. The requirement is based on a primary goal of the final rule—to avoid the disorderly termination of QFCs in response to the failure of an affiliate of a GSIB. The requirement accomplishes this goal by making clear that a party that exercises a default right when an affiliate of its direct party enters receivership or insolvency proceedings is unlikely to prevail in court unless there is clear and convincing evidence that the exercise of the default right against a covered FSI is not related to the insolvency or resolution proceeding. The requirement therefore should discourage the impermissible exercise of default rights without prohibiting the exercise of all default rights. Moreover, the burden of

<sup>12</sup> U.S.C. 1821(e)(10)(B)(i). See also final rule § 382.1.

<sup>167</sup> 12 U.S.C. 1821(e)(9)–(10).

<sup>168</sup> See final rule § 382.4(h).

<sup>169</sup> See *id.* (noting that the general creditor protections in § 382.4(d), and the additional creditor protections for supported QFCs in § 382.4(f), are inapplicable to FDI Act proceedings).

<sup>170</sup> The reference to a "similar" burden of proof is intended to allow covered QFCs to provide for the application of a standard that is analogous to clear and convincing evidence in jurisdictions that do not recognize that particular standard. A covered QFC is not permitted to provide for a lower standard.

<sup>171</sup> See final rule § 382.4(i).

<sup>165</sup> As discussed above, the FDI Act stays direct default rights against the failed depository institution but does not stay the exercise of cross-default rights against its affiliates.

<sup>166</sup> Under the FDI Act, the relevant stay period runs until 5 p.m. (eastern time) on the business day following the appointment of the FDIC as receiver.

proof requirement should not discourage the exercise of default rights after or in response to a failure to satisfy a creditor protection provision (e.g., direct default rights); such a failure should be easily evidenced, even under a heightened burden of proof, such that clarification through court proceedings should not be necessary.

*Agency transactions.* In addition to entering into QFCs as principals, GSIBs may engage in QFCs as agents for other principals. For example, a GSIB subsidiary may enter into a master securities lending arrangement with a foreign bank as agent for a U.S.-based pension fund. The GSIB subsidiary would document its role as agent for the pension fund, often through an annex to the master agreement, and would generally provide to its customer (the principal party) a securities replacement guarantee or indemnification for any shortfall in collateral in the event of the default of the foreign bank.<sup>172</sup> Similarly, a covered FSI may also enter into a QFC as agent acting on behalf of a principal.

The proposal would have applied to a covered QFC regardless of whether the covered FSI was acting as a principal or as an agent. Sections 382.3 and 382.4 of the proposal did not distinguish between agents and principals with respect to default rights or transfer restrictions applicable to covered QFCs. Under the proposal, § 382.3 would have limited default rights and transfer restrictions that a counterparty may have against a covered FSI consistent with the U.S. Special Resolution Regimes.<sup>173</sup> Section 382.4 of the proposed rule would have ensured that, subject to the enumerated creditor protections, counterparties could not exercise cross-default rights under the covered QFC against the covered FSI, acting as agent or principal, based on the resolution of an affiliate of the covered FSI.<sup>174</sup>

Commenters argued that the provisions of §§ 382.3 and 382.4 that relate to transactions entered into by the covered FSI as agent should exclude QFCs where the covered FSI or its affiliate does not have any liability (including contingent liability) under or in connection with the contract, or any payment or delivery obligations with respect thereto. Commenters also argued that the proposed agent provisions should not apply to circumstances

where the covered FSI acts as agent for a counterparty whose transactions are excluded from the requirements of the rule.<sup>175</sup> Commenters provided as an example where an agent simply executes an agreement on behalf of the principal but bears no liability thereunder, such as where an investment manager signs an agreement on behalf of a client. Commenters noted that such agreements could contain events of default relating to the insolvency of the agent or an affiliate of the agent but that such default rights would be difficult to track and that close-out of such QFCs would not result in any loss or liquidity impact to the agent. Rather, early termination under the agreements would subject the cash and securities of the principals—not the agent—to realization and liquidation. Therefore, the agent would not be exposed to the liquidity and asset fire sale risks the proposal was intended to address.

Commenters contended that the requirement to conform QFCs with all affiliates of a counterparty when an agent is acting on behalf of the counterparty would be particularly burdensome, as the agent may not have information about the counterparty's affiliates or their contracts with covered FSIs, covered banks, or covered entities. Commenters also requested clarification that conformance is not required of contracts between a covered FSI as agent on behalf of a non-U.S. affiliate of a foreign GSIB that would not be a covered FSI under the proposal, since default rights related to the non-U.S. operations of foreign GSIBs are not the focus of the rule and do not bear a sufficient connection to U.S. financial stability to warrant the burden and cost of compliance.

One commenter also urged that securities lending authorization agreements (SLAAs) should also be exempt from the rule. The commenter explained that SLAAs are banking services agreements that establish an agency relationship with the lender of securities and an agent and may be considered credit enhancements for securities lending transactions (and therefore QFCs) because the SLAAs typically require the agent to indemnify the lender for any shortfall between the value of the collateral and the value of the securities in the event of a borrower default. The commenter explained that SLAAs typically do not contain provisions that may impede the

resolution of a GSIB, but may contain termination rights or contractual restrictions on assignability. However, the commenter argued that the beneficiaries under SLAAs lack the incentive to contest the transfer of the SLAA to a bridge institution in the event of GSIB insolvency.

To respond to concerns raised by commenters, the agency provisions of the proposed rule have been modified in the final rule. The final rule provides that a covered FSI does not become a party to a QFC solely by acting as agent to a QFC.<sup>176</sup> Therefore, an in-scope QFC would not be a covered QFC solely because a covered FSI was acting as agent for a principal for the QFC.<sup>177</sup> For example, the final rule would not require a covered FSI to conform a master securities lending arrangement (or the transactions under the agreement) to the requirements of the final rule if the only obligations of the covered FSI under the agreement are to act as an agent on behalf of one or more principals. This modification should address many of the concerns raised by commenters.

The final rule does not specifically exempt SLAAs because the agreements provide the beneficiaries with contractual rights that may hinder the orderly resolution of a GSIB and because it is unclear how such beneficiaries would act in response to the failure of their agent. More generally, the final rule does not exempt a QFC with respect to which an agent also acts in another capacity, such as guarantor. Continuing the example regarding the covered FSI acting as agent with respect to a master securities lending agreement, if the covered FSI also provided a SLAA that included the typical indemnification provision, discussed above, the agency exemption of the final rule would not exclude the SLAA but would still exclude the master securities lending agreement. This is because the covered FSI is acting solely as agent with respect to the master securities lending agreement but is acting as agent and guarantor with respect to the SLAA. However, SLAAs would be exempted under the final rule to the extent that they are not “in-scope QFCs” or otherwise meet the exemptions for covered QFCs of the final rule.

*Enforceability.* Commenters also requested that the final rule should clarify that obligations under a QFC

<sup>172</sup> The definition of QFC under Title II of the Dodd-Frank Act, which is adopted in the final rule, includes security agreements and other credit enhancements as well as master agreements (including supplements). 12 U.S.C. 5390(c)(8)(D); see also final rule § 382.1.

<sup>173</sup> See proposed rule § 382.3(a)(3).

<sup>174</sup> See proposed rule § 382.4(a)(3) and (d).

<sup>175</sup> Commenters argued this should be the case even where an agent has entered an umbrella master agreement on behalf of more than one principal, but only with respect to the contract of any principals that are excluded counterparties.

<sup>176</sup> See final rule § 382.2(e)(1).

<sup>177</sup> Such a QFC would nonetheless be a covered QFC with respect to a principal that also was a covered FSI. In response to comments, the FDIC notes that covered FSIs do not include non-U.S. subsidiaries of a foreign GSIB.

would still be enforceable even if its terms do not comply with the requirements of the final rule similar to assurances provided in respect of the UK rule and German legislation. The enforceability of a contract is beyond the scope of this rule.

*Interaction with Other Regulatory Requirements.* Certain commenters requested clarification that amending covered QFCs as required by this final rule should not trigger other regulatory requirements for covered FSIs such as the swap margin requirements issued by the FDIC, other prudential regulators (the OCC, FRB, Farm Credit Administration and Federal Housing Financing Agency), and the U.S. Commodity Futures Trading Commission (CFTC). In particular, commenters urged that amending a swap to conform to this final rule should not jeopardize the status of the swap as a legacy swap for purposes of the swap margin requirements for non-cleared swaps. These issues are outside the scope of this rule as they relate to the requirements of another rule issued by the FDIC jointly with the other prudential regulators as well as a rule issued by the CFTC. As commenters highlighted, addressing such issues may require consultation with the other prudential regulators as well as the CFTC and the U.S. Securities and Exchange Commission to determine the impact of the amendments required by this final rule for purposes of the regulatory requirements under Title VII. However, as the proposal noted, the FDIC is considering an amendment to the definition of “eligible master netting agreement” to account for the restrictions on covered QFCs and is consulting with the other prudential regulators and the CFTC on this aspect of the final rule.<sup>178</sup> The FDIC does not expect that compliance with this final rule will trigger the swap margin requirements for non-cleared swaps.

*Compliance with the ISDA 2015 Resolution Stay Protocol.* The final rule, like the proposal, allows covered FSIs to conform covered QFCs to the requirements of the rule through adherence to the Universal Protocol.<sup>179</sup> The two primary operative provisions of the Universal Protocol are Section 1 and Section 2. Under Section 1, adhering parties essentially “opt in” to the U.S. Special Resolution Regimes and certain other special resolution regimes. Therefore, Section 1 is generally responsive to the concerns addressed in § 382.3 of the final rule. Under Section 2, adhering parties essentially forego,

subject to the creditor protections of Section 2, cross-default rights and transfer restrictions on affiliate credit enhancements. Therefore, Section 2 is generally responsive to the concerns addressed in § 382.4 of the final rule.

The proposal noted that, while the scope of the stay-and-transfer provisions of the Universal Protocol are narrower than the stay-and-transfer provisions that would have been required under the proposal and the Universal Protocol provides a number of creditor protection provisions that would not otherwise have been available under the proposal, the Universal Protocol includes a number of desirable features that the proposal lacked. When an entity (whether or not it is a covered FSI) adheres to the Universal Protocol, it necessarily adheres to the Universal Protocol with respect to all covered FSIs that have also adhered to the Protocol rather than one or a subset of covered FSIs (as the proposal would otherwise have permitted). This feature appears to allow the Universal Protocol to address impediments to resolution on an industry-wide basis and increase market certainty, transparency, and equitable treatment with respect to default rights of non-defaulting parties.<sup>180</sup> This feature is referred to as “universal adherence.” Other favorable features of the Universal Protocol included that it amends all existing transactions of adhering parties, does not provide the counterparty with default rights in addition to those provided under the underlying QFC, applies to all QFCs, and includes resolution under bankruptcy as well as U.S. and certain non-U.S. Special Resolution Regimes. Because the features of the Universal Protocol, considered together, appeared to increase the likelihood that the resolution of a GSIB under a range of scenarios could be carried out in an orderly manner, the proposal stated that QFCs amended by the Universal Protocol would have been consistent with the proposal, notwithstanding § 382.4 of the proposal.

Commenters generally supported the proposal’s provisions to allow covered FSIs to comply with the requirements of the proposed rule through adherence to the Universal Protocol. For the reasons discussed above and in the proposal, the final rule allows covered FSIs to comply with the rule through adherence to the Universal Protocol and makes other modifications to the proposal to address comments.

A few commenters requested that the final rule clarify two technical aspects of adherence to the Universal Protocol.

These commenters requested confirmation that adherence to the Universal Protocol would also satisfy the requirements of § 382.3. The commenters also requested confirmation that QFCs that incorporate the terms of the Universal Protocol by reference also would be deemed to comply with the terms of the proposed alternative method of compliance.<sup>181</sup> By clarifying § 382.5(a), the final rule confirms that adherence to the Universal Protocol is deemed to satisfy the requirements of § 382.3 of the final rule (as well as § 382.4) and that conformance of a covered QFC through the Universal Protocol includes incorporation of the terms of the Universal Protocol by reference by protocol adherents. This clarification also applies to the U.S. Protocol, discussed below.

One commenter indicated that many non-covered FSI counterparties do not have ISDA master agreements for physically-settled forward and commodity contracts and, therefore, compliance with the rule’s requirements through adherence to the Universal Protocol would entail substantial time and educational effort. As in the proposal, the final rule simply permits adherence to the Universal Protocol as one method of compliance with the rule’s requirements, and parties may meet the rule’s requirements through bilateral negotiation, if they choose. Moreover, the Securities Financing Transaction Annex and Other Agreements Annex of the Universal Protocol, which are specifically identified in the proposed and final rule, are designed to amend QFCs that are not ISDA master agreements.

Many commenters argued that the final rule should also allow compliance with the rule through a yet-to-be-created

<sup>181</sup> “As between two Adhering Parties, the [Universal Protocol] only amends agreements between the Adhering Parties that have been entered into as of the date that the Adhering Parties adhere (as well as any subsequent transactions thereunder), but it does not amend agreements that Adhering Parties enter into after that date. . . . If Adhering Parties wish for their future agreements to be subject to the terms of the [Universal Protocol] or a Jurisdictional Module Protocol under the ISDA JMP, it is expected that they would incorporate the terms of the [relevant protocol] by reference into such agreements.” Letter to Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, from Katherine T. Darras, ISDA General Counsel, The International Swaps and Derivatives Association, Inc., at 8–9 (Aug. 5, 2016). This commenter noted that incorporation by reference was consistent with the proposal and asked that the text of the rule be clarified. *Id.* at 9. ISDA requested the FDIC to consider ISDA’s FRB comment letter in ISDA’s comment letter to the FDIC. See Letter to Robert E. Feldman, Executive Secretary, Federal Deposit Insurance Corporation, from Katherine T. Darras, ISDA General Counsel, The International Swaps and Derivatives Association, Inc., at 3 (Dec. 12, 2016).

<sup>178</sup> See 81 FR 74326, 74340 (Oct. 26, 2016).

<sup>179</sup> See final rule § 382.5(a).

<sup>180</sup> See 81 FR 74326.

“U.S. Jurisdictional Module to the ISDA Resolution Stay Jurisdictional Modular Protocol” (an “approved U.S. JMP”) that is generally the same but narrower in scope than the Universal Protocol.<sup>182</sup> Many non-GSIB commenters argued that they were not involved with the drafting of the Universal Protocol and that an approved U.S. JMP would create a level playing field between those that were involved in the drafting and those that were not. In general, commenters identified two aspects of the Universal Protocol that they argued should be narrowed in the approved U.S. JMP: The scope of the special resolution regimes and the universal adherence feature of the Universal Protocol. Commenters also asked that the FDIC coordinate with the FRB and the OCC regarding treatment of the JMP and to ensure that any determinations made concerning the JMP are consistent.

With respect to the scope of the special resolution regimes of the Universal Protocol, commenters’ concern focused on the special resolution regimes of “Protocol-eligible Regimes.” Some commenters also expressed concern with the scope of “Identified Regimes” of the Universal Protocol.

The Universal Protocol defines “Identified Regimes” as the special resolution regimes of France, Germany, Japan, Switzerland, and the United Kingdom as well as the U.S. Special Resolution Regimes. The Universal Protocol defines “Protocol-eligible Regimes” as resolution regimes of other jurisdictions specified in the protocol that satisfies the requirements of the Universal Protocol. The Universal Protocol provides a “Country Annex,” which is a mechanism by which individual adherents to the Universal Protocol may agree that a specific jurisdiction satisfies the requirements of a “Protocol-eligible Regime.” The Universal Protocol referred to in the proposal did not include any Country Annex for any Protocol-eligible Regime.<sup>183</sup>

<sup>182</sup> Commenters argued that approval of the approved U.S. JMP should not require satisfaction of the administrative requirements of proposed rule § 382.5(b)(3), since the FDIC has already conducted that analysis in deciding to provide a safe harbor for the Universal Protocol.

<sup>183</sup> The proposal defined the Universal Protocol as the “ISDA 2015 Universal Resolution Stay Protocol, including the Securities Financing Transaction Annex and Other Agreements Annex, published by the International Swaps and Derivatives Association, Inc., as of May 3, 2016, and minor or technical amendments thereto.” See proposed rule § 382.5(a). As of May 3, 2016, ISDA had not published any Country Annex for a Protocol-eligible Regime and such publication would not be a minor or technical amendment to the Universal Protocol. Consistent with the

Commenters requested the final rule include a safe harbor for an approved U.S. JMP that does not include Protocol-eligible Regimes. Commenters argued that many counterparties may not be able to adhere to the Universal Protocol because they would not be able to adhere to a Protocol-eligible Regime in the absence of law or regulation mandating such adherence, as it would force counterparties to give up default rights in jurisdictions where that is not yet legally required.<sup>184</sup> In support of their argument, commenters cited their fiduciary duties to act in the best interests of their clients or shareholders. Commenters also argued that an approved U.S. JMP should not include Identified Regimes and noted that the other Identified Regimes have already adopted measures to require contractual recognition of their special resolution regimes.<sup>185</sup>

With respect to the universal adherence feature of the Universal Protocol, commenters argued that universal adherence imposed significant monitoring burden since new adherents may join the Universal Protocol at any time. To address this concern, some commenters requested that an approved U.S. JMP allow a counterparty to adhere on a firm-by-firm or entity-by-entity basis. Other commenters suggested or supported approval of, an approved U.S. JMP in which a counterparty would adhere to all current covered FSIs under the final rule (to be identified on a “static list”) and would adhere to new covered FSIs on an entity-by-entity basis. This static list, commenters argued, would retain the “universal adherence mechanics” of the Universal Protocol and allow market participants to fulfill due diligence obligations related to compliance. Commenters also argued that universal adherence would

proposal, the final rule does not define the Universal Protocol to include any Country Annex. However, the final rule does not penalize adherence to any Country Annex. A covered QFC that is amended by the Universal Protocol—but not a Country Annex—will be deemed to conform to the requirements of the final rule. In addition, a covered QFC that is amended by the Universal Protocol—including one or more Country Annexes—is also deemed to conform to the requirements of the final rule. See final rule § 382.5(a)(2).

<sup>184</sup> The Protocol-eligible Regime requirements of the Universal Protocol do not include a requirement that a law or regulation, such as the final rule, require parties to contractually opt in to the regime.

<sup>185</sup> One commenter requested clarification that a QFC of a covered FSI with a non-U.S. credit support provider for the covered FSI complies with the requirements of the final rule to the extent the covered FSI has adhered to the relevant jurisdictional modular protocol for the jurisdiction of the non-U.S. credit support provider. The jurisdictional modular protocols for other countries do not satisfy the requirements of the final rule.

be overbroad because the Universal Protocol could amend QFCs to which a covered FSI, covered bank, or covered entity was not a party. Certain commenters argued that adhering with respect to any counterparty would also be inconsistent with their fiduciary duties.

In response to comments and to further facilitate compliance with the rule, the final rule provides that covered QFCs amended through adherence to the Universal Protocol or a new (and separate) protocol (the “U.S. Protocol”) would be deemed to conform to the covered QFCs to the requirements of the final rule.<sup>186</sup> The U.S. Protocol may differ (and is required to differ) from the Universal Protocol in certain respects, as discussed below, but otherwise must be substantively identical to the Universal Protocol.<sup>187</sup> Therefore, the reasons for deeming covered QFCs amended by the Universal Protocol to conform to the final rule, discussed above and in the proposal, apply to the U.S. Protocol.

Consistent with the proposal<sup>188</sup> and requests by commenters, the U.S. Protocol may limit the application of the provisions the Universal Protocol identifies as Section 1 and Section 2 to only covered FSIs, covered banks, and covered entities.<sup>189</sup> As requested by commenters, this limitation on the scope of the U.S. Protocol may ensure that the U.S. Protocol would only amend covered QFCs under this final rule or the substantially identical final rules expected to be issued by the OCC and already issued by the FRB and not also QFCs outside the scope of the agencies’ final rules (*i.e.*, QFCs between

<sup>186</sup> The final rule also provides that the FDIC may determine otherwise based on specific facts and circumstances. See final rule § 382.5(a).

<sup>187</sup> Commenters expressed support for having the U.S. Protocol apply to both existing and future QFCs. One commenter requested that an approved U.S. JMP should apply only to QFCs governed by non-U.S. law because the U.S. Special Resolution Regimes already apply to QFCs governed by U.S. law. As discussed above, the final rule does not exempt a QFC solely because the QFC explicitly states that it is governed by U.S. law. Moreover, such a limited application would reduce the desirable additional benefits of the Universal Protocol, discussed above.

<sup>188</sup> The proposal explained that a “jurisdictional module for the United States that is substantively identical to the [Universal] Protocol in all respects aside from exempting QFCs between adherents that are not covered entities, covered FSIs, or covered banks would be consistent with the current proposal.” 81 FR 74326, 74337, n. 91 (Oct. 26, 2016).

<sup>189</sup> The final rule does not require the U.S. Protocol to retain the same section numbering as the Universal Protocol. The final rule allows the U.S. protocol to have minor and technical differences from the Universal Protocol. See final rule § 382.5(a)(3)(ii)(F).



parties that are not covered FSIs, covered banks, or covered entities).

The final rule also provides that the U.S. Protocol is required to include the U.S. Special Resolution Regimes and the other Identified Regimes but is not required to include Protocol-eligible Regimes.<sup>190</sup> As noted above, the Universal Protocol, as defined in the proposal, did not include any Country Annex for a Protocol-eligible Regime; the only special resolution regimes specifically identified in the Universal Protocol, as defined in the proposal, were the U.S. Special Resolution Regimes and the other Identified Regimes. The inclusion of the Identified Regimes should help facilitate the resolution of a GSIB across a broader range of circumstances. Inclusion of the Identified Regimes in the U.S. Protocol also should support laws and regulations similar to the final rule and help encourage GSIB entities in the United States to adhere to a protocol that includes all Identified Regimes. However, the final rule does not require the U.S. Protocol to include Protocol-eligible Regimes, including definitions and adherence mechanisms related to Protocol-eligible Regimes.<sup>191</sup> Inclusion of only the Identified Regimes in the U.S. Protocol, considered in light of the other benefits to the resolution of GSIBs provided by the Universal Protocol and U.S. Protocol as well as commenters' concerns with potential adherence to Protocol-eligible Regimes, should sufficiently advance the objective of the final rule to increase the likelihood that a resolution of a GSIB could be carried out in an orderly manner under a range of scenarios.

The U.S. Protocol does not permit parties to adhere on a firm-by-firm or entity-by-entity basis because such adherence mechanisms requested by commenters would obviate one of the primary benefits of the Universal Protocol: Universal adherence. Similarly, the final rule does not permit adherence to a "static list" of all current covered FSIs, which other commenters requested.<sup>192</sup> Although the static list

would initially provide for universal adherence, the static list would not provide for universal adherence with respect to entities that became covered FSIs after the static list was finalized. To help ensure that the additional creditor protections of the Universal Protocol and U.S. Protocol continue to be justified, both protocols must ensure that the desirable features of the protocols, including universal adherence, continue to be present as GSIBs acquire subsidiaries with existing QFCs and existing organizations become designated as GSIBs.

The final rule also addresses provisions that allow an adherent to elect that Section 1 and/or Section 2 of the Universal Protocol do not apply to the adherent's contracts.<sup>193</sup> The Universal Protocol refers to these provisions as "opt-outs." The proposal explained that adherence to the Universal Protocol was an alternative method of compliance with the proposed rule and that covered QFCs that were not amended by the Universal Protocol must otherwise conform to the proposed rule. In other words, the proposal would have required that a covered QFC be conformed regardless of the method the covered FSI and counterparty choose to conform to the QFC.<sup>194</sup>

Consistent with the basic purposes of the proposed and final rules, the U.S. Protocol requires that opt-outs exercised by its adherents will only be effective to the extent that the affected covered QFCs otherwise conform to the requirements of the final rule. Therefore, the U.S. Protocol allows counterparties to exercise available opt-out rights in a manner that also allows covered FSIs to ensure that their covered QFCs continue to conform to the requirements of the rule.

The final rule also provides that, under the U.S. Protocol, the opt-out in Section 4(b)(i)(A) of the attachment to the Universal Protocol (Sunset Opt-out)<sup>195</sup> must not apply with respect to the U.S. Special Resolution Regimes, because the opt-out is no longer relevant with respect to the U.S. Special Resolution Regimes. This final rule, along with the substantially identical rules already issued by the FRB and

expected to be issued by the OCC, should prevent exercise of the Sunset Opt-out provision with respect to the U.S. Special Resolution Regimes under the Universal Protocol. Inapplicability of this opt-out with respect to U.S. Special Resolution Regimes in the U.S. Protocol should provide additional clarity to adherents that the U.S. Protocol will continue to provide for universal adherence after January 1, 2018.

The final rule also expressly addresses a provision in the Universal Protocol that concerns the client-facing leg of a cleared transaction. As discussed above, the final rule, like the proposal, does not include the exemption in Section 2 of the Universal Protocol regarding the client-facing leg of a cleared transaction. Therefore, the final rule provides that the U.S. Protocol must not exempt the client-facing leg of the transaction.<sup>196</sup>

#### *F. Process for Approval of Enhanced Creditor Protections (Section 382.5 of the Proposed Rule)*

As discussed above, the restrictions of the final rule would leave many creditor protections that are commonly included in QFCs unaffected. The final rule would also allow any covered FSI to submit to the FDIC a request to approve as compliant with the rule one or more QFCs that contain additional creditor protections—that is, creditor protections that would be impermissible under the restrictions set forth above.<sup>197</sup> A covered FSI making such a request would be required to provide an analysis of the contractual terms for which approval is requested in light of a range of factors that are set forth in the final rule and intended to facilitate the FDIC's consideration of whether permitting the contractual terms would be consistent with the proposed restrictions.<sup>198</sup> The FDIC also expects to consult with the FRB and OCC during its consideration of such a request—in particular, when the covered QFC is between a covered FSI and either a covered bank or a covered entity.

The first two factors concern the potential impact of the requested creditor protections on GSIB resilience and resolvability. The next four concern

<sup>190</sup> See final rule § 382.5(a)(3)(ii)(A). The U.S. Protocol is likewise not required to include definitions and adherence mechanisms related to Protocol-eligible Regimes. The final rule allows the U.S. Protocol to include minor and technical differences from the Universal Protocol and, similarly, differences necessary to conform the U.S. Protocol to the substantive differences allowed or required from the Universal Protocol. See final rule § 382.5(a)(3)(ii)(F).

<sup>191</sup> See final rule § 382.5(a)(3)(ii)(A).

<sup>192</sup> The final rule, however, does not prohibit the creation of a dynamic list identifying all current "Covered Parties," as would be defined in the U.S. Protocol, to facilitate due diligence and provide additional clarity to the market. See final rule

§ 382.5(a)(2)(ii)(F) (allowing minor and technical differences from the Universal Protocol).

<sup>193</sup> Section 4(b) of the Universal Protocol.

<sup>194</sup> Under the final rule, if an adherent to the Universal Protocol or U.S. Protocol exercises an available opt-out, covered FSIs with covered QFCs affected by the exercise would be required to otherwise conform the covered QFCs to the requirements of the final rule.

<sup>195</sup> See Section 4(b)(i)(A) of the Universal Protocol.

<sup>196</sup> Section 2 of the Universal Protocol provides an exemption for any client-facing leg of a cleared transaction. See Section 2(k) of the Universal Protocol and the definition of "Cleared Client Transaction." The final rule does not amend the proposal's treatment of QFCs that are "Cleared Client Transactions" under the Universal Protocol, but requires that the provisions of that section must not apply with respect to the U.S. Protocol. See final rule § 382.5(a)(3)(ii)(E).

<sup>197</sup> See final rule § 382.5(b).

<sup>198</sup> See final rule § 382.5(d)(1) through (10).

the scope of the final rule: Adoption on an industry-wide basis, coverage of existing and future transactions, coverage of one or multiple QFCs, and coverage of some or all covered entities, covered banks, and covered FSIs. Creditor protections that may be applied on an industry-wide basis may help to ensure that impediments to resolution are addressed on a uniform basis, which could increase market certainty, transparency, and equitable treatment. Creditor protections that apply broadly to a range of QFCs and covered entities, covered banks, and covered FSIs would increase the chances that all of a GSIB's QFC counterparties would be treated the same way during a resolution of that GSIB and may improve the prospects for an orderly resolution of that GSIB. By contrast, proposals that would expand counterparties' rights beyond those afforded under existing QFCs would conflict with the proposal's goal of reducing the risk of mass unwinds of GSIB QFCs. The final rule also includes three factors that focus on the creditor protections specific to supported parties. The FDIC may weigh the appropriateness of additional protections for supported QFCs against the potential impact of such provisions on the orderly resolution of a GSIB.

In addition to analyzing the request under the enumerated factors, a covered FSI requesting that the FDIC approve enhanced creditor protections would be required to submit a legal opinion stating that the requested terms would be valid and enforceable under the applicable law of the relevant jurisdictions, along with any additional relevant information requested by the FDIC.<sup>199</sup>

Under the final rule, the FDIC could approve a request for an alternative set of creditor protections if the terms of the QFC, as compared to a covered QFC containing only the limited creditor protections permitted by the final rule, would promote the safety and soundness of covered FSIs by mitigating the potential destabilizing effects of the resolution of a GSIB that is an affiliate of the covered FSI to at least the same extent.<sup>200</sup> Once approved by the FDIC, enhanced creditor protections could be used by other covered FSIs (in addition to the covered FSI that submitted the request for FDIC approval), as appropriate. The request-and-approval process would improve flexibility by allowing for an industry-proposed alternative to the set of creditor protections permitted by the final rule while ensuring that any approved

alternative would serve the final rule's policy goals to at least the same extent as a covered QFC that complies fully with the final rule.

Commenters requested that this approval process be made less burdensome and more flexible and urged for additional clarifications on the process for submitting and approving such requests (e.g., whether approvals would be published in the **Federal Register**). For example, commenters requested the final rule include a reasonable timeline (e.g., 180 days) by which the FDIC would approve or deny a request. Certain commenters urged that counterparties and trade groups, in addition to covered entities, covered FSIs, and covered banks, should be permitted to make such requests. One commenter noted that the proposal's approval process would have created a free-rider problem, where parties that submit enhanced creditor protection conditions for FDIC approval bear the full cost of learning which remedies are available for creditors while other parties will gain that information for free. Commenters contended that the provision requiring a "written legal opinion verifying the proposed provisions and amendments would be valid and enforceable under applicable law of the relevant jurisdictions" should be eliminated as unnecessary.<sup>201</sup> Additionally, commenters also urged that the provision should be broadened to allow approvals of provisions not directly related to enhanced creditor protections.

Finally, commenters also urged the FDIC, FRB, and OCC to either harmonize their standards for approving enhanced creditor protections or otherwise be consistent in approving enhanced creditor protection conditions. Imposing different outcomes would subject identical QFCs to different creditor protections, raise fairness issues, increase legal and operational complexity, and hence impede the goal of orderly resolution of a GSIB.

The FDIC has clarified that the FDIC could approve an alternative proposal of additional creditor protections as compliant with §§ 382.3 and 382.4 of the final rule, but has not otherwise modified these provisions of the proposal in response to changes requested by commenters. The

provisions contain flexibility and guidance on the process for submitting and approving enhanced creditor protections. The final rule directly places requirements only on covered FSIs and thus only covered FSIs are eligible to submit requests pursuant to these provisions. In response to commenters' concerns, the FDIC notes that the final rule does not prevent multiple covered FSIs from presenting one request and does not prevent covered FSIs from seeking the input of counterparties when developing a request. The final rule does not provide a maximum time to review proposals because proposals could vary greatly in complexity and novelty. The final rule also maintains the provision requiring a written legal opinion which helps ensure that proposed provisions are valid and enforceable under applicable law. The final rule does not expand the approval process beyond additional creditor protections; however, revisions to aspects of the final rule may be made through the rulemaking process. The FDIC intends to consult with the FRB and OCC with respect to any requests for approvals for additional creditor protections. Therefore, the FDIC does not expect that the agencies would arrive at different outcomes with respect to an identical application for approval for enhanced creditor protections based on the differences in standards for approval.

### III. Transition Periods

Under the proposal, the rule would have required compliance on the first day of the first calendar quarter beginning at least one year after issuance of the final rule, which the proposal referred to as the effective date.<sup>202</sup> A number of commenters urged the adoption of a phased-in approach to compliance that would extend the compliance deadline for covered QFCs with certain types of counterparties in order to allow time for necessary client outreach and education, especially for non-GSIB counterparties that may be unfamiliar with the Universal Protocol or the final rule's requirements. These commenters contended that the original compliance period of one year should be limited to counterparties that are banks, broker-dealers, swap dealers, security-based swap dealers, major swap participants, and major security-based

<sup>199</sup> One commenter also suggested permitting amendments to QFCs to be accomplished through a confirmation document for a new agreement or by email instead of a formal amendment of the QFC signed by the parties. The final rule does not prescribe a specific method for amending covered QFCs.

<sup>202</sup> See proposed rule § 382.2(b). Under section 302(b) of the Riegle Community Development and Regulatory Improvement Act of 1994, new FDIC regulations that impose requirements on insured depository institutions generally must "take effect on the first day of a calendar quarter which begins on or after the date on which the regulations are published in final form." 12 U.S.C. 4802(b).

<sup>199</sup> See final rule § 382.5(b)(3)(ii) and (iii).

<sup>200</sup> See final rule § 382.5(c).

swap participants. These commenters urged that the compliance period for QFCs with asset managers, commodity pools, private funds, and other entities that are predominantly engaged in activities that are financial in nature within the meaning of section 4(k) of the BHC Act should be extended for six months after the date of the original compliance period identified in the proposed rule. Finally, these commenters argued that the compliance period for QFCs with all other counterparties should be extended for 12 months after the date of the original compliance period identified in the proposed rule as these counterparties are likely to be least familiar with the requirements of the final rule.

One commenter suggested that the rule should take effect no sooner than one year from the date that an approved U.S. JMP is published and available for adherence, including any additional time it might take for the agencies to approve it. Certain commenters requested that the compliance deadline for covered QFCs entered into by an agent on behalf of a principal be extended by six months as well. Other commenters, however, cautioned against an approach that would impose different deadlines with respect to different classes of QFCs, as opposed to counterparty types, since the main challenge in connection with the remediation is the need for outreach to and education of counterparties. These commenters contended that once a counterparty has become familiar with the requirements of the rule and the terms of the required amendments, it would be more efficient to remediate all covered QFCs with the counterparty at the same time.

A number of commenters also requested that the FDIC confirm that entities newly acquired by a GSIB, and thereby become new covered FSIs have until the first day of the first calendar quarter immediately following one year after becoming covered FSIs to conform their existing QFCs. Commenters argued that this would allow the GSIB to conform existing QFCs in an orderly fashion without impairing the ability of covered FSIs to engage in corporate activities. These commenters also requested clarification that, during that conformance period, affiliates of covered FSIs would not be prohibited from entering into new transactions or QFCs with counterparties of the newly acquired entity if the existing covered FSIs otherwise comply with the rule's requirements. Some commenters urged the FDIC to exclude existing contracts from the final rule's requirements and only apply the rule on a prospective

basis. Additionally, commenters asked for harmonized compliance dates across the different agencies' rules.

The effective date for the final rule is January 1, 2018, more than 60 days following publication in the **Federal Register**. However, in order to reduce the compliance burden of the final rule, the FDIC has adopted a phased-in compliance schedule as requested by commenters. The final rule provides that a covered FSI must conform a covered QFC to the requirements of this final rule by the first day of the calendar quarter immediately following one year from the effective date of this subpart with respect to covered QFCs with other covered FSIs, covered entities, and covered banks (referred to in this discussion as the "first compliance date").<sup>203</sup> This provision allows the counterparties that should be the most familiar with the requirements of the final rule over one year to comply with the rule's requirements. Moreover, this is a relatively small number of counterparties that would need to modify their QFCs in the first year following the effective date of the final rule and many covered FSIs, covered entities, and covered banks with covered QFCs have already adhered to the Universal Protocol.

The final rule provides additional time for compliance with the requirements for other types of counterparties. In particular, for other types of financial counterparties<sup>204</sup> (other than small financial institutions)<sup>205</sup> the final rule provides 18 months from the effective date of the final rule for compliance with its requirements as requested by commenters.<sup>206</sup> For smaller banks and other non-financial counterparties, the final rule provides approximately two years from the effective date of the final rule for compliance with its requirements, as requested by

<sup>203</sup> See final rule § 382.2(f)(1)(i). The definition of covered QFC of the final rule has been revised to make clear that, consistent with the proposal, a covered QFC is a QFC that the covered FSI becomes a party to on or after the first day of the calendar quarter immediately following one year from the effective date of this part. See final rule § 382.2(c). As discussed above, a covered FSI's in-scope QFC that is entered into before this date may also be a covered QFC if the covered FSI or any affiliate that is a covered entity, covered FSI, or covered bank also becomes a party to a QFC with the same counterparty or a consolidated affiliate of the same counterparty on or after the first compliance date. See *id.*

<sup>204</sup> See final rule § 382.1 (defining "financial counterparty").

<sup>205</sup> The final rule defines small financial institution as an insured bank, insured savings association, farm credit system institution, or credit union with assets of \$10,000,000,000 or less. See final rule § 382.1.

<sup>206</sup> See final rule § 382.2(f)(1)(ii).

commenters.<sup>207</sup> Adopting a phased-in compliance approach based on the type (and, in some cases, size) of the counterparty will allow market participants time to adjust to the new requirements and make required changes to QFCs in an orderly manner. It will also give time for development of the U.S. Protocol or any other protocol that would meet the requirements of the final rule.

The FDIC is giving this additional time for compliance to respond to concerns raised by commenters. The FDIC encourages covered FSIs to start planning and outreach efforts early in order to come into compliance with the rule on the time frames provided. The FDIC believes that this additional time for compliance should also address concerns raised by commenters regarding the burden of conforming existing contracts by allowing firms additional time to conform all covered QFCs to the requirements of the final rule.

Although the phased-in compliance period does not contain special rules related to acting as an agent as requested by certain commenters, the rule has been modified as described above to clarify that a covered FSI does not become a party to a QFC solely by acting as agent with respect to the QFC.<sup>208</sup>

Entities that are covered FSIs when the final rule is effective would be required to comply with the requirements of the final rule beginning on the first compliance date, but would be given more time to conform such covered QFCs with entities that are not covered FSIs, covered entities, or covered banks.<sup>209</sup> Thus, a covered FSI would be required to ensure that covered QFCs entered into on or after the effective date comply with the rule's requirements.<sup>210</sup> Moreover, a covered FSI would be required to bring an in-scope QFC entered into prior to the first compliance date into compliance with the rule no later than the applicable date of the tiered compliance dates (discussed above) if the covered FSI or an affiliate (that is also a covered entity, covered bank, or covered FSI) enters into a new covered QFC with the counterparty to the pre-existing covered QFC or a consolidated affiliate of the counterparty on or after the first compliance date.<sup>211</sup> (Thus, a covered FSI would not be required to conform a pre-existing QFC if that covered FSI and its covered FSI, covered entity or

<sup>207</sup> See final rule § 382.2(f)(1)(iii).

<sup>208</sup> See final rule § 382.2(e)(1).

<sup>209</sup> See final rule § 382.2(c)(1) and (f)(1).

<sup>210</sup> See *id.*

<sup>211</sup> See final rule § 382.2(c)(1).

covered bank affiliates do not enter into any new QFCs with the same counterparty or its consolidated affiliates on or after the compliance date.)

In addition, an entity that becomes a covered FSI after the effective date of the final rule (a “new covered FSI” for purposes of this preamble) generally has the same period of time to comply as an entity that is a covered FSI on the effective date (*i.e.*, compliance will phase in over a two-year period based on the type of counterparty).<sup>212</sup> The final rule also clarifies that a covered QFC, with respect to a new covered FSI, means an in-scope QFC that the new covered FSI becomes a party to (1) on the date the covered FSI first becomes a covered FSI, and (2) before that date, if the covered FSI or one of its affiliates that is a covered FSI, covered entity, or covered bank also enters, executes, or otherwise becomes a party to a QFC with the same counterparty or a consolidated affiliate of the counterparty after that date.<sup>213</sup> Under the final rule, a company that is a covered FSI on the effective date of the final rule (an “existing covered FSI” for purposes of this preamble) and becomes an affiliate of a new covered FSI, covered bank, or covered entity generally must conform any existing but non-conformed in-scope QFC that the existing covered FSI continues to have with a counterparty after the applicable initial compliance date by the date the new covered FSI enters a QFC with the same counterparty or any of its consolidated affiliates. Acquisitions of new entities are planned in advance and should include preparing to comply with applicable laws and regulations.

Certain commenters opposed application of the requirements of the rule to existing QFCs, requesting instead that the final rule only apply to QFCs entered into after the effective date of any final rule and that all pre-existing QFCs not be subject to the rule’s requirements. Commenters suggested that end users of QFCs with GSIB affiliates might not have entered into existing contracts without the default rights prohibited in the proposed rule and that revising existing QFCs would be time-consuming and expensive. Commenters asserted that this treatment would be consistent with the final rules in the United Kingdom and the statutory requirements adopted by Germany.

The FDIC does not believe it is appropriate to exclude all pre-existing QFCs because of the current and future risk that existing covered QFCs pose to

the orderly resolution of a covered FSI. Moreover, application of different default rights to existing and future transactions within a netting set could cause the netting set to be broken, which commenters noted could increase burden to both parties to the netting set.<sup>214</sup> Therefore, the final rule requires an existing QFC between a covered FSI and a counterparty to be conformed to the requirements of the final rule if the covered FSI (or an affiliate that is a covered FSI, covered entity, or covered bank) enters into another QFC with the counterparty or its consolidated affiliate on or after the first day of the calendar quarter immediately following one year from the effective date of the final rule.<sup>215</sup>

By permitting a covered FSI to remain a party to noncompliant QFCs entered before the effective date unless the covered FSI or any affiliate (that is also a covered entity, covered bank, or covered FSI) enters into new QFCs with the same counterparty or its consolidated affiliates, the final rule strikes a balance between ensuring QFC continuity if the GSIB were to fail and ensuring that covered FSIs and their existing counterparties can manage any compliance costs and disruptions associated with conforming existing QFCs by refraining from entering into new QFCs. The requirement that a covered FSI ensure that all existing QFCs with a particular counterparty and its consolidated affiliates are compliant before it or any affiliate of the covered FSI (that is also a covered entity, covered bank, or covered FSI) enters into a new QFC with the same counterparty or its consolidated affiliates after the effective date will provide covered FSIs with an incentive to seek the modifications necessary to ensure that their QFCs with their most important counterparties are compliant. Moreover, the volume of noncompliant covered QFCs outstanding can be expected to decrease over time and eventually to reach zero. In light of these considerations, and to avoid creating potentially inappropriate compliance costs with respect to existing QFCs with counterparties that, together with their consolidated affiliates, do not enter into new covered QFCs with the GSIB on or after the first day of the calendar quarter that is one year from the effective date of the final

rule, it would be appropriate to permit a limited number of noncompliant QFCs to remain outstanding, in keeping with the terms described above. Moreover, the final rule also excludes existing warrants and retail investment advisory agreements to address concerns raised by commenters and mitigate burden.<sup>216</sup> The FDIC will monitor covered FSIs’ levels of noncompliant QFCs and evaluate the risk, if any, that they pose to the safety and soundness of the covered FSIs.

#### IV. Expected Effects

The final rule is intended to promote the financial stability of the United States by reducing the potential that resolution of a GSIB, particularly through bankruptcy, will be disorderly. The final rule will help meet this policy objective by more effectively and efficiently managing the exercise of cross default rights and transfer restrictions contained in QFCs. It will therefore help mitigate the risk of future financial crises and imposition of substantial costs on the U.S. economy.<sup>217</sup> The final rule furthers the FDIC’s mission and responsibilities, which include resolving failed institutions in the least costly manner and ensuring that FDIC-insured institutions operate safely and soundly. It also furthers the fulfillment of the FDIC’s role as the (i) the primary Federal supervisor for State non-member banks and State savings associations; (ii) the insurer of deposits and manager of the DIF; and (iii) the resolution authority for all FDIC-insured institutions under the FDI Act and, if appointed by the Secretary of the Treasury in accordance with the requirements of Title II of the Dodd-Frank Act, for large complex financial institutions.

The final rule only applies to FDIC-supervised institutions that are subsidiaries or affiliates of a GSIB. Of the 3,717 institutions that the FDIC supervises,<sup>218</sup> eleven are subsidiaries or affiliates of GSIBs.<sup>219</sup> Out of those eleven institutions, eight had QFC contracts at some point over the past five years. Those eight institutions had an average of \$39 billion worth of QFC contracts, as measured by notional value, over the same time period

<sup>216</sup> See final rule § 382.7(c).

<sup>217</sup> A recent estimate of the unrealized economic output that resulted from 2007–09 financial crisis in the United States amounted to between \$6 and \$14 trillion. See “How Bad Was It? The Costs and Consequences of the 2007–09 Financial Crisis,” Staff Paper No. 20, Federal Reserve Bank of Dallas, July 2013, available at <https://dallasfed.org/assets/documents/research/staff/staff1301.pdf>.

<sup>218</sup> Call Report data, June 2017.

<sup>219</sup> FFIEC National Information Center.

<sup>212</sup> See final rule § 382.2(f)(2).

<sup>213</sup> See final rule § 382.2(c)(2).

<sup>214</sup> The requirements of the final rule, particularly those of § 382.4, may have a different impact on netting, including close-out netting, than the UK and German requirements cited by commenters.

<sup>215</sup> Subject to any compliance date applicable to the covered FSI, the FDIC expects a covered FSI to conform existing QFCs that become covered QFCs within a reasonable period.

compared to an average of over \$200 trillion in notional value for all FDIC-insured GSIB affiliates.<sup>220</sup> Therefore, the final rule applies only to a small number of institutions and to a small portion of total QFC activity.

#### Benefits

The final rule will likely benefit the counterparties of covered FSIs by preventing the disorderly failure of the GSIB subsidiary and enabling it to continue to meet its obligations. The mass exercise of default rights against an otherwise healthy covered FSI resulting from the failure of an affiliate may cause it to weaken or fail. Therefore, preventing the mass exercise of QFC default rights at the time the parent or other affiliate enters resolution proceedings makes it more likely that the subsidiaries will be able to meet their obligations to QFC counterparties. Moreover, the creditor protections permitted under the rule will allow any counterparty that does not continue to receive payment under the QFC to exercise its default rights, after any applicable stay period.

Because financial crises impose enormous costs on the economy, even small reductions in the probability or severity of future financial crises create substantial economic benefits.<sup>221</sup> QFCs play a large role in the financial markets and are a major source of financial interconnectedness. Therefore, they can pose a threat to financial stability in times of market stress. The final rule will materially reduce risk to the financial stability of the United States that could arise from the failure of a GSIB by enhancing the prospects for the orderly resolution of such a firm, and would thereby reduce the probability and severity of financial crises in the future.

The final rule will also likely benefit the DIF. Mass exercise of QFC default rights by the counterparties at the time the parent or other affiliate of an FDIC-insured institution enters resolution could lead to severe losses for, or possibly the failure of, FDIC-insured subsidiaries of failed GSIBs. Those losses and/or failures could result in considerable losses to the DIF.

#### Costs

The costs of the final rule are likely to be relatively small and only affect eleven covered FSIs. Only eight of the eleven affected institutions had QFC contracts over the past 5 years. The QFC

activity of those eight firms represented less than .02 percent of QFC activity among all FDIC-insured GSIB subsidiaries.<sup>222</sup> Covered FSIs and their counterparties may incur administrative costs associated with drafting and negotiating compliant QFCs. However, the rule only limits the execution of default rights for a brief time period in the event that a GSIB or GSIB affiliate enters a resolution process. Further, the rule only affects QFC contracts that contain default rights or transfer restrictions, so not all QFC activity will be affected by the rule. Affected institutions also have the option of adhering to the Universal Protocol or the U.S. Protocol as an alternative to amending QFC contracts, and they have a phase-in compliance period of up to two years to become fully compliant with the rule. The flexibility that the final rule allows for affected institutions and their counterparties further reduces the expected costs associated with this rule. Therefore, costs associated with drafting compliant QFCs are likely to be low.

In addition, the FDIC anticipates that covered FSIs would likely share resources with their parent GSIB and/or GSIB affiliates—which are subject to parallel requirements—to help cover compliance costs. The stay-and-transfer provisions of the Dodd-Frank Act and the FDI Act are already in force, and the Universal Protocol is already partially effective for the 25 existing GSIB adherents. The partial effectiveness of the Universal Protocol (regarding Section 1, which addresses recognition of stays on the exercise of default rights and remedies in financial contracts under special resolution regimes, including in the United States, the United Kingdom, Germany, France, Switzerland and Japan) suggests that to the extent covered FSIs already adhere to the Universal Protocol, some implementation costs will likely be reduced.

The final rule could potentially impose costs on covered FSIs to the extent that they may need to provide their QFC counterparties with better contractual terms in order to compensate those parties for the loss of their ability to exercise default rights. These costs may be higher than drafting and negotiating costs. However, they are also expected to be relatively small because of the limited reduction in the rights of counterparties and the availability of other forms of credit protection for counterparties.

The final rule could also create economic costs by causing a marginal

reduction in QFC-related economic activity. For example, a covered FSI may not enter into a QFC that it would have otherwise entered into in the absence of the rule. Therefore, economic activity that would have been associated with that QFC absent the rule (such as economic activity that would have otherwise been hedged with a derivatives contract or funded through a repo transaction) might not occur. The FDIC does not expect any significant reduction in QFC activity to result from this rule because the restrictions on default rights in covered QFCs that the rule requires are relatively narrow and would not change a counterparty's rights in response to its direct counterparty's entry into a bankruptcy proceeding (that is, the default rights covered by the Bankruptcy Code's "safe harbor" provisions). Counterparties are also able to prudently manage risk through other means, including entering into QFCs with entities that are not GSIB entities and therefore would not be subject to the final rule.

#### V. Revisions to Certain Definitions in the FDIC's Capital and Liquidity Rules

This final rule also amends several definitions in the FDIC's capital and liquidity rules to help ensure that the final rule does not have unintended effects for the treatment of covered FSIs' netting agreements under those rules, consistent with the amendments contained in the FRB FR and the OCC FR.<sup>223</sup>

The FDIC's regulatory capital rules permit a banking organization to measure exposure from certain types of financial contracts on a net basis and recognize the risk-mitigating effect of financial collateral for other types of exposures, provided that the contracts are subject to a "qualifying master netting agreement" or agreement that provides for certain rights upon the default of a counterparty.<sup>224</sup> The FDIC

<sup>223</sup> On September 20, 2016, the FDIC adopted a separate final rule (the Final QMNA Rule), following the earlier notice of proposed rulemaking issued in January 2015, *see* 80 FR 5063 (Jan. 30, 2015), covering amendments to the definition of "qualifying master netting agreement" in the FDIC's capital and liquidity rules and related definitions in its capital rules. The Final QMNA Rule is designed to prevent similar unintended effects from implementation of special resolution regimes in non-U.S. jurisdictions, or by parties' adherence to the ISDA Protocol. The amendments contained in the Final QMNA Rule also are similar to revisions that the FRB and the OCC made in their joint 2014 interim final rule to ensure that the regulatory capital and liquidity rules' treatment of certain financial contracts is not affected by the implementation of special resolution regimes in foreign jurisdictions. *See* 79 FR 78287 (Dec. 30, 2014).

<sup>224</sup> *See* 12 CFR 324.34(a)(2).

<sup>220</sup> Call Report data, June 2012–June 2017.

<sup>221</sup> "How Bad Was It? The Costs and Consequences of the 2007–09 Financial Crisis," Staff Paper No. 20, Federal Reserve Bank of Dallas, July 2013.

<sup>222</sup> *See* Call Report data, June 2012–June 2017.

has defined “qualifying master netting agreement” to mean a netting agreement that permits a banking organization to terminate, apply close-out netting, and promptly liquidate or set-off collateral upon an event of default of the counterparty, thereby reducing its counterparty exposure and market risks.<sup>225</sup> On the whole, measuring the amount of exposure of these contracts on a net basis, rather than on a gross basis, results in a lower measure of exposure and thus a lower capital requirement.

The current definition of “qualifying master netting agreement” recognizes that default rights may be stayed if the financial company is in resolution under the Dodd-Frank Act, the FDI Act, a substantially similar law applicable to government-sponsored enterprises, or a substantially similar foreign law, or where the agreement is subject by its terms to any of those laws. Accordingly, transactions conducted under netting agreements where default rights may be stayed in those circumstances may qualify for the favorable capital treatment described above. However, the current definition of “qualifying master netting agreement” does not recognize the restrictions that the final rule would impose on the QFCs of covered FSIs. Thus, a master netting agreement that is compliant with this final rule would not qualify as a qualifying master netting agreement. This would result in considerably higher capital and liquidity requirements for QFC counterparties of covered FSIs, which is not an intended effect of this final rule.

Accordingly, the final rule would amend the definition of “qualifying master netting agreement” so that a master netting agreement could qualify for such treatment where the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty is limited to the extent necessary to comply with the requirements of this final rule. This revision maintains the existing treatment for these contracts under the FDIC’s capital and liquidity rules by accounting for the restrictions that the final rule, or the substantively identical rules of issued by the FRB and expected from the OCC, would place on default rights related to covered FSIs’ QFCs. The FDIC does not believe that the disqualification of master netting agreements that would result in the

absence of this amendment would accurately reflect the risk posed by the affected QFCs. As discussed above, the implementation of consistent restrictions on default rights in GSIB QFCs would increase the prospects for the orderly resolution of a failed GSIB and thereby protect the financial stability of the United States.

The final rule would similarly revise certain other definitions in the regulatory capital rules to make analogous conforming changes designed to account for this final rule’s restrictions and ensure that a banking organization may continue to recognize the risk-mitigating effects of financial collateral received in a secured lending transaction, repo-style transaction, or eligible margin loan for purposes of the FDIC’s capital rules. Specifically, the final rule would revise the definitions of “collateral agreement,” “eligible margin loan,” and “repo-style transaction” to provide that a counterparty’s default rights may be limited as required by this final rule without unintended adverse impacts under the FDIC’s capital rules.

The interagency rule establishing margin and capital requirements for covered swap entities (swap margin rule) defines the term “eligible master netting agreement” in a manner similar to the definition of “qualifying master netting agreement.”<sup>226</sup> Thus, it may also be appropriate to amend the definition of “eligible master netting agreement” to account for the restrictions on covered FSIs’ QFCs. Because the FDIC issued the swap margin rule jointly with other U.S. regulatory agencies, however, the FDIC is consulting with the other agencies before proposing amendments to that rule’s definition of “eligible master netting agreement.”

Certain commenters requested technical modifications to the proposed modifications to the definitions to better distinguish the requirements of § 382.4 and the provisions of Section 2 of the Universal Protocol from provisions regarding “opt in” to special resolution regimes. In response to this comment, the final rule establishes an independent exception addressing the requirements of § 382.4 and the provisions of Section 2 of the Universal Protocol and makes other minor clarifying edits.

One commenter requested that the definitions of the terms “collateral agreement,” “eligible margin loan,” “qualifying master netting agreement,” and “repo-style transaction” include

references to stays in State resolution regimes (such as insurance receiverships). The commenters did not identify, and the FDIC is not aware of, any State resolution regime that currently includes QFC stays similar to those of the U.S. Special Resolution Regimes. Neither the nature of the potential laws nor the extent of their effect on the regulatory capital requirements of FDIC-regulated institutions is known. Therefore, the final rule does not reference State resolution regimes.

One commenter argued that neither the current nor the proposed definition of qualifying master netting agreement comports with section 302(a) of the Business Risk Mitigation and Price Stabilization Act of 2015, which exempts certain types of counterparties from initial and variation margin requirements, and that the proposed amendments to the definition add unnecessary complexity to the existing rules and therefore make compliance more difficult. Section 302(a) of that act is not relevant to the definition of qualifying master netting agreement because the definition does not require initial or variation margin. Rather, the definition of qualifying master netting agreement requires that margin provided under the agreement, if any, be able to be promptly liquidated or set off under the circumstances specified in the definition. The FDIC continues to believe that the amendments are necessary and do not substantially add to the complexity of the FDIC’s rules.

*Effective date for the definition of “covered bank”:* The FDIC is delaying the effective date of the definition of “covered bank” until the OCC adopts 12 CFR part 47.

## VI. Regulatory Analysis

### A. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 through 3521 (PRA), the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid OMB control number. Section 382.5 of the proposed rule contains “collection of information” requirements within the meaning of the PRA. OMB has assigned the following control numbers to this information collection: 3064–AE46.

This information collection consists of amendments to covered QFCs and, in some cases, approval requests prepared and submitted to the FDIC regarding modifications to enhanced creditor protection provisions (in lieu of adherence to the ISDA Protocol).

<sup>225</sup> See the definition of “qualifying master netting agreement” in 12 CFR 324.2 (capital rules) and 329.3 (liquidity rules).

<sup>226</sup> 80 FR 74840, 74861–74862 (November 30, 2015). The FDIC’s definition of “eligible master netting agreement” for purposes of the swap margin rule is codified at 12 CFR 349.2.

Section 382.5(b) of the final rule would require a covered FSI to request the FDIC to approve as compliant with the requirements of §§ 382.3 and 382.4, provisions of one or more forms of covered QFCs or proposed amendments to one or more forms of covered QFCs, with enhanced creditor protection conditions. A covered FSI making a request must provide (1) an analysis of the proposal under each consideration of § 382.5(d); (2) a written legal opinion

verifying that proposed provisions or amendments would be valid and enforceable under applicable law of the relevant jurisdictions, including, in the case of proposed amendments, the validity and enforceability of the proposal to amend the covered QFCs; and (3) any additional relevant information that the FDIC requests.

Covered FSIs would also have recordkeeping associated with proposed amendments to their covered QFCs.

However, much of the recordkeeping associated with amending the covered QFCs is already expected from a covered FSI. Therefore, the FDIC would expect minimal additional burden to accompany the initial efforts to bring all covered QFCs into compliance. The existing burden estimates for the information collection associated with § 382.5 are as follows:

Title	Times/year	Respondents	Hours per response	Total burden hours
Paperwork for proposed revisions .....	On occasion .....	6	40	240
Total Burden .....	.....	.....	.....	240

The FDIC received no comments on the PRA section of the proposal or the burden estimates. However, the FDIC has an ongoing interest in public comments on its burden estimates. Any such comments should be sent to the Paperwork Reduction Act Officer, FDIC Legal Division, 550 17th Street NW., Washington, DC 20503. Written comments should address the accuracy of the burden estimates and ways to minimize burden, as well as other relevant aspects of the information collection request.

**B. Regulatory Flexibility Act**

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, requires that each Federal agency either certify that a proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities or prepare and make available for public comment an initial regulatory flexibility analysis of the proposal.<sup>227</sup> For the reasons provided below, the FDIC hereby certifies pursuant to 5 U.S.C. 605(b) that the final rule will not have a significant economic impact on a substantial number of small entities.

The final rule would only apply to FSIs that form part of GSIB organizations, which include the largest, most systemically important banking organizations and certain of their subsidiaries. More specifically, the proposed rule would apply to any covered FSI that is a subsidiary of a U.S. GSIB or foreign GSIB—regardless of size—because an exemption for small entities would significantly impair the effectiveness of the proposed stay-and-transfer provisions and thereby undermine a key objective of the

proposal: To reduce the execution risk of an orderly GSIB resolution.

The FDIC estimates that the final rule would apply to approximately eleven FSIs. As of June 30, 2017, only eight of the eleven covered FSIs have derivatives portfolios that could be affected. None of these eight banking organizations would qualify as a small entity for the purposes of the RFA.<sup>228</sup> In addition, the FDIC anticipates that any small subsidiary of a GSIB that could be affected by the final rule would not bear significant additional costs as it is likely to rely on its parent GSIB, or a large affiliate, that will be subject to similar reporting, recordkeeping, and compliance requirements.<sup>229</sup> The final rule complements the FRB FR and the expected OCC FR. It is not designed to duplicate, overlap with, or conflict with any other Federal regulation.

This regulatory flexibility analysis demonstrates that the proposed rule would not, if promulgated, have a significant economic impact on a substantial number of small entities, and the FDIC so certifies.<sup>230</sup>

**C. Riegle Community Development and Regulatory Improvement Act of 1994**

The Riegle Community Development and Regulatory Improvement Act of 1994 (RCDRIA), 12 U.S.C. 4701, requires that the FDIC, in determining the effective date and administrative compliance requirements for new regulations that impose additional reporting, disclosure, or other requirements on insured depository institutions, consider, consistent with

principles of safety and soundness and the public interest, any administrative burdens that such regulations would place on depository institutions, including small depository institutions, and customers of depository institutions, as well as the benefits of such regulations. In addition, subject to certain exceptions, new regulations that impose additional reporting, disclosures, or other new requirements on insured depository institutions must take effect on the first day of a calendar quarter that begins on or after the date on which the regulations are published in final form. In accordance with these provisions and as discussed above, the FDIC considered any administrative burdens, as well as benefits, that the final rule would place on depository institutions and their customers in determining the effective date and administrative compliance requirements of the final rule. The final rule will be effective no earlier than the first day of a calendar quarter that begins on or after the date on which the final rule is published.

**D. Solicitation of Comments on the Use of Plain Language**

Section 722 of the Gramm-Leach-Bliley Act, 12 U.S.C. 4809, requires the FDIC to use plain language in all proposed and final rules published after January 1, 2000. The FDIC has presented the final rule in a simple and straightforward manner.

**E. Small Business Regulatory Enforcement Fairness Act**

The Office of Management and Budget has determined that this final rule is a “major rule” within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801, *et seq.*) (“SBREFA”). As required by the

<sup>228</sup> Under regulations issued by the Small Business Administration, small entities include banking organizations with total assets of \$550 million or less.

<sup>229</sup> See FRB FR, 82 FR 42882 (Sept. 12, 2017) and OCC NPRM, 81 FR 55381 (August 19, 2016).

<sup>230</sup> 5 U.S.C. 605.

<sup>227</sup> See 5 U.S.C. 603, 605.

SBREFA, the FDIC will file the appropriate reports with Congress and the Government Accountability Office so that the Final Rule may be reviewed.

#### List of Subjects

##### 12 CFR Part 324

Administrative practice and procedure, Banks, Banking, Capital adequacy, Reporting and recordkeeping requirements, Securities, State savings associations, State non-member banks.

##### 12 CFR Part 329

Administrative practice and procedure, Banks, Banking, Federal Deposit Insurance Corporation, FDIC, Liquidity, Reporting and recordkeeping requirements.

##### 12 CFR Part 382

Administrative practice and procedure, Banks, Banking, Federal Deposit Insurance Corporation, FDIC, Qualified financial contracts, Reporting and recordkeeping requirements, State savings associations, State non-member banks.

For the reasons stated in the supplementary information, the Federal Deposit Insurance Corporation amends 12 CFR chapter III as follows:

#### PART 324—CAPITAL ADEQUACY OF FDIC-SUPERVISED INSTITUTIONS

■ 1. The authority citation for part 324 continues to read as follows:

**Authority:** 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; 5371; 5412; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, as amended by Pub. L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub. L. 102–242, 105 Stat. 2236, 2386, as amended by Pub. L. 102–550, 106 Stat. 3672, 4089 (12 U.S.C. 1828 note); Pub. L. 111–203, 124 Stat. 1376, 1887 (15 U.S.C. 78o–7 note).

■ 2. Section 324.2 is amended by revising the definitions of “Collateral agreement,” “Eligible margin loan,” “Qualifying master netting agreement,” and “Repo-style transaction” to read as follows:

#### § 324.2 Definitions.

\* \* \* \* \*

*Collateral agreement* means a legal contract that specifies the time when, and circumstances under which, a counterparty is required to pledge collateral to an FDIC-supervised institution for a single financial contract or for all financial contracts in a netting set and confers upon the FDIC-supervised institution a perfected, first-

priority security interest (notwithstanding the prior security interest of any custodial agent), or the legal equivalent thereof, in the collateral posted by the counterparty under the agreement. This security interest must provide the FDIC-supervised institution with a right to close-out the financial positions and liquidate the collateral upon an event of default of, or failure to perform by, the counterparty under the collateral agreement. A contract would not satisfy this requirement if the FDIC-supervised institution’s exercise of rights under the agreement may be stayed or avoided.

(1) Under applicable law in the relevant jurisdictions, other than:

(i) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar<sup>4</sup> to the U.S. laws referenced in this paragraph (1)(i) in order to facilitate the orderly resolution of the defaulting counterparty;

(ii) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (1)(i) of this definition; or

(2) Other than to the extent necessary for the counterparty to comply with the requirements of part 382 of this title, subpart I of part 252 of this title or part 47 of this title, as applicable.

\* \* \* \* \*  
*Eligible margin loan* means:

(1) An extension of credit where:

(i) The extension of credit is collateralized exclusively by liquid and readily marketable debt or equity securities, or gold;

(ii) The collateral is marked to fair value daily, and the transaction is subject to daily margin maintenance requirements; and

(iii) The extension of credit is conducted under an agreement that provides the FDIC-supervised institution the right to accelerate and terminate the extension of credit and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, insolvency, liquidation, conservatorship, or similar proceeding, of the counterparty, provided that, in any such case,

(A) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than

<sup>4</sup> The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

(1) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs,<sup>5</sup> or laws of foreign jurisdictions that are substantially similar<sup>6</sup> to the U.S. laws referenced in this paragraph (1)(iii)(A)(1) in order to facilitate the orderly resolution of the defaulting counterparty; or

(2) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (1)(iii)(A)(1) of this definition; and

(B) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 382 of this title, subpart I of part 252 of this title or part 47 of this title, as applicable.

(2) In order to recognize an exposure as an eligible margin loan for purposes of this subpart, an FDIC-supervised institution must comply with the requirements of § 324.3(b) with respect to that exposure.

\* \* \* \* \*

*Qualifying master netting agreement* means a written, legally enforceable agreement provided that:

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default following any stay permitted by paragraph (2) of this definition, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty;

(2) The agreement provides the FDIC-supervised institution the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case,

<sup>5</sup> This requirement is met where all transactions under the agreement are (i) executed under U.S. law and (ii) constitute “securities contracts” under section 555 of the Bankruptcy Code (11 U.S.C. 555), qualified financial contracts under section 11(e)(8) of the Federal Deposit Insurance Act, or netting contracts between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act or the Federal Reserve Board’s Regulation EE (12 CFR part 231).

<sup>6</sup> The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.



(i) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar<sup>7</sup> to the U.S. laws referenced in this paragraph (2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty; or

(B) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i)(A) of this definition; and

(ii) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 382 of this title, subpart I of part 252 of this title or part 47 of this title, as applicable;

(3) The agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it otherwise would make under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the agreement); and

(4) In order to recognize an agreement as a qualifying master netting agreement for purposes of this subpart, an FDIC-supervised institution must comply with the requirements of § 324.3(d) with respect to that agreement.

\* \* \* \* \*

*Repo-style transaction* means a repurchase or reverse repurchase transaction, or a securities borrowing or securities lending transaction, including a transaction in which the FDIC-supervised institution acts as agent for a customer and indemnifies the customer against loss, provided that:

(1) The transaction is based solely on liquid and readily marketable securities, cash, or gold;

(2) The transaction is marked-to-fair value daily and subject to daily margin maintenance requirements;

(3)(i) The transaction is a “securities contract” or “repurchase agreement” under section 555 or 559, respectively, of the Bankruptcy Code (11 U.S.C. 555

or 559), a qualified financial contract under section 11(e)(8) of the Federal Deposit Insurance Act, or a netting contract between or among financial institutions under sections 401–407 of the Federal Deposit Insurance Corporation Improvement Act or the Federal Reserve’s Regulation EE (12 CFR part 231); or

(ii) If the transaction does not meet the criteria set forth in paragraph (3)(i) of this definition, then either:

(A) The transaction is executed under an agreement that provides the FDIC-supervised institution the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case,

(1) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than

(i) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar<sup>8</sup> to the U.S. laws referenced in this paragraph (3)(ii)(A)(1)(i) in order to facilitate the orderly resolution of the defaulting counterparty;

(ii) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (3)(ii)(A)(1)(i) of this definition; and

(2) The agreement may limit the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 382 of this title, subpart I of part 252 of this title or part 47 of this title, as applicable; or

(B) The transaction is:

(1) Either overnight or unconditionally cancelable at any time by the FDIC-supervised institution; and

(2) Executed under an agreement that provides the FDIC-supervised institution the right to accelerate, terminate, and close-out the transaction on a net basis and to liquidate or set off collateral promptly upon an event of counterparty default; and

(4) In order to recognize an exposure as a repo-style transaction for purposes of this subpart, an FDIC-supervised institution must comply with the requirements of § 324.3(e) of this part with respect to that exposure.

\* \* \* \* \*

## PART 329—LIQUIDITY RISK MEASUREMENT STANDARDS

■ 3. The authority citation for part 329 continues to read as follows:

**Authority:** 12 U.S.C. 1815, 1816, 1818, 1819, 1828, 1831p–1, 5412.

■ 4. Section 329.3 is amended by revising the definition of “Qualifying master netting agreement” to read as follows:

### § 329.3 Definitions.

\* \* \* \* \*

*Qualifying master netting agreement* means a written, legally enforceable agreement provided that:

(1) The agreement creates a single legal obligation for all individual transactions covered by the agreement upon an event of default following any stay permitted by paragraph (2) of this definition, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty;

(2) The agreement provides the FDIC-supervised institution the right to accelerate, terminate, and close-out on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default, including upon an event of receivership, conservatorship, insolvency, liquidation, or similar proceeding, of the counterparty, provided that, in any such case,

(i) Any exercise of rights under the agreement will not be stayed or avoided under applicable law in the relevant jurisdictions, other than:

(A) In receivership, conservatorship, or resolution under the Federal Deposit Insurance Act, Title II of the Dodd-Frank Act, or under any similar insolvency law applicable to GSEs, or laws of foreign jurisdictions that are substantially similar<sup>1</sup> to the U.S. laws referenced in this paragraph (2)(i)(A) in order to facilitate the orderly resolution of the defaulting counterparty;

(B) Where the agreement is subject by its terms to, or incorporates, any of the laws referenced in paragraph (2)(i)(A) of this definition; and

(ii) The agreement may limit the right to accelerate, terminate, and close-out

<sup>7</sup> The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

<sup>8</sup> The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

<sup>1</sup> The FDIC expects to evaluate jointly with the Federal Reserve and the OCC whether foreign special resolution regimes meet the requirements of this paragraph.

on a net basis all transactions under the agreement and to liquidate or set-off collateral promptly upon an event of default of the counterparty to the extent necessary for the counterparty to comply with the requirements of part 382 of this title, subpart I of part 252 of this title or part 47 of this title, as applicable;

(3) The agreement does not contain a walkaway clause (that is, a provision that permits a non-defaulting counterparty to make a lower payment than it otherwise would make under the agreement, or no payment at all, to a defaulter or the estate of a defaulter, even if the defaulter or the estate of the defaulter is a net creditor under the agreement); and

(4) In order to recognize an agreement as a qualifying master netting agreement for purposes of this subpart, an FDIC-supervised institution must comply with the requirements of § 329.4(a) with respect to that agreement.

\* \* \* \* \*

■ 5. Add part 382 to read as follows:

**PART 382—RESTRICTIONS ON QUALIFIED FINANCIAL CONTRACTS**

Sec.	
382.1	Definitions.
382.2	Applicability.
382.3	U.S. Special resolution regimes.
382.4	Insolvency proceedings.
382.5	Approval of enhanced creditor protection conditions.
382.6	[Reserved]
382.7	Exclusion of certain QFCs.

**Authority:** 12 U.S.C. 1816, 1818, 1819, 1820(g) 1828, 1828(m), 1831n, 1831o, 1831p–l, 1831(u), 1831w.

**§ 382.1 Definitions.**

*Affiliate* has the same meaning as in section 12 U.S.C. 1813(w).

*Central counterparty (CCP)* has the same meaning as in § 324.2 of this chapter.

*Chapter 11 proceeding* means a proceeding under Chapter 11 of Title 11, United States Code (11 U.S.C. 1101–74).

*Consolidated affiliate* means an affiliate of another company that:

(1) Either consolidates the other company, or is consolidated by the other company, on financial statements prepared in accordance with U.S. Generally Accepted Accounting Principles, the International Financial Reporting Standards, or other similar standards;

(2) Is, along with the other company, consolidated with a third company on a financial statement prepared in accordance with principles or standards referenced in paragraph (1) of this definition; or

(3) For a company that is not subject to principles or standards referenced in paragraph (1), if consolidation as described in paragraph (1) or (2) of this definition would have occurred if such principles or standards had applied.

*Control* has the same meaning as in section 3(w) of the Federal Deposit Insurance Act (12 U.S.C. 1813(w)).

*Covered entity* means a covered entity as defined by the Federal Reserve Board in 12 CFR 252.82.

*Covered QFC* means a QFC as defined in § 382.2 of this part.

*Credit enhancement* means a QFC of the type set forth in sections 210(c)(8)(D)(ii)(XII), (iii)(X), (iv)(V), (v)(VI), or (vi)(VI) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)(ii)(XII), (iii)(X), (iv)(V), (v)(VI), or (vi)(VI)) or a credit enhancement that the Federal Deposit Insurance Corporation determines is a QFC pursuant to section 210(c)(8)(D)(i) of Title II of the act (12 U.S.C. 5390(c)(8)(D)(i)).

*Default right* means:

(1) With respect to a QFC, any

(i) Right of a party, whether contractual or otherwise (including, without limitation, rights incorporated by reference to any other contract, agreement, or document, and rights afforded by statute, civil code, regulation, and common law), to liquidate, terminate, cancel, rescind, or accelerate such agreement or transactions thereunder, set off or net amounts owing in respect thereto (except rights related to same-day payment netting), exercise remedies in respect of collateral or other credit support or property related thereto (including the purchase and sale of property), demand payment or delivery thereunder or in respect thereof (other than a right or operation of a contractual provision arising solely from a change in the value of collateral or margin or a change in the amount of an economic exposure), suspend, delay, or defer payment or performance thereunder, or modify the obligations of a party thereunder, or any similar rights; and

(ii) Right or contractual provision that alters the amount of collateral or margin that must be provided with respect to an exposure thereunder, including by altering any initial amount, threshold amount, variation margin, minimum transfer amount, the margin value of collateral, or any similar amount, that entitles a party to demand the return of any collateral or margin transferred by it to the other party or a custodian or that modifies a transferee's right to reuse collateral or margin (if such right previously existed), or any similar

rights, in each case, other than a right or operation of a contractual provision arising solely from a change in the value of collateral or margin or a change in the amount of an economic exposure;

(2) With respect to § 382.4, does not include any right under a contract that allows a party to terminate the contract on demand or at its option at a specified time, or from time to time, without the need to show cause.

*FDI Act proceeding* means a proceeding in which the Federal Deposit Insurance Corporation is appointed as conservator or receiver under section 11 of the Federal Deposit Insurance Act (12 U.S.C. 1821).

*FDI Act stay period* means, in connection with an FDI Act proceeding, the period of time during which a party to a QFC with a party that is subject to an FDI Act proceeding may not exercise any right that the party that is not subject to an FDI Act proceeding has to terminate, liquidate, or net such QFC, in accordance with section 11(e) of the Federal Deposit Insurance Act (12 U.S.C. 1821(e)) and any implementing regulations.

*Financial counterparty* means a person that is:

(1)(i) A bank holding company or an affiliate thereof; a savings and loan holding company as defined in section 10(n) of the Home Owners' Loan Act (12 U.S.C. 1467a(n)); a U.S. intermediate holding company that is established or designated for purposes of compliance with 12 CFR 252.153; or a nonbank financial institution supervised by the Board of Governors of the Federal Reserve System under Title I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5323);

(ii) A depository institution as defined, in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)); an organization that is organized under the laws of a foreign country and that engages directly in the business of banking outside the United States; a Federal credit union or State credit union as defined in section 2 of the Federal Credit Union Act (12 U.S.C. 1752(1) and (6)); an institution that functions solely in a trust or fiduciary capacity as described in section 2(c)(2)(D) of the Bank Holding Company Act (12 U.S.C. 1841 (c)(2)(D)); an industrial loan company, an industrial bank, or other similar institution described in section 2(c)(2)(H) of the Bank Holding Company Act (12 U.S.C. 1841(c)(2)(H));

(iii) An entity that is State-licensed or registered as;

(A) A credit or lending entity, including a finance company; money

lender; installment lender; consumer lender or lending company; mortgage lender, broker, or bank; motor vehicle title pledge lender; payday or deferred deposit lender; premium finance company; commercial finance or lending company; or commercial mortgage company; except entities registered or licensed solely on account of financing the entity's direct sales of goods or services to customers;

(B) A money services business, including a check casher; money transmitter; currency dealer or exchange; or money order or traveler's check issuer;

(iv) A regulated entity as defined in section 1303(20) of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, as amended (12 U.S.C. 4502(20)) or any entity for which the Federal Housing Finance Agency or its successor is the primary Federal regulator;

(v) Any institution chartered in accordance with the Farm Credit Act of 1971, as amended, 12 U.S.C. 2001 *et seq.* that is regulated by the Farm Credit Administration;

(vi) Any entity registered with the Commodity Futures Trading Commission as a swap dealer or major swap participant pursuant to the Commodity Exchange Act of 1936 (7 U.S.C. 1 *et seq.*), or an entity that is registered with the U.S. Securities and Exchange Commission as a security-based swap dealer or a major security-based swap participant pursuant to the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*);

(vii) A securities holding company within the meaning specified in section 618 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 1850a); a broker or dealer as defined in sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(45)); an investment adviser as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)); an investment company registered with the U.S. Securities and Exchange Commission under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*); or a company that has elected to be regulated as a business development company pursuant to section 54(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-53(a));

(viii) A private fund as defined in section 202(a) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)); an entity that would be an investment company under section 3 of the Investment Company Act of 1940 (15 U.S.C. 80a-3) but for section 3(c)(5)(C); or an entity that is deemed

not to be an investment company under section 3 of the Investment Company Act of 1940 pursuant to Investment Company Act Rule 3a-7 (17 CFR 270.3a-7) of the U.S. Securities and Exchange Commission;

(ix) A commodity pool, a commodity pool operator, or a commodity trading advisor as defined, respectively, in section 1a(10), 1a(11), and 1a(12) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(10), 1a(11), and 1a(12)); a floor broker, a floor trader, or introducing broker as defined, respectively, in 1a(22), 1a(23) and 1a(31) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(22), 1a(23), and 1a(31)); or a futures commission merchant as defined in 1a(28) of the Commodity Exchange Act of 1936 (7 U.S.C. 1a(28));

(x) An employee benefit plan as defined in paragraphs (3) and (32) of section 3 of the Employee Retirement Income and Security Act of 1974 (29 U.S.C. 1002);

(xi) An entity that is organized as an insurance company, primarily engaged in writing insurance or reinsuring risks underwritten by insurance companies, or is subject to supervision as such by a State insurance regulator or foreign insurance regulator; or

(xii) An entity that would be a financial counterparty described in paragraphs (1)(i) through (xi) of this definition, if the entity were organized under the laws of the United States or any State thereof.

(2) The term "financial counterparty" does not include any counterparty that is:

- (i) A sovereign entity;
- (ii) A multilateral development bank; or
- (iii) The Bank for International Settlements.

*Financial market utility (FMU)* means any person, regardless of the jurisdiction in which the person is located or organized, 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, but does not include:

(1) Designated contract markets, registered futures associations, swap data repositories, and swap execution facilities registered under the Commodity Exchange Act (7 U.S.C. 1 *et seq.*), or national securities exchanges, national securities associations, alternative trading systems, security-based swap data repositories, and swap execution facilities registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), solely by reason of

their providing facilities for comparison of data respecting the terms of settlement of securities or futures transactions effected on such exchange or by means of any electronic system operated or controlled by such entities, provided that the exclusions in this clause apply only with respect to the activities that require the entity to be so registered; or

(2) Any broker, dealer, transfer agent, or investment company, or any futures commission merchant, introducing broker, commodity trading advisor, or commodity pool operator, solely by reason of functions performed by such institution as part of brokerage, dealing, transfer agency, or investment company activities, or solely by reason of acting on behalf of a FMU or a participant therein in connection with the furnishing by the FMU of services to its participants or the use of services of the FMU by its participants, provided that services performed by such institution do not constitute critical risk management or processing functions of the FMU.

*Investment advisory contract* means any contract or agreement whereby a person agrees to act as investment adviser to or to manage any investment or trading account of another person.

*Master agreement* means a QFC of the type set forth in sections 210(c)(8)(D)(ii)(XI), (iii)(IX), (iv)(IV), (v)(V), or (vi)(V) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)(ii)(XI), (iii)(IX), (iv)(IV), (v)(V), or (vi)(V)) or a master agreement that the Federal Deposit Insurance Corporation determines is a QFC pursuant to section 210(c)(8)(D)(i) of Title II of the act (12 U.S.C. 5390(c)(8)(D)(i)).

*Person* has the same meaning as in 12 CFR 225.2.

*Qualified financial contract (QFC)* has the same meaning as in section 210(c)(8)(D) of Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5390(c)(8)(D)).

*Retail customer or counterparty* has the same meaning as in § 329.3 of this chapter.

*Small financial institution* means a company that:

(1) Is organized as a bank, as defined in section 3(a) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a savings association, as defined in section 3(b) of the Federal Deposit Insurance Act, the deposits of which are insured by the Federal Deposit Insurance Corporation; a farm credit system institution chartered under the Farm Credit Act of

1971; or an insured Federal credit union or State-chartered credit union under the Federal Credit Union Act; and

(2) Has total assets of \$10,000,000,000 or less on the last day of the company's most recent fiscal year.

*State* means any State, commonwealth, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, or the United States Virgin Islands.

*Subsidiary of a covered FSI* means any subsidiary of a covered FSI as defined in 12 U.S.C. 1813(w).

*U.S. agency* has the same meaning as the term "agency" in 12 U.S.C. 3101.

*U.S. branch* has the same meaning as the term "branch" in 12 U.S.C. 3101.

*U.S. special resolution regimes* means the Federal Deposit Insurance Act (12 U.S.C. 1811–1835a) and regulations promulgated thereunder and Title II of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5381–5394) and regulations promulgated thereunder.

### § 382.2 Applicability.

(a) *General requirement.* A covered FSI must ensure that each covered QFC conforms to the requirements of §§ 382.3 and 382.4 of this part.

(b) *Covered FSI.* For purposes of this part a covered FSI means

(1) Any State savings association or State non-member bank (as defined in the Federal Deposit Insurance Act, 12 U.S.C. 1813(e)(2)) that is a direct or indirect subsidiary of:

(i) A global systemically important bank holding company that has been designated pursuant to § 252.82(a)(1) of the Federal Reserve Board's Regulation YY (12 CFR 252.82); or

(ii) A global systemically important foreign banking organization that has been designated pursuant to subpart I of 12 CFR part 252 (FRB Regulation YY), and

(2) Any subsidiary of a covered FSI other than:

(i) A subsidiary that is owned in satisfaction of debt previously contracted in good faith;

(ii) A portfolio concern that is a small business investment company, as defined in section 103(3) of the Small Business Investment Act of 1958 (15 U.S.C. 662), or that has received from the Small Business Administration notice to proceed to qualify for a license as a Small Business Investment Company, which notice or license has not been revoked; or

(iii) A subsidiary designed to promote the public welfare, of the type permitted

under paragraph (11) of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), including the welfare of low- to moderate-income communities or families (such as providing housing, services, or jobs).

(c) *Covered QFCs.* For purposes of this part, a covered QFC is:

(1) With respect to a covered FSI that is a covered FSI on January 1, 2018, an in-scope QFC that the covered FSI:

(i) Enters, executes, or otherwise becomes a party to on or after January 1, 2019; or

(ii) Entered, executed, or otherwise became a party to before January 19, 2019, if the covered FSI or any affiliate that is a covered entity, covered bank, or covered FSI also enters, executes, or otherwise becomes a party to a QFC with the same person or a consolidated affiliate of the same person on or after January 1, 2019.

(2) With respect to a covered FSI that becomes a covered FSI after January 1, 2018, an in-scope QFC that the covered FSI:

(i) Enters, executes, or otherwise becomes a party to on or after the later of the date the covered FSI first becomes a covered FSI and January 1, 2019; or

(ii) Entered, executed, or otherwise became a party to before the date identified in paragraph (c)(2)(i) of this section with respect to the covered FSI, if the covered FSI or any affiliate that is a covered entity, covered bank or covered FSI also enters, executes, or otherwise becomes a party to a QFC with the same person or consolidated affiliate of the same person on or after the date identified in paragraph (c)(2)(i) of this section with respect to the covered FSI.

(d) *In-scope QFCs.* An in-scope QFC is a QFC that explicitly:

(1) Restricts the transfer of a QFC (or any interest or obligation in or under, or any property securing, the QFC) from a covered FSI; or

(2) Provides one or more default rights with respect to a QFC that may be exercised against a covered FSI.

(e) *Rules of construction.* For purposes of this part,

(1) A covered FSI does not become a party to a QFC solely by acting as agent with respect to the QFC; and

(2) The exercise of a default right with respect to a covered QFC includes the automatic or deemed exercise of the default right pursuant to the terms of the QFC or other arrangement.

(f) *Initial applicability of requirements for covered QFCs.* (1) With respect to each of its covered QFCs, a covered FSI that is a covered FSI on January 1, 2018 must conform the covered QFC to the requirements of this part by:

(i) January 1, 2019, if each party to the covered QFC is a covered entity, covered bank, or covered FSI.

(ii) July 1, 2019, if each party to the covered QFC (other than the covered FSI) is a financial counterparty that is not a covered entity, covered bank or covered FSI; or

(iii) January 1, 2020, if a party to the covered QFC (other than the covered FSI) is not described in paragraph (f)(1)(i) or (ii) of this section or if, notwithstanding paragraph (f)(1)(ii), a party to the covered QFC (other than the covered FSI) is a small financial institution.

(2) With respect to each of its covered QFCs, a covered FSI that is not a covered FSI on January 1, 2018 must conform the covered QFC to the requirements of this part by:

(i) The first day of the calendar quarter immediately following 1 year after the date the covered FSI first becomes a covered FSI if each party to the covered QFC is a covered entity, covered bank, or covered FSI;

(ii) The first day of the calendar quarter immediately following 18 months from the date the covered FSI first becomes a covered FSI if each party to the covered QFC (other than the covered FSI) is a financial counterparty that is not a covered entity, covered bank or covered FSI; or

(iii) The first day of the calendar quarter immediately following 2 years from the date the covered FSI first becomes a covered FSI if a party to the covered QFC (other than the covered FSI) is not described in paragraph (f)(2)(i) or (ii) of this section or if, notwithstanding paragraph (f)(2)(ii), a party to the covered QFC (other than the covered FSI) is a small financial institution.

(g) *Rights of receiver unaffected.*

Nothing in this part shall in any manner limit or modify the rights and powers of the FDIC as receiver under the Federal Deposit Insurance Act or Title II of the Dodd-Frank Act, including, without limitation, the rights of the receiver to enforce provisions of the Federal Deposit Insurance Act or Title II of the Dodd-Frank Act that limit the enforceability of certain contractual provisions.

### § 382.3 U.S. special resolution regimes.

(a) *Covered QFCs not required to be conformed.* (1) Notwithstanding § 382.2 of this part, a covered FSI is not required to conform a covered QFC to the requirements of this section if:

(i) The covered QFC designates, in the manner described in paragraph (a)(2) of this section, the U.S. special resolution

regimes as part of the law governing the QFC; and

(ii) Each party to the covered QFC, other than the covered FSI, is

(A) An individual that is domiciled in the United States, including any State;

(B) A company that is incorporated in or organized under the laws of the United States or any State;

(C) A company the principal place of business of which is located in the United States, including any State; or

(D) A U.S. branch or U.S. agency.

(2) A covered QFC designates the U.S. special resolution regimes as part of the law governing the QFC if the covered QFC:

(i) Explicitly provides that the covered QFC is governed by the laws of the United States or a State of the United States; and

(ii) Does not explicitly provide that one or both of the U.S. special resolution regimes, or a broader set of laws that includes a U.S. special resolution regime, is excluded from the laws governing the covered QFC.

(b) *Provisions required.* A covered QFC must explicitly provide that:

(1) In the event the covered FSI becomes subject to a proceeding under a U.S. special resolution regime, the transfer of the covered QFC (and any interest and obligation in or under, and any property securing, the covered QFC) from the covered FSI will be effective to the same extent as the transfer would be effective under the U.S. special resolution regime if the covered QFC (and any interest and obligation in or under, and any property securing, the covered QFC) were governed by the laws of the United States or a State of the United States; and

(2) In the event the covered FSI or an affiliate of the covered FSI becomes subject to a proceeding under a U.S. special resolution regime, default rights with respect to the covered QFC that may be exercised against the covered FSI are permitted to be exercised to no greater extent than the default rights could be exercised under the U.S. special resolution regime if the covered QFC were governed by the laws of the United States or a State of the United States.

(c) *Relevance of creditor protection provisions.* The requirements of this section apply notwithstanding § 382.4(d), (f), and (h) of this part.

#### **§ 382.4 Insolvency proceedings.**

This section does not apply to proceedings under Title II of the Dodd-Frank Act.

(a) *Covered QFCs not required to be conformed.* Notwithstanding § 382.2 of this part, a covered FSI is not required

to conform a covered QFC to the requirements of this section if the covered QFC:

(1) Does not explicitly provide any default right with respect to the covered QFC that is related, directly or indirectly, to an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding; and

(2) Does not explicitly prohibit the transfer of a covered affiliate credit enhancement, any interest or obligation in or under the covered affiliate credit enhancement, or any property securing the covered affiliate credit enhancement to a transferee upon or following an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding or would prohibit such a transfer only if the transfer would result in the supported party being the beneficiary of the credit enhancement in violation of any law applicable to the supported party.

(b) *General prohibitions.* (1) A covered QFC may not permit the exercise of any default right with respect to the covered QFC that is related, directly or indirectly, to an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding.

(2) A covered QFC may not prohibit the transfer of a covered affiliate credit enhancement, any interest or obligation in or under the covered affiliate credit enhancement, or any property securing the covered affiliate credit enhancement to a transferee upon or following an affiliate of the direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding unless the transfer would result in the supported party being the beneficiary of the credit enhancement in violation of any law applicable to the supported party.

(c) *Definitions relevant to the general prohibitions—(1) Direct party.* Direct party means a covered entity, covered bank, or covered FSI that is a party to the direct QFC.

(2) *Direct QFC.* Direct QFC means a QFC that is not a credit enhancement, provided that, for a QFC that is a master agreement that includes an affiliate credit enhancement as a supplement to the master agreement, the direct QFC does not include the affiliate credit enhancement.

(3) *Affiliate credit enhancement.* Affiliate credit enhancement means a credit enhancement that is provided by an affiliate of a party to the direct QFC that the credit enhancement supports.

(d) *General creditor protections.* Notwithstanding paragraph (b) of this section, a covered direct QFC and covered affiliate credit enhancement that supports the covered direct QFC may permit the exercise of a default right with respect to the covered QFC that arises as a result of

(1) The direct party becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding;

(2) The direct party not satisfying a payment or delivery obligation pursuant to the covered QFC or another contract between the same parties that gives rise to a default right in the covered QFC; or

(3) The covered affiliate support provider or transferee not satisfying a payment or delivery obligation pursuant to a covered affiliate credit enhancement that supports the covered direct QFC.

(e) *Definitions relevant to the general creditor protections—(1) Covered direct QFC.* Covered direct QFC means a direct QFC to which a covered entity, covered bank, or covered FSI is a party.

(2) *Covered affiliate credit enhancement.* Covered affiliate credit enhancement means an affiliate credit enhancement in which a covered entity, covered bank, or covered FSI is the obligor of the credit enhancement.

(3) *Covered affiliate support provider.* Covered affiliate support provider means, with respect to a covered affiliate credit enhancement, the affiliate of the direct party that is obligated under the covered affiliate credit enhancement and is not a transferee.

(4) *Supported party.* Supported party means, with respect to a covered affiliate credit enhancement and the direct QFC that the covered affiliate credit enhancement supports, a party that is a beneficiary of the covered affiliate support provider's obligation(s) under the covered affiliate credit enhancement.

(f) *Additional creditor protections for supported QFCs.* Notwithstanding paragraph (b) of this section, with respect to a covered direct QFC that is supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right after the stay period that is related, directly or indirectly, to the covered affiliate support provider becoming subject to a receivership, insolvency, liquidation, resolution, or similar proceeding if:

(1) The covered affiliate support provider that remains obligated under the covered affiliate credit enhancement becomes subject to a receivership, insolvency, liquidation, resolution, or

similar proceeding other than a Chapter 11 proceeding;

(2) Subject to paragraph (h) of this section, the transferee, if any, becomes subject to a receivership, insolvency, liquidation, resolution, or similar proceeding;

(3) The covered affiliate support provider does not remain, and a transferee does not become, obligated to the same, or substantially similar, extent as the covered affiliate support provider was obligated immediately prior to entering the receivership, insolvency, liquidation, resolution, or similar proceeding with respect to:

(i) The covered affiliate credit enhancement;

(ii) All other covered affiliate credit enhancements provided by the covered affiliate support provider in support of other covered direct QFCs between the direct party and the supported party under the covered affiliate credit enhancement referenced in paragraph (f)(3)(i) of this section; and

(iii) All covered affiliate credit enhancements provided by the covered affiliate support provider in support of covered direct QFCs between the direct party and affiliates of the supported party referenced in paragraph (f)(3)(ii) of this section; or

(4) In the case of a transfer of the covered affiliate credit enhancement to a transferee,

(i) All of the ownership interests of the direct party directly or indirectly held by the covered affiliate support provider are not transferred to the transferee; or

(ii) Reasonable assurance has not been provided that all or substantially all of the assets of the covered affiliate support provider (or net proceeds therefrom), excluding any assets reserved for the payment of costs and expenses of administration in the receivership, insolvency, liquidation, resolution, or similar proceeding, will be transferred or sold to the transferee in a timely manner.

(g) *Definitions relevant to the additional creditor protections for supported QFCs*—(1) *Stay period*. Stay period means, with respect to a receivership, insolvency, liquidation, resolution, or similar proceeding, the period of time beginning on the commencement of the proceeding and ending at the later of 5 p.m. (EST) on the business day following the date of the commencement of the proceeding and 48 hours after the commencement of the proceeding.

(2) *Business day*. Business day means a day on which commercial banks in the jurisdiction the proceeding is commenced are open for general

business (including dealings in foreign exchange and foreign currency deposits).

(3) *Transferee*. Transferee means a person to whom a covered affiliate credit enhancement is transferred upon the covered affiliate support provider entering a receivership, insolvency, liquidation, resolution, or similar proceeding or thereafter as part of the resolution, restructuring, or reorganization involving the covered affiliate support provider.

(h) *Creditor protections related to FDI Act proceedings*. Notwithstanding paragraphs (d) and (f) of this section, which are inapplicable to FDI Act proceedings, and notwithstanding paragraph (b) of this section, with respect to a covered direct QFC that is supported by a covered affiliate credit enhancement, the covered direct QFC and the covered affiliate credit enhancement may permit the exercise of a default right that is related, directly or indirectly, to the covered affiliate support provider becoming subject to FDI Act proceedings only in the following circumstances:

(1) After the FDI Act stay period, if the covered affiliate credit enhancement is not transferred pursuant to 12 U.S.C. 1821(e)(9)–(10) and any regulations promulgated thereunder; or

(2) During the FDI Act stay period, if the default right may only be exercised so as to permit the supported party under the covered affiliate credit enhancement to suspend performance with respect to the supported party's obligations under the covered direct QFC to the same extent as the supported party would be entitled to do if the covered direct QFC were with the covered affiliate support provider and were treated in the same manner as the covered affiliate credit enhancement.

(i) *Prohibited terminations*. A covered QFC must require, after an affiliate of the direct party has become subject to a receivership, insolvency, liquidation, resolution, or similar proceeding,

(1) The party seeking to exercise a default right to bear the burden of proof that the exercise is permitted under the covered QFC; and

(2) Clear and convincing evidence or a similar or higher burden of proof to exercise a default right.

#### **§ 382.5 Approval of enhanced creditor protection conditions.**

(a) *Protocol compliance*. (1) Unless the FDIC determines otherwise based on the specific facts and circumstances, a covered QFC is deemed to comply with this part if it is amended by the universal protocol or the U.S. protocol.

(2) A covered QFC will be deemed to be amended by the universal protocol for purposes of paragraph (a)(1) of this section notwithstanding the covered QFC being amended by one or more Country Annexes, as the term is defined in the universal protocol.

(3) For purposes of paragraphs (a)(1) and (2) of this section:

(i) The universal protocol means the ISDA 2015 Universal Resolution Stay Protocol, including the Securities Financing Transaction Annex and Other Agreements Annex, published by the International Swaps and Derivatives Association, Inc., as of May 3, 2016, and minor or technical amendments thereto;

(ii) The U.S. protocol means a protocol that is the same as the universal protocol other than as provided in paragraphs (a)(3)(ii)(A) through (F) of this section.

(A) The provisions of Section 1 of the attachment to the universal protocol may be limited in their application to covered entities, covered banks, and covered FSIIs and may be limited with respect to resolutions under the Identified Regimes, as those regimes are identified by the universal protocol;

(B) The provisions of Section 2 of the attachment to the universal protocol may be limited in their application to covered entities, covered banks, and covered FSIIs;

(C) The provisions of Section 4(b)(i)(A) of the attachment to the universal protocol must not apply with respect to U.S. special resolution regimes;

(D) The provisions of Section 4(b) of the attachment to the universal protocol may only be effective to the extent that the covered QFCs affected by an adherent's election thereunder would continue to meet the requirements of this part;

(E) The provisions of Section 2(k) of the attachment to the universal protocol must not apply; and

(F) The U.S. protocol may include minor and technical differences from the universal protocol and differences necessary to conform the U.S. protocol to the differences described in paragraphs (a)(3)(ii)(A) through (E) of this section.

(iii) Amended by the universal protocol or the U.S. protocol, with respect to covered QFCs between adherents to the protocol, includes amendments through incorporation of the terms of the protocol (by reference or otherwise) into the covered QFC; and

(iv) The attachment to the universal protocol means the attachment that the universal protocol identifies as "ATTACHMENT to the ISDA 2015

UNIVERSAL RESOLUTION STAY  
PROTOCOL.”

(b) *Proposal of enhanced creditor protection conditions.* (1) A covered FSI may request that the FDIC approve as compliant with the requirements of §§ 382.3 and 382.4 proposed provisions of one or more forms of covered QFCs, or proposed amendments to one or more forms of covered QFCs, with enhanced creditor protection conditions.

(2) Enhanced creditor protection conditions means a set of limited exemptions to the requirements of § 382.4(b) of this part that is different than that of § 382.4(d), (f), and (h).

(3) A covered FSI making a request under paragraph (b)(1) of this section must provide

(i) An analysis of the proposal that addresses each consideration in paragraph (d) of this section;

(ii) A written legal opinion verifying that proposed provisions or amendments would be valid and enforceable under applicable law of the relevant jurisdictions, including, in the case of proposed amendments, the validity and enforceability of the proposal to amend the covered QFCs; and

(iii) Any other relevant information that the FDIC requests.

(c) *FDIC approval.* The FDIC may approve, subject to any conditions or commitments the FDIC may set, a proposal by a covered FSI under paragraph (b) of this section if the proposal, as compared to a covered QFC that contains only the limited exemptions in § 382.4(d), (f), and (h) or that is amended as provided under paragraph (a) of this section, would promote the safety and soundness of covered FSIs by mitigating the potential destabilizing effects of the resolution of a global significantly important banking entity that is an affiliate of the covered FSI to at least the same extent.

(d) *Considerations.* In reviewing a proposal under this section, the FDIC may consider all facts and circumstances related to the proposal, including:

(1) Whether, and the extent to which, the proposal would reduce the resiliency of such covered FSIs during distress or increase the impact on U.S. financial stability were one or more of the covered FSIs to fail;

(2) Whether, and the extent to which, the proposal would materially decrease the ability of a covered FSI, or an affiliate of a covered FSI, to be resolved in a rapid and orderly manner in the event of the financial distress or failure of the entity that is required to submit a resolution plan;

(3) Whether, and the extent to which, the set of conditions or the mechanism in which they are applied facilitates, on an industry-wide basis, contractual modifications to remove impediments to resolution and increase market certainty, transparency, and equitable treatment with respect to the default rights of non-defaulting parties to a covered QFC;

(4) Whether, and the extent to which, the proposal applies to existing and future transactions;

(5) Whether, and the extent to which, the proposal would apply to multiple forms of QFCs or multiple covered FSIs;

(6) Whether the proposal would permit a party to a covered QFC that is within the scope of the proposal to adhere to the proposal with respect to only one or a subset of covered FSIs;

(7) With respect to a supported party, the degree of assurance the proposal provides to the supported party that the material payment and delivery obligations of the covered affiliate credit enhancement and the covered direct QFC it supports will continue to be performed after the covered affiliate support provider enters a receivership, insolvency, liquidation, resolution, or similar proceeding;

(8) The presence, nature, and extent of any provisions that require a covered affiliate support provider or transferee to meet conditions other than material payment or delivery obligations to its creditors;

(9) The extent to which the supported party's overall credit risk to the direct party may increase if the enhanced creditor protection conditions are not met and the likelihood that the supported party's credit risk to the direct party would decrease or remain the same if the enhanced creditor protection conditions are met; and

(10) Whether the proposal provides the counterparty with additional default rights or other rights.

**§ 382.6 [Reserved]****§ 382.7 Exclusion of certain QFCs.**

(a) *Exclusion of QFCs with FMUs.* Notwithstanding § 382.2 of this part, a covered FSI is not required to conform to the requirements of this part a covered QFC to which:

(1) A CCP is party; or  
(2) Each party (other than the covered FSI) is an FMU.

(b) *Exclusion of certain covered entity and covered bank QFCs.* If a covered QFC is also a covered QFC under part 252 or part 47 of this title that an affiliate of the covered FSI is also required to conform pursuant to part 252 or part 47 and the covered FSI is:

(1) The affiliate credit enhancement provider with respect to the covered QFC, then the covered FSI is required to conform the credit enhancement to the requirements of this part but is not required to conform the direct QFC to the requirements of this part; or

(2) The direct party to which the covered entity or covered bank is the affiliate credit enhancement provider, then the covered FSI is required to conform the direct QFC to the requirements of this part but is not required to conform the credit enhancement to the requirements of this part.

(c) *Exclusion of certain contracts.* Notwithstanding § 382.2 of this part, a covered FSI is not required to conform the following types of contracts or agreements to the requirements of this part:

(1) An investment advisory contract that:

(i) Is with a retail customer or counterparty;

(ii) Does not explicitly restrict the transfer of the contract (or any QFC entered into pursuant thereto or governed thereby, or any interest or obligation in or under, or any property securing, any such QFC or the contract) from the covered FSI except as necessary to comply with section 205(a)(2) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-5(a)(2)); and  
(iii) Does not explicitly provide a default right with respect to the contract or any QFC entered pursuant thereto or governed thereby.

(2) A warrant that:

(i) Evidences a right to subscribe to or otherwise acquire a security of the covered FSI or an affiliate of the covered FSI; and

(ii) Was issued prior to January 1, 2018.

(d) *Exemption by order.* The FDIC may exempt by order one or more covered FSI(s) from conforming one or more contracts or types of contracts to one or more of the requirements of this part after considering:

(1) The potential impact of the exemption on the ability of the covered FSI(s), or affiliates of the covered FSI(s), to be resolved in a rapid and orderly manner in the event of the financial distress or failure of the entity that is required to submit a resolution plan;

(2) The burden the exemption would relieve; and

(3) Any other factor the FDIC deems relevant.

■ 6. Amend 382.1 by adding the definition of “covered bank” to read as follows:

**§ 382.1 Definitions.**

\* \* \* \* \*

*Covered bank* means a covered bank as defined by the Office of the Comptroller of the Currency in 12 CFR part 47.

\* \* \* \* \*

Dated at Washington, DC, this 27th day of September 2017.  
By order of the Board of Directors.

Federal Deposit Insurance Corporation.  
**Valerie J. Best,**  
*Assistant Executive Secretary.*

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Part III

## National Credit Union Administration

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12 CFR Part 746

Supervisory Review Committee; Procedures for Appealing Material  
Supervisory Determinations; Final Rule

**NATIONAL CREDIT UNION  
ADMINISTRATION**

**12 CFR Part 746**

RIN 3133-AE69

**Supervisory Review Committee;  
Procedures for Appealing Material  
Supervisory Determinations**

**AGENCY:** National Credit Union  
Administration (NCUA).

**ACTION:** Final rule.

**SUMMARY:** The NCUA Board (Board) is adopting regulatory procedures for appealing material supervisory determinations to the NCUA's Supervisory Review Committee (SRC). These procedures significantly expand the number of material supervisory determinations appealable to the SRC to include most agency decisions that could significantly affect capital, earnings, operating flexibility, or the nature or level of supervisory oversight of a federally insured credit union (FICU). Furthermore, the procedures contain a number of safeguards designed to provide FICUs with enhanced due process and promote greater consistency with the practices of the Federal banking agencies.

**DATES:** This rule is effective January 1, 2018.

**FOR FURTHER INFORMATION CONTACT:** Michael J. McKenna, General Counsel, Frank S. Kressman, Associate General Counsel, or Benjamin M. Litchfield, Staff Attorney, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314-3428 or telephone: (703) 518-6540.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994 (Riegle Act) required the NCUA and the Federal banking agencies<sup>1</sup> to establish independent intra-agency appeals procedures for the review of "material supervisory determinations" no later than 180 days after September 23, 1994.<sup>2</sup> The Riegle Act defined the term "material supervisory determination" to include agency decisions relating to "(i) examination ratings; (ii) the adequacy of loan loss reserve provisions; and (iii)

loan classifications on loans that are significant to the [credit union]" and to exclude agency decisions to appoint a conservator or liquidating agent for a FICU, or to take prompt corrective action pursuant to section 216 of the Federal Credit Union Act (FCU Act).<sup>3</sup>

When establishing the intra-agency appeals procedures, the Riegle Act required the NCUA and the Federal banking agencies to ensure that (1) any appeal of a material supervisory determination by an insured depository institution or insured credit union is heard and decided expeditiously; and (2) appropriate safeguards exist for protecting the appellant from retaliation by agency examiners.<sup>4</sup> Furthermore, the Riegle Act required the NCUA and the Federal banking agencies to appoint an agency ombudsman responsible for serving as a liaison "between the agency and any affected person with respect to any problem such party may have in dealing with the agency resulting from the regulatory activities of the agency" and assuring "that safeguards exist to encourage complainants to come forward and preserve confidentiality."<sup>5</sup>

The Board published a proposed Interpretive Ruling and Policy Statement (IRPS) setting out intra-agency appeals procedures for the review of material supervisory determinations in the **Federal Register** on November 17, 1994 for a 30-day comment period ending on December 19, 1994.<sup>6</sup> The proposed IRPS took the form of guidelines that established an SRC of five senior NCUA staff members consisting of the Executive Director, the General Counsel, the Director of the Office of Examination and Insurance (E&I), one Regional Director, and one additional senior staff or Board staff member to hear appeals of material supervisory determinations. The Executive Director was to serve as the SRC Chairman. Furthermore, the proposed IRPS limited the scope of appealable determinations to agency decisions specifically defined as "material supervisory determinations" under section 309 of the Riegle Act with the appeal of "examination ratings" further limited to composite CAMEL ratings of 4 and 5.

The Board extended the comment period until January 18, 1995 to allow stakeholders additional opportunity to comment on the proposed IRPS.<sup>7</sup> After reviewing and considering the public comments, the Board published a final

IRPS in the **Federal Register** on March 20, 1995 as IRPS 95-1 "Supervisory Review Committee."<sup>8</sup> The final IRPS took the form of guidelines that established an SRC consisting of three senior NCUA staff members each appointed by the NCUA Chairman. The scope of appealable determinations remained limited to agency decisions specifically defined as "material supervisory determinations" under section 309 of the Riegle Act, however, the final IRPS expanded the ability to appeal CAMEL ratings cover composite ratings of 3, 4, and 5 as well as all component ratings of those composite ratings.

On April 23, 2002, the Board adopted IRPS 02-1, which amended IRPS 95-1 to expand the scope of appealable determinations to include a decision by a Regional Director to revoke a Federal credit union's (FCU) authority under the NCUA's then-Regulatory Flexibility Program (RegFlex).<sup>9</sup> RegFlex permitted an FCU with advanced levels of net worth and consistently strong supervisory examination ratings to request exemptions, in whole or in part, from certain NCUA regulations.<sup>10</sup> The Board eliminated this program in 2011, but made certain regulatory relief provisions previously available under the program widely available to all FCUs.<sup>11</sup>

The Board adopted IRPS 11-1, which contains the current SRC appeals procedures, on April 29, 2011.<sup>12</sup> IRPS 11-1 expanded the jurisdiction of the SRC to include denials of Technical Assistance Grant (TAG) reimbursements by the Director of the Office of Small Credit Union Initiatives (OSCUI). A TAG is an award of money, in such amounts and according to such terms and conditions as the NCUA may establish, to a credit union participating in the Community Development Revolving Loan Fund that does not have to be repaid.<sup>13</sup> TAGs are paid on a reimbursement basis to cover expenses approved in advance by the NCUA and supported by adequate documentation. In IRPS 11-1, the Board determined that the fact-intensive nature of TAG reimbursement requests warranted review by the SRC. The Board has not made material changes to IRPS 11-1 since 2012 when it removed all references to RegFlex to reflect the elimination of that program.<sup>14</sup>

<sup>1</sup> The Federal banking agencies include the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency (OCC), and the Board of Governors of the Federal Reserve System (FRB). See 12 U.S.C. 1813(q) (defining "appropriate Federal banking agency").

<sup>2</sup> Public Law 103-325, tit. III, section 309, 108 Stat. 2160, 2218 (Sept. 23, 1994) (codified at 12 U.S.C. 4806).

<sup>3</sup> 12 U.S.C. 1790d.

<sup>4</sup> 12 U.S.C. 4806(b)(1)-(2).

<sup>5</sup> 12 U.S.C. 4806(d)(1)-(2).

<sup>6</sup> 59 FR 59437 (Nov. 17, 1994).

<sup>7</sup> 59 FR 61003 (Nov. 29, 1994).

<sup>8</sup> 60 FR 14795 (Mar. 20, 1995).

<sup>9</sup> 67 FR 19778 (Apr. 23, 2002).

<sup>10</sup> 66 FR 23971 (Nov. 23, 2001).

<sup>11</sup> 77 FR 31981 (May 31, 2012).

<sup>12</sup> 76 FR 3674 (Jan. 20, 2011) (interim final IRPS); 76 FR 23871 (Apr. 29, 2011) (final IRPS).

<sup>13</sup> 12 CFR 705.2.

<sup>14</sup> 12 CFR 705.7(g)(2).

## II. Summary of the Proposed Rule

On June 7, 2017, the Board published a proposed rule in the **Federal Register** formally codifying the SRC appeals process as part of the NCUA's regulations.<sup>15</sup> The proposed rule also included significant amendments to the SRC appeals process to enhance due process and to be more consistent with the Federal banking agencies. The proposed rule expanded the number of supervisory determinations appealable to the SRC and provided FICUs with an opportunity to seek review by the Director of E&I. To accommodate the increased workload of the SRC, the Board proposed to expand the size of the SRC to include a rotating pool of not less than eight senior staff from the NCUA's regional and central offices. Central office staff would have included high level officials within the Office of the Executive Director (OED), the Office of Consumer Financial Protection and Access (OCFPA), the Office of National Examinations and Insurance (ONES), and OSCUI. The Secretary of the Board was to serve as the permanent SRC Chairman and select three individuals (one of whom could include the SRC Chairman) to hear a particular appeal.

## III. Summary of Comments to the Proposed Rule

The Board received 9 comments on the proposed rule from State and national credit union trade associations, an FCU, a management consulting company, a professional association for State credit union supervisors, and a private individual. Commenters generally approved of the proposed rule and appreciated the Board's efforts to provide FICUs with enhanced due process regarding agency decisions. However, commenters raised several concerns with various aspects of the proposed rule and recommended changes to address those concerns. Specific comments and recommendations are discussed in more detail in the Section-by-Section Analysis set out in Part V below.

One commenter requested that the Board establish an examination outreach officer position to conduct a post-examination interview with each FICU to determine whether the goals of a healthy exam are being met, and if not, what parts of the exam can be improved upon to achieve those goals. The commenter also requested that the Board establish an advisory committee of senior credit union officials similar to the Consumer Financial Protection Bureau's credit union advisory council

(CUAC) to advise the NCUA on credit union matters. These requests are outside the scope of the proposed rule and, therefore, the Board will not address them in this rulemaking.

## IV. Summary of the Final Rule

The Board is generally adopting the rule as proposed, with certain modifications based on public comments and other considerations as discussed in greater detail in the section-by-section analyses set out in Part V below. The final rule expands the scope of appealable determinations to include most agency decisions that may significantly affect the capital, earnings, operating flexibility, or that may otherwise affect the nature and level of supervisory oversight of a FICU. This includes, but is not limited to, a composite examination rating of 3, 4, or 5; a determination relating to the adequacy of loan loss reserve provisions; the classification of loans and other assets that are significant to the FICU; a determination relating to compliance with Federal consumer financial law; and a determination relating to a waiver request or application for additional authority where independent appeals procedures have not been specified in other NCUA regulations.

The final rule also creates an optional intermediate level of review (at the FICU's option) by the Director of E&I, or his or her designee, before a FICU appeals an agency decision to the SRC. Review by the Director of E&I will be based entirely on written submissions provided by the appropriate program office and the petitioning FICU with no opportunity for an oral hearing. The Director of E&I will have an opportunity, however, to request additional information from the parties and may consult with them jointly or separately before rendering a decision. The Director of E&I may also solicit input from any other pertinent program office, including the Office of General Counsel, as necessary. A FICU that receives an adverse decision from the Director of E&I may appeal that decision to the SRC. Under no circumstances, however, may either party request reconsideration of a decision rendered by the Director of E&I.

Furthermore, the final rule restructures the SRC by creating a rotating pool of at least eight senior staff appointed by the NCUA Chairman from NCUA's central and regional offices who may be selected by the SRC Chairman to serve on a three-member panel to hear a particular appeal. The Secretary of the Board will serve as the permanent SRC Chairman and will also

be eligible to serve as one of the three members on any particular panel. The Special Counsel to the General Counsel (Special Counsel), or any senior staff within the Office of General Counsel assigned such duties, will serve as a permanent non-voting advisor to each three-member panel to consult on procedural and legal matters regarding the jurisdiction of the SRC. To avoid any real or apparent conflicts of interest, the SRC Chairman will not be permitted to select individuals for the program office that rendered the material supervisory determination that is the subject of the appeal to serve on the three-member panel hearing that appeal.

## V. Section-by-Section Analysis

### Part 746—Appeals Procedures

#### Subpart A—Procedures for Appealing Material Supervisory Determinations

The proposed rule, along with a companion rule on agency appeals, created a comprehensive set of appeals procedures to the appeal of most agency decisions to the Board. This comprehensive set of procedures was to be codified in a new part of the NCUA's regulations, part 746, with the SRC appeals process codified in subpart A to part 746 and the appeals procedures codified in subpart B to part 746. The Board received one substantive comment on this aspect of the proposed rule. The commenter requested that the Board codify the SRC appeals process in part 741, NCUA's share insurance requirements rule, to make the procedures more conspicuous for federally insured, State-chartered credit unions (FISCUs). While the commenter's argument is not without merit, the Board believes that codifying these procedures in their own part of the NCUA's regulations gives all credit unions, regardless of charter, greater notice of the procedures for appealing most agency decisions. Accordingly, the Board is codifying the SRC appeals process as subpart A to part 746 as proposed.

#### Section 746.101 Authority, Purpose, and Scope

Proposed § 746.101 set out the authority for issuing the regulation as well as the regulation's purpose and scope. Paragraph (a) provided that the rule was being issued pursuant to section 309 of the Riegle Act<sup>16</sup> and the Board's plenary regulatory authority to administer the FCU Act.<sup>17</sup> Paragraph (b) noted that the purpose of the rule was to establish an expeditious review

<sup>16</sup> 12 U.S.C. 4806(a).

<sup>17</sup> 12 U.S.C. 1766(a), 1789(a)(11).

<sup>15</sup> 82 FR 26391 (June 7, 2017).

process for a FICU to appeal a material supervisory determination to an independent supervisory panel and, if applicable, to the Board. Finally, paragraph (c) clarified that the rule only applied to the appeal of a material supervisory determination made by NCUA staff. The proposed rule did not apply to a decision to appoint a conservator or liquidating agent for a FICU, to order a FICU to take prompt corrective action, or to enforcement-related actions and decisions. The Board did not receive any comments on proposed § 746.101 and is finalizing this provision as proposed with minor wording changes for clarification.

#### Section 746.102 Definitions

Proposed § 746.102 set out definitions for certain terms relevant to the proposed rule. The Board received one substantive comment on this aspect of the proposed rule requesting that the Board add a definition of “senior staff” to clarify which individuals are eligible to be appointed by the NCUA Chairman to serve as members of the rotating pool of individuals able to be selected by the SRC Chairman to hear a particular appeal. The commenter expressed concerns that many of the procedural safeguards in the proposed rule designed to prevent conflicts of interest might actually result in NCUA staff with executive level knowledge and experience being ineligible to serve as part of the rotating pool. As a result, NCUA staff with the same level of knowledge and experience as the individuals making the initial material supervisory determination may be called upon to evaluate judgments and impressions of their peers which could create pressure to affirm that initial material supervisory determination.

The Board appreciates the commenter’s concerns and agrees that the SRC will function best if the most knowledgeable and experienced NCUA staff are reviewing appeals to the SRC. However, the Board does not believe that adding a definition of “senior staff” is either the most practical or effective solution for ensuring the competency and independence of members of the rotating pool. A definition of “senior staff” would necessarily need to be open-ended and vague, as opposed to being tied to particular titles or pay grades, to account for any operational changes at the NCUA, as well as to ensure that there is a sufficiently broad group of individuals from which the NCUA Chairman can select members of the rotating pool. As a result, the Board believes that any definition of “senior staff” would almost certainly lack the clarity that the commenter seeks.

Therefore, the Board will not define “senior staff” in the final rule. The determination of which individuals are considered “senior staff” eligible to be appointed to the rotating pool will rest solely within the discretion of the NCUA Chairman.

The Board did not receive any other substantive comments on proposed § 746.102 and is finalizing this provision as proposed with minor modifications. The Board is removing the definitions of “petitioner” and “respondent” to reflect the fact that a program office will no longer be eligible to appeal an adverse decision by the Director of E&I or the SRC. The Board is adopting this policy change in response to concerns raised by the commenters that are discussed in more detail below. The Board has replaced the words “petitioner” and “respondent” with “insured credit union” and “program office” where appropriate throughout the final rule.

#### Section 746.103 Material Supervisory Determinations

Proposed § 746.103 set out a general definition of “material supervisory determination” and provided a list of examples. The proposed rule defined “material supervisory determination” to mean a written decision by a program office that may significantly affect the capital, earnings, operating flexibility, or that may otherwise affect the nature or level of supervisory oversight of a FICU. The Board intended this general definition to be broad, capturing most agency decisions where independent appeals procedures did not exist, and as consistent with the definitions adopted by the Federal banking agencies as possible taking into consideration any operational differences between those agencies and the NCUA. Commenters generally supported this aspect of the proposed rule, highlighting the importance of significantly expanding the ability of FICUs to appeal agency decisions to the SRC and the Board. Accordingly, the Board is adopting the general definition of “material supervisory determination” set out in § 746.103 substantially as proposed with modifications for clarity.

The Board is modifying § 746.103(a) to clarify that the SRC appeals procedures do not apply to agency decisions that have been committed to the sole discretion of the appropriate program office director. While the Board seeks to provide FICUs with the greatest possible opportunity to seek agency review of material supervisory determinations, some agency decisions require significant expertise that is unique to a particular program office or

must be made with such finality that the SRC appeals procedures would be inappropriate. Accordingly, the Board is revising the general definition of “material supervisory determination” in the final rule to read “a written decision by a program office (unless ineligible for appeal) that may significantly affect the capital, earnings, operating flexibility, or that may otherwise affect the nature or level of supervisory oversight of a FICU.” In cases where an agency decision has been committed to the sole discretion of the program office, a FICU that receives an adverse decision could potentially seek judicial review of the agency decision under the Administrative Procedure Act (APA).<sup>18</sup>

The Board is also modifying § 746.103(a) to clarify that a decision by the reviewing authority (*i.e.*, the appropriate program office director, the Director of E&I, the SRC, or the Board) to dismiss an appeal will be considered a “material supervisory determination.” Allowing the reviewing authority to dismiss an appeal avoids unnecessary administrative burden on the NCUA caused by inconsequential disputes and reinforces the Board’s longstanding policy that supervisory disputes should be resolved at the program office level as often as possible. However, the Board also believes that it is important to counterbalance this ability of the reviewing authority to dismiss an appeal with the right of a FICU to appeal a wrongful dismissal. Accordingly, should the Director of E&I, the SRC, or the Board determine that dismissal was inappropriate under the circumstances, the reviewing authority will address appeal on its merits without referring the matter back to the original reviewing authority that dismissed the appeal.<sup>19</sup> The Board is making a similar change to § 746.104(b) which addresses dismissal and withdrawal.

This clarification is particularly necessary to address cases where the reviewing authority dismisses an appeal

<sup>18</sup> 5 U.S.C. 704 (permitting judicial review of a final agency action).

<sup>19</sup> Unlike Federal courts of appeal, which review factual determinations by a Federal district court for clear error, the Director of E&I, the SRC, and the Board review the factual basis of an appeal *de novo*. Accordingly, while the Board encourages a FICU to resolve all supervisory disputes at the examiner or Regional Office level as often as possible, there is little merit to sending an appeal back to the reviewing authority that made the determination that an agency decision was not a “material supervisory determination.” See *e.g.* *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (“We are also aware that we review the District Court’s findings only for ‘clear error.’ In applying this standard, we, like any reviewing court, will not reverse a lower court’s finding of fact simply because we ‘would have decided the case differently.’”).

because an agency decision is not a “material supervisory determination.” The threshold test for determining whether an agency decision is appealable to the SRC is whether it is a “material supervisory determination.” An agency decision is only a “material supervisory determination” if it has a significant impact on capital, earnings, operating flexibility, or the nature or level of supervisory oversight of a FICU. Terms like “significant” are difficult to define in the abstract but an agency decision is most likely to be “significant” if it has an actual effect in some direct and immediate way on the FICU’s capital, earnings, operating flexibility, or the nature or level of supervisory oversight of the FICU. An agency decision that requires the FICU to incur substantial costs would be the clearest example of a “material supervisory determination.” In contrast, an agency decision where the harm is more speculative, such as an impact on long-term growth strategies, would likely not be a “material supervisory determination.” In each case, it will be the responsibility of the reviewing authority to determine whether an agency decision meets this threshold test. If the agency decision does not, the reviewing authority may dismiss the appeal. Accordingly, the Board believes it is necessary to allow a FICU to appeal that agency decision to ensure accountability and enhance due process.

#### Examination Ratings

Proposed § 746.103(a)(1) listed a composite examination rating of 3, 4, or 5 as an example of a material supervisory determination. Proposed § 746.103(b)(1), however, excluded a composite examination rating of 1 or 2 because the Board did not believe that a composite examination rating of 2 would have a significant impact on the supervisory oversight of a FICU. Similarly, proposed § 746.103(b)(2) excluded component examination ratings unless such ratings had a significant adverse effect on the nature or level of supervisory oversight of a FICU. Several commenters objected to these aspects of the proposed rule, highlighting that the Federal banking agencies permit insured depository institutions to appeal all composite and component examination ratings and urging the Board to adopt a similar approach.

However, the Board does not believe that adopting an approach that is entirely consistent with the Federal banking agencies is appropriate. The NCUA uses a credit union examination as a diagnostic tool to identify potential operational vulnerabilities and address

regulatory compliance concerns that could impact the safety and soundness of a FICU. While a FICU’s composite examination rating may change if an NCUA examiner identifies an emerging trend that increases a FICU’s risk profile, a change in an examination rating does not, in and of itself, typically have a significant impact on a FICU until the FICU reaches a composite examination rating of 3, 4, or 5. Furthermore, a change in a component examination rating hardly impacts a FICU unless that particular component examination rating is connected with some specified regulatory relief initiative by the NCUA, such as the ability to participate in an extended examination cycle.<sup>20</sup>

In contrast, the FDIC uses composite and component examination ratings issued by the respective Federal banking agencies (including the FDIC) as a basis for determining an insured depository institution’s Federal deposit insurance premium.<sup>21</sup> Under FDIC’s risk-based assessment system, an insured depository institution’s weighted average component examination rating is used along with other financial ratios and risk indicators to determine the initial base assessment rate.<sup>22</sup> This initial base assessment rate is then used to determine an insured depository institution’s quarterly Federal deposit insurance premium which can vary within an established range based on the institution’s composite examination rating.<sup>23</sup> As a result of these complex formulas, any change in an insured depository institution’s composite or component examination ratings could have a significant impact on the amount of its Federal deposit insurance premium.

Put differently, a change in a composite or component examination rating is not a “material supervisory determination” for a FICU until the FICU reaches a composite examination rating of 3, 4, or 5, or unless the particular component examination rating changes the nature or level of supervisory oversight of the FICU. Meanwhile, a change in a composite or component examination may be a “material supervisory determination” for an insured depository institution

<sup>20</sup> See e.g. Letter to Credit Unions 16–CU–12 (Dec. 2016) (announcing an extended examination cycle for certain FICUs with a composite examination rating of 1 or 2 with a corresponding management component rating of 1 or 2).

<sup>21</sup> See 12 CFR 327.16. The term “insured depository institution” refers to a bank or savings association the deposits of which are insured by the FDIC under the Federal Deposit Insurance Act. See 12 U.S.C. 1813(c).

<sup>22</sup> *Id.*

<sup>23</sup> See 12 CFR 327.10.

because it can lead to an increase in that institution’s Federal deposit insurance premium. In light of this important distinction, the Board does not believe that absolute consistency with the Federal banking agencies is necessary to provide FICUs with enhanced due process. Accordingly, the Board adopts this aspect of § 746.103 as proposed.

#### Restitution Orders Pursuant to the Truth in Lending Act and Regulation Z

Proposed § 746.103(a)(4) listed a restitution order pursuant to the Truth in Lending Act (TILA)<sup>24</sup> and its implementing regulation, Regulation Z,<sup>25</sup> as an example of a material supervisory determination. By doing so, the Board intended to signal to FICUs that any determination by NCUA examiners or by OCFPA regarding a FICU’s compliance with Federal consumer financial law,<sup>26</sup> as that term is defined in the Consumer Financial Protection Act of 2010,<sup>27</sup> would be appealable to the SRC under the proposed rule. However, the Board recognizes that by specifically discussing restitution orders under TILA and Regulation Z, the Board may have given the false impression that other determinations regarding other aspects of TILA and Regulation Z or other Federal consumer financial laws would not be appealable to the SRC and the Board. Accordingly, the Board is revising this aspect of proposed § 746.103 to clarify that all agency decisions regarding a FICU’s compliance with Federal consumer financial law are appealable to the SRC and the Board.

#### Prompt Corrective Action

Proposed § 746.103(b)(5) excluded from the definition of material supervisory determination a directive imposing prompt corrective action under section 216 of the FCU Act.<sup>28</sup> One commenter objected to this exclusion, arguing that the significance and

<sup>24</sup> 15 U.S.C. 1601 *et seq.*

<sup>25</sup> 12 CFR part 1026.

<sup>26</sup> The term “Federal consumer financial law” means any provision of the Consumer Financial Protection Act, enumerated consumer laws, or any regulation issued by the Consumer Financial Protection Bureau. See 12 U.S.C. 5481(14). The term “enumerated consumer laws” refer to several Federal consumer protections statutes including the Consumer Leasing Act of 1976, the Electronic Fund Transfer Act, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, and the Truth in Lending Act. See 12 U.S.C. 5481(12). The NCUA has exclusive supervision and enforcement authority with respect to the Consumer Financial Protection Bureau for compliance with Federal consumer financial law for FICUs with assets of \$10 billion or less. See 12 U.S.C. 5516.

<sup>27</sup> Public Law 111–203, tit. X, 124 Stat. 1375, 1955 (July 21, 2010).

<sup>28</sup> 12 U.S.C. 1790d.

potential impact of such a directive warrants further review by the SRC to provide FICUs with enhanced due process. The Board disagrees. The current procedures for issuing a directive imposing prompt corrective action provide FICUs with significant procedural safeguards. A FICU may present written arguments against a proposed directive directly to the Board and request that the Board modify or rescind an existing directive at any time due to changed circumstances.<sup>29</sup> Such a request is automatically granted if it remains outstanding for more than 60 calendar days after receipt by the Board.<sup>30</sup> A FICU may also request a written recommendation from the NCUA Ombudsman, an impartial agency official who does not report directly or indirectly to any program office involved with the issuance of the directive, regarding a proposed directive or a pending request for modification or rescission of an existing directive.<sup>31</sup> The Board believes that these procedural safeguards provide FICUs with even more due process than the SRC appeals procedures.

The commenter also argued that allowing a FICU to appeal a directive imposing prompt corrective action to the SRC would be consistent with the approach adopted by the FDIC. However, proposed § 746.103(b)(5) is nearly identical to an exclusion adopted by the FDIC in its “Guidelines for Appeal of Material Supervisory Determinations,” (Guidelines) which establishes the FDIC’s Supervisory Appeals Review Committee (SARC) and sets out procedures for insured depository institutions to appeal material supervisory determinations by FDIC staff.<sup>32</sup> While the FDIC did adopt “catch all” language in its Guidelines that allows an insured depository institution to appeal an agency decision that may impact the institution’s “capital category for prompt corrective action purposes,” that language does not independently authorize an insured depository institution to appeal a directive imposing prompt corrective action. Rather, it allows an insured depository institution to appeal an underlying agency decision that could impact net worth,<sup>33</sup> which may cause

the institution to fall within a lower capital classification.<sup>34</sup> To avoid this kind of confusion, the Board specifically omitted this language from its definition of “material supervisory determination” in the proposed rule.

Because the Board already provides significant procedural safeguards for FICUs prior to issuing a directive imposing prompt corrective action that are more expeditious than the SRC appeals process and consistent with the practices of the Federal banking agencies, the Board does not believe that subjecting these agency decisions to the SRC appeals process would be appropriate. Accordingly, the Board is adopting § 746.103(b)(5) as proposed.

#### Enforcement Matters

Proposed § 746.103(b)(6) excluded from the definition of “material supervisory determination” all decisions to initiate formal enforcement actions. One commenter objected to this exclusion noting that the FDIC recently revised its Guidelines to allow insured depository institutions to appeal a decision regarding the institution’s level of compliance with a formal enforcement action. The commenter argued that the Board should similarly expand the definition of material supervisory determination for consistency with the FDIC. The Board disagrees. Compliance with a formal enforcement action is monitored by high-level NCUA staff within a program office in consultation with staff attorneys within the Office of General Counsel. Accordingly, the Board believes that FICUs already have significant procedural and structural safeguards with respect to formal enforcement matters such that subjecting these decisions to the SRC appeals process would be unnecessarily duplicative.

As the Board noted in the preamble to the proposed rule, once a formal enforcement action is initiated, the SRC appeals process is suspended regardless of how far along the FICU may be in that process. Once the formal enforcement action is resolved, the FICU may continue to seek redress through the SRC appeals process to the extent that any matters remain outstanding and were not addressed as part of the formal enforcement action. To avoid confusion, the Board is adopting a modification in the final rule to clarify when a formal enforcement action commences. A formal enforcement action begins when

earnings balance at quarter-end as determined under U.S. Generally Accepted Accounting Principles (U.S. GAAP). See 12 CFR 702.2(f).

<sup>34</sup> See 12 CFR part 702, subpart A (net worth classification).

the NCUA provides written notice to the FICU of a recommended or proposed formal enforcement action under section 206 of the FCU Act.<sup>35</sup> A FICU will be notified in writing that the NCUA has recommended or proposed a formal enforcement action. Other types of correspondence from the NCUA, such as letters requesting additional information or referencing a violation of law without an express statement that the NCUA has recommended or proposed formal enforcement action are not considered to constitute notice of a recommended or proposed formal enforcement action for purposes of the SRC appeals process.

#### Other Examples and Exclusions

Proposed § 746.103 included several other examples of and exclusions from the general definition of “material supervisory determination.” The examples and exclusions included matters specifically addressed by the Riegle Act and preliminary matters such as the scope and timing of supervisory contacts. The Board did not receive substantive comments on these examples and exclusions. Accordingly, the Board is adopting the examples set out in proposed § 746.103(a)(2), (3), and (5) and the exclusions set out in proposed § 746.103(b)(3), (4), (7), (8), (9), and (10) as proposed.

#### Section 746.104 General Provisions

Proposed § 746.104 set out general provisions to be applied by each reviewing authority during the SRC appeals process. The proposed rule established an explicit standard of review to ensure that the NCUA’s policies and procedures were applied fairly and consistently. The proposed rule also addressed the effect of an appeal on the commencement of enforcement actions, applications for additional authority, and waiver requests. The Board received several comments on various aspects of proposed § 746.104. As discussed in more detail below, the Board is adopting § 746.104 as proposed with minor modifications for clarity.

#### Standard of Review

Proposed § 746.104(a) established a *de novo* standard of review for each stage of the SRC appeals process. The standard of review required each reviewing authority to make an independent decision regarding whether the material supervisory determination was correct and not just reasonable. If the appropriate reviewing authority determined that the material supervisory determination was

<sup>35</sup> 12 U.S.C. 1786.

<sup>29</sup> 12 CFR 747.2002(a)(1) and (f).

<sup>30</sup> 12 CFR 747.2002(f).

<sup>31</sup> 12 CFR 747.2002(g).

<sup>32</sup> See 60 FR 15923 (Mar. 28, 1995) (establishing the FDIC’s intra-agency appeals procedures under the Riegle Act). The FDIC recently adopted amended Guidelines on July 18, 2017 following publication of the proposed rule. See 82 FR 34522 (July 25, 2017).

<sup>33</sup> “Net worth” for prompt corrective action purposes is defined principally as a FICU’s retained

incorrect, they would render a corrected determination. Commenters generally supported this explicit standard of review for each stage of the SRC appeals process. However, commenters requested that the Board modify § 746.104(a) to explicitly state that a decision by a FICU to forgo optional review by the Director of E&I would not prejudice the FICU in an appeal to the SRC or the Board. While the Board believes that the retaliation provision in proposed § 746.112 was sufficient to address this issue, the Board understands the commenters' concerns and is adopting a modification to § 746.104(a) in the final rule to clarify that a decision to bypass optional review by the Director of E&I may not be used by the SRC or the Board as a basis to deny an otherwise proper appeal.

Commenters also requested that the Board clarify what constitutes the administrative record to be reviewed by the relevant reviewing authority at each stage of the SRC appeals process. While the Board believes that several sections of the proposed rule addressed this issue, such as proposed § 746.106(c), which outlined the basis for review of a material supervisory determination by the Director of E&I, the Board recognizes that a more general statement regarding the administrative record may be necessary to provide FICUs with greater clarity and enhanced due process. Accordingly, the Board is adopting a new paragraph in the final rule, § 746.104(f), to explicitly describe what information is part of the administrative record to be reviewed by the reviewing authority at each stage of the SRC appeals process. For most appeals, the administrative record consists entirely of written submissions by the petitioning FICU and the appropriate program office. In cases involving a federally insured, State-chartered credit union (FISCU), the administrative record may also include written submissions by the appropriate State supervisory authority (SSA). A decision by an intermediate reviewing authority, such as the Director of E&I or the SRC, is also part of the administrative record. Furthermore, the administrative record includes a transcript of any oral hearing before the SRC or the Board.

One commenter specifically requested that the Board require that any consultations between a reviewing authority and another party must take the form of written submissions that would become part of the administrative record. The proposed rule explicitly allowed the Director of E&I to consult with the FICU, the program office, or any other party prior to rendering a

decision. The consultation process was meant to allow the Director of E&I to get clarification on a written submission or seek advice from a program office, such as the Office of General Counsel, on a technical or legal matter outside of the Director of E&I's area of expertise. In fact, the Board anticipates that much of the consultation process will involve outreach to staff within the Office of General Counsel to seek legal opinions on various regulatory matters which may be subject to one or more evidentiary privileges. Accordingly, the Board does not believe that it is appropriate to include such communications as part of the administrative record.

#### Dismissal and Withdrawal

Proposed § 746.104(b) set out the conditions under which a reviewing authority could dismiss the appeal of a material supervisory determination. Under the proposed rule, a reviewing authority could dismiss an appeal if it was not timely filed, if the basis for the appeal was not discernable, if the petitioner asked to withdraw the request in writing, or for reasons deemed appropriate by the reviewing authority, including, for example, if the petitioner acted in bad faith by knowingly withholding evidence from the appropriate reviewing authority. The Board cautioned that FICUs are encouraged to make good faith efforts to resolve supervisory issues at the most direct level possible, starting with their examinations or program office staff, and as efficiently as possible. Accordingly, the Board stated that if a FICU engaged in bad faith by knowingly withholding evidence from an examiner, the program office, the Director of E&I, the SRC, or the Board, withholding that evidence would result in dismissal of the appeal. The Board did not receive substantive comments on this aspect of the proposed rule and is adopting § 746.104(b) substantially as proposed with one clarification to address the appeal of a dismissal for failure to state a material supervisory determination discussed in the section analysis of § 746.103 above.

#### Discovery

Proposed § 746.104(c) prohibited discovery or any similar process in connection with an appeal. Instead, each appeal was based entirely on written submissions to the reviewing authority and, where permitted, oral presentations to the SRC and the Board. The Board did not receive substantive comments on this aspect of the proposed rule and is, therefore,

Accordingly, the Board is adopting § 746.104(c) as proposed.

#### Enforcement Matters

Proposed § 746.104(d) clarified that no provision of the proposed rule was intended to affect, delay, or impede any formal or informal supervisory or enforcement action in progress or affect the NCUA's authority to take any supervisory or enforcement action against a FICU. The purpose of this provision was to ensure that appeals to the SRC and enforcement matters remained separate processes governed by different rules. The Board received one comment on this specific aspect of the proposed rule. The commenter requested that the Board modify § 746.104(d) to allow a FICU to request a stay of a supervisory or enforcement action during the pendency of an appeal consistent with recently adopted amendments to the FDIC's Guidelines. The Board has carefully reviewed the recent amendments to the FDIC's Guidelines and believes that proposed § 746.104(d) is consistent with the overall approach adopted by the FDIC. While the FDIC, in response to a public comment, noted that the Guidelines do not prohibit an insured depository institution from requesting a stay from a Division Director, the Guidelines make abundantly clear that the FDIC does not generally stay supervisory actions during the pendency of an appeal.<sup>36</sup> Similarly, while the proposed rule does not explicitly prohibit a FICU from requesting a stay of a supervisory or enforcement action during the pendency of an appeal, such a stay would be reluctantly countenanced and rarely granted. Accordingly, the Board adopts § 746.104(d) as proposed.

#### Additional Authority and Waiver Requests During the Pendency of an Appeal

Proposed § 746.104(e) required a program office to delay action on a waiver request or an application for additional authority that could be affected by the outcome of an appeal unless the FICU specifically requested that the waiver request or application for additional authority be considered notwithstanding the appeal. The proposed rule suspended any deadline for a program office to make a determination on a waiver request or application for additional authority set out in any part of the NCUA's regulations until the FICU exhausted its administrative remedies under the SRC appeals process or was no longer eligible to pursue an appeal. The

<sup>36</sup> 82 FR 34522, 34526 (July 25, 2017).

purpose of this provision was to avoid situations where a FICU receives an adverse determination on a waiver request or an application for additional authority based on a material supervisory determination, only to have the material supervisory determination subsequently reversed by the SRC. It also prevented a waiver request or an application for additional authority from being automatically denied by operation of other parts of the NCUA's regulations. The Board did not receive comments on § 746.104(e) and is adopting this provision as proposed.

#### Section 746.105 Procedures for Reconsideration From the Appropriate Program Office

Proposed § 746.105 set out procedures for a FICU to request reconsideration from the appropriate program office. Prior to requesting review by the Director of E&I or filing an appeal with the SRC, the proposed rule required a FICU to make a written request for reconsideration from the appropriate program office within 30 calendar days after receiving an examination report or other written communication containing a material supervisory determination. The request for reconsideration needed to include a statement of the facts on which the request for reconsideration was based, a statement of the basis for the material supervisory determination and the alleged error in the determination, and any other evidence relied upon by the FICU that was not previously provided to the appropriate program office making the material supervisory determination.

Under the proposed rule, the appropriate program office was required to reach a decision on a request for reconsideration within 30 calendar days after receiving the request. If a written decision was not issued within 30 calendar days after receiving a request for reconsideration, the request was automatically deemed to have been denied. Any subsequent request for reconsideration was to be treated as a request for review by the Director of E&I or an appeal to the SRC as determined by the Secretary of the Board after consultation with the FICU. As the Board explained in the preamble to the proposed rule, these procedures largely follow NCUA's long standing policy of requiring a FICU to first request reconsideration from the program office prior to filing an appeal with the SRC. This is to encourage a program office and a FICU to resolve disputes informally and as expeditiously as possible.<sup>37</sup>

Several commenters requested that the Board remove the requirement that a FICU seek reconsideration from the appropriate program office prior to a request for review by the Director of E&I or an appeal to the SRC. Alternatively, some commenters requested that the Board permit a FICU to appeal time-sensitive matters directly to the SRC. As the Board first explained in IRPS 94-2,<sup>38</sup> it is NCUA policy to require a FICU to attempt to resolve supervisory disputes with the program office before invoking the jurisdiction of the SRC. Review by the SRC is disruptive to the normal organizational structure of NCUA and should only be reserved for those issues that cannot be resolved in good faith between a program office and the FICU. Requiring a FICU to request reconsideration as a prerequisite before obtaining further review under the SRC appeals process preserves the ordinary relationship between FICUs and program offices and ensures that only serious disputes are elevated to the SRC. Accordingly, the Board is adopting § 746.105 as proposed.

#### Section 746.106 Procedures for Requesting Review by the Director of the Office of Examination and Insurance

Proposed § 746.106 set out procedures for requesting review by the Director of E&I, or his or her designee. Prior to filing an appeal with the SRC, but after receiving a written decision by the appropriate program office in response to a request for reconsideration, the proposed rule allowed a FICU to make a written request for review by the Director of E&I of the program office's material supervisory determination. The proposed rule required such a request to be made in writing within 30 calendar days after receiving a final decision on reconsideration by the appropriate program office. The request for review needed to include a statement that the FICU is requesting review by the Director of E&I, a statement of the facts on which the request for review was based, a statement of the basis for the material supervisory determination and the alleged error in the determination, any evidence relied upon by the FICU that was not previously provided to the program office making the material supervisory determination, and a certification from the FICU's board of directors authorizing the request for review to be filed.

Under the proposed rule, review of a material supervisory determination by the Director of E&I was based on written submissions provided with the initial documents requesting review. The

Director of E&I could request additional information from any party within 15 calendar days after the Secretary of the Board received the request for review and the relevant party had 15 calendar days to submit the requested information. The Director of E&I also had the authority to consult with the FICU and the program office jointly or separately, and with any other party prior to issuing a written decision. The proposed rule required the Director of E&I to issue a written decision within 30 calendar days after the Secretary of the Board receives the request for review. However, the deadline would be extended by the time period during which the Director of E&I gathered additional information from the FICU or the program office. If a written decision was not issued within 30 calendar days, or as extended by any additional time during which information was being gathered, the request for review was automatically deemed to have been denied. Any subsequent request for review was to be treated as an appeal to the SRC.

The Board received one substantive comment regarding the ability of the Director of E&I to consult with any party, including the FICU or the program office, prior to issuing a written decision. The commenter requested that these consultations take the form of written submissions that would become part of the administrative record. As the Board discussed above in the section analysis of § 746.104, the Board does not believe that consultations should be part of the administrative record. The Board sees little merit in including these kinds of communications as part of the administrative record because they will already be reflected in the initial submissions of the FICU and the program office and the final decision of the Director of E&I. Accordingly, the Board is adopting § 746.106 as proposed.

#### Section 746.107 Procedures for Appealing to the Supervisory Review Committee

Proposed § 746.107 set out procedures for appealing a material supervisory determination to the SRC. The proposed rule required a FICU to file an appeal within 30 calendar days after receiving a written decision by the appropriate program office on reconsideration or, if the FICU requested review by the Director of E&I, within 30 calendar days after a final decision made by the Director of E&I, or his or her designee. The appeal documents submitted to the SRC needed to include a statement that the FICU was filing an appeal with the SRC, a statement of the facts on which

<sup>37</sup> 82 FR 26391, 26395 (June 7, 2017).

<sup>38</sup> 59 FR 59437 (Nov. 17, 1994).



the appeal is based, a statement of the basis for the material supervisory determination to which the FICU objected and the alleged error in the determination, any other evidence relied upon by the FICU, and a certification that the FICU's board of directors authorized the appeal to be filed.

The conduct of the appeal was primarily by oral hearing before the SRC at NCUA headquarters in Alexandria, Virginia, except where the FICU requested that an appeal be based entirely on the written record. At the oral hearing, the FICU and the appropriate program office could introduce written evidence or witness testimony during each side's oral presentation. The SRC was also permitted to ask questions of any individual, including witnesses, appearing before it. Prior to the oral hearing, both the FICU and the program office would submit notices of appearance identifying no more than two individuals who would be representing them in the oral hearing, including counsel. However, either party could request permission from the SRC to allow additional individuals to appear before the SRC. The SRC was required to reach a decision within 30 calendar days after an oral presentation or, if the appeal was based entirely on the written record, within 30 calendar days from the date of receipt of the appeal. If a written decision was not issued within 30 calendar days, the appeal was automatically deemed to have been denied.

The proposed rule also required the SRC to publish its decisions on the NCUA's Web site with appropriate redactions to protect confidential or exempt information. In cases where redaction was insufficient to prevent improper disclosure, published decisions could be presented in summary form. If an appeal involved the interpretation of material supervisory policy or generally accepted accounting principles, the SRC was required to notify the Director of E&I and solicit input from E&I prior to rendering a decision. Likewise, if an appeal involved an interpretation of NCUA's regulations, the FCU Act, or any other law applicable to FICUs, the SRC was required to notify the General Counsel and solicit input from the Office of General Counsel. Finally, the proposed rule authorized the SRC Chairman to issue rules governing the operations of the SRC, to order that material be kept confidential, or to consolidate appeals that presented similar issues of law or fact. The Board is adopting § 746.107 substantially as

proposed with minor modifications discussed below.

The Board received four substantive comments on this aspect of the proposed rule. One commenter requested that the Board remove the ability of the program office to appeal a decision by the Director of E&I to the SRC. The commenter argued that it would be inappropriate to allow a program office to challenge a determination by the central head of examination policy and that only a FICU should have the ability to appeal a decision by the Director of E&I. The Board agrees with the commenter and has accordingly removed the ability of the program office to appeal a decision by the Director of E&I to the SRC in the final rule. For the same reasons, the Board has also removed the ability of the program office to appeal an adverse decision by the SRC to the Board under § 746.108.

Another commenter requested that the Board include, as part of the publication of a written decision by the SRC, a synopsis of each appeal and a summary of the final result on NCUA's Web site. The Board agrees with the commenter and has accordingly added language in the final rule indicating that a synopsis of each appeal and a summary of the final result will be published on NCUA's Web site along with the written decision by the SRC with appropriate redactions. The Board believes that publishing a synopsis and the final result will make it easier for a FICU to research previous SRC decisions which enhances the precedential value of each SRC decision and encourages consistent results throughout the SRC appeals process. For the same reasons, the Board will also publish a synopsis of each appeal and a summary of the final result for appeals from the SRC to the Board under § 746.110.

A third commenter requested that the Board expand the publication of written decisions by the SRC to include publication of appeals that were rejected without being considered by the SRC. The commenter argued that allowing stakeholders to determine the number of petitions granted or rejected enhances the ability of stakeholders to evaluate the efficacy of the SRC appeals process. However, the Board does not believe that publishing rejected appeals will necessarily achieve either of those goals. The Board anticipates that a large majority of rejected appeals will involve a FICU failing to file a timely appeal. The Board sees little merit in publishing these determinations on NCUA's Web site because those determinations are of little precedential value to FICUs and

give little, if any, insight into the SRC appeals process. Accordingly, neither the SRC nor the Board will not publish rejected appeals.

Finally, a commenter objected to the ability of the SRC Chairman to issue supplemental rules governing the operations of the SRC. The commenter argued that while the SRC Chairman may use this authority to ensure the SRC appeals process operates efficiently, the broad authority to adopt supplemental rules invites potential misuse of that authority. The Board disagrees. The substantive appellate rights of each FICU are set out in the final rule. The SRC Chairman may not adopt any supplemental rules that would limit or alter those rights in any way. For example, the SRC Chairman could not adopt a supplemental rule that would conflict with the requirement in § 746.107(b) to submit certain information as part of an appeal to the SRC. Instead, the SRC Chairman may only adopt rules that further define, clarify, or simplify the SRC appeals process. For example, the SRC Chairman could adopt a supplemental rule to allow a FICU to make an oral presentation through video conference rather than in person at NCUA headquarters in Alexandria, Virginia. As a result, the Board sees little opportunity for the SRC Chairman to misuse the authority to adopt supplemental rules and declines to limit the authority of the SRC Chairman to issue such rules. Should a FICU believe that a particular rule adopted by the SRC Chairman is an inappropriate exercise of the SRC Chairman's authority, the FICU may appeal that rule to the Board as part of its appeal of the SRC decision.

#### Section 746.108 Composition of the Supervisory Review Committee

Proposed § 746.108 set out rules governing the formation and composition of the SRC. Under the proposed rule, the NCUA Chairman would appoint not less than eight individuals from among the NCUA's central and regional offices to serve along with the SRC Chairman as a rotating pool from which individual members could be selected by the SRC Chairman to serve as the three-member SRC for a particular appeal. Each member of the rotating pool, with the exception of the SRC Chairman, was to serve a one year term with eligibility to be reappointed by the NCUA Chairman for additional terms. Certain individuals, however, such as the General Counsel and Executive Director, were ineligible to serve as members of the rotating pool and, accordingly,

could not be selected by the SRC Chairman to serve on the SRC for any particular appeal.

The Secretary of the Board was to serve as permanent SRC Chairman and the Special Counsel was to serve as a permanent non-voting member of each SRC to offer advice to the SRC on procedural and legal matters. When selecting SRC members to hear a particular appeal, the SRC Chairman was required to consider any real or apparent conflicts of interest that could impact the SRC member's objectivity as well as that individual's experience with the subject matter of the appeal. Members of the program office that rendered the material supervisory determination that was the subject of the appeal were ineligible to serve as SRC members for that appeal. Likewise, E&I staff were ineligible to serve as SRC members for appeals where the FICU appealed a decision by the Director of E&I. Commenters generally favored this aspect of the proposed rule but raised some concerns and offered suggested modifications discussed below. With the exception of a minor modification to grant the NCUA additional flexibility and the increase of the term limits for members of the rotating pool, the Board is adopting § 746.108 as proposed.

#### Formation and Composition of the Committee Pool

Proposed § 746.108(a) established a rotating pool of at least eight senior staff appointed by the NCUA Chairman from NCUA's central and regional offices who may be selected by the SRC Chairman to serve on a three-member panel to hear a particular appeal. The Board received several comments on this aspect of the proposed rule. One commenter requested that the Board include a representative from an SSA as part of the rotating pool similar to the representative from the State Liaison Committee who serves on the Federal Financial Institutions Examination Council (FFIEC).<sup>39</sup> Another commenter requested that the Board allow senior credit union executives to serve as part of the rotating pool similar to establishing a jury of credit union peers to judge appeals of material supervisory determinations. The Board appreciates the commenters' suggestions but believes that review by senior NCUA staff who are not involved in the material supervisory determination at issue is more consistent with the Riegle Act, which requires the Board to establish an independent *intra-agency* appellate process.

The Board is adopting one modification to proposed § 746.108(a), however, to address the closure and consolidation of various program offices to avoid the need for future technical corrections to the SRC appeals rule. The proposed rule specifically listed several central offices from which the NCUA Chairman could select senior staff to serve on the rotating pool. However, on July 21, 2017, the Board announced a major restructuring initiative including the consolidation of two Regional Offices and the creation of the Office of Credit Union Resources and Expansion which could eliminate at least one central office listed in the proposed rule. Accordingly, the Board is modifying § 746.108(a) in the final rule to eliminate any reference to specific central offices. Instead, the regulatory text will refer, generally, to senior staff in the central and regional offices to allow for additional agency flexibility.

#### Term of Office for Members of the Committee Pool

Proposed § 746.108(b) limited each member of the rotating pool to a one year term with the option of being reappointed by the NCUA Chairman for additional terms. This was to ensure greater accountability among members of the rotating pool. However, one commenter expressed concerns that such an approach could lead to a lack of consistency in SRC decisions and requested that the Board modify this provision to establish permanent members of the rotating pool with the ability to appoint alternatives in the event of a conflict of interest. Another commenter requested that the Board adopt a minimum five year term for members of the rotating pool. The Board is mindful of commenters' concerns regarding the need to retain experienced senior staff as part of the rotating pool to ensure greater consistency in SRC decisions. Accordingly, the Board is adjusting the term limit in § 746.108(b) to a two-year term with the option of reappointment by the NCUA Chairman after the expiration of the two-year term.

#### Selection Criteria

Proposed § 746.108(d) required the SRC Chairman when selecting members from the rotating pool to serve as the SRC for a particular appeal to consider any real or apparent conflicts of interest that may impact the objectivity of the member as well as the individual's experience with the subject matter of the appeal. One commenter requested that the Board also include language requiring the SRC Chairman to also consider any perceived conflict of interest, in addition to a real or apparent

conflict of interest, in selecting members of the rotating pool to hear a particular appeal. Functionally, this would allow a FICU to veto the selection of a member of the SRC panel that the FICU subjectively feels cannot render an impartial decision. While the Board seeks to adopt a process that is transparent and provides FICUs enhanced due process, adopting such a subjective disqualification standard would unnecessarily complicate the SRC appeals process by opening every SRC decision to challenge from a FICU that subjectively felt that a particular member of the SRC panel was biased against the FICU regardless of any objective evidence to indicate a real or potential conflict of interest. Accordingly, the Board is adopting § 746.108(d) as proposed.

#### Section 746.109 Procedures for Appealing to the NCUA Board

Proposed § 746.109 set out procedures for appealing an adverse decision by the SRC to the Board. The proposed rule required a FICU or program office to file an appeal within 30 calendar days after receiving an adverse decision from the SRC. Under the proposed rule, an appeal to the Board was not an automatic right. Instead, the proposed rule required at least one Board Member to agree to hear an appeal within 20 calendar days of receiving a request for an appeal to the Board. If at least one Board Member did not agree to hear an appeal within 20 calendar days, the request for an appeal was automatically deemed to have been denied. If a FICU or program office failed to file an appeal within 30 calendar days after receiving an adverse decision from the SRC, the FICU was deemed to have waived all claims pertaining the subject matter of the appeal. Consistent with IRPS 12-1, an adverse decision by the SRC on the denial of a TAG reimbursement was not reviewable by the Board.

The appeal documents submitted to the Board needed to include a statement of the facts on which the appeal was based, a statement of the basis for the material supervisory determination to which the FICU or program office objected and the alleged error in the determination, and (for FICUs) a certification that the FICU's board of directors authorized the appeal to be filed with the Board. For a FICU or program office requesting an oral hearing, the appeal documents also needed to include a separate written document requesting an oral hearing and demonstrating good cause why an appeal could not be presented adequately in writing. A FICU or program office could amend or

<sup>39</sup> 12 U.S.C. 3303(a)(6), 3306.

supplement its appeal in writing within 15 calendar days from the date the Secretary of the Board received the appeal. If the FICU amended or supplemented its appeal, the program office was permitted to file responsive materials within 15 calendar days from the date the Secretary of the Board received the amended or supplemental information.

The Board received one substantive comment regarding this aspect of the proposed rule. The commenter argued that a FICU should be allowed to appeal all adverse decisions from the SRC to the Board as a matter of right rather than at the discretion of one Board Member. The commenter reasoned that requiring the Board to hear all appeals would serve an important agency goal of alerting the Board to emerging trends in supervisory policy.<sup>40</sup> The Board disagrees. As the Board stated in the preamble to the proposed rule, the purpose of this provision is to reserve Board review only for those cases involving significant issues of supervisory policy that cannot be addressed at a lower appellate level or that may require further Board action such a rulemaking to clarify an ambiguity in one of the NCUA's regulations.<sup>41</sup> For all other supervisory issues, the Director of E&I, the central office responsible for supervisory policy, is in the best position to respond to emerging trends through the issuance of guidance documents. Accordingly, the Board is adopting § 746.109 as proposed.

#### Section 746.110 Administration of the Appeal

Proposed § 746.110 set out procedures for appealing an adverse decision from the SRC to the Board based solely on the written record. Under the proposed rule, the Board or the Special Counsel could request additional information to be provided in writing from either party within 15 calendar days after: (1) Either the FICU or the program office filed an appeal with the Secretary of the Board; (2) either the FICU or the program office filed an amendment or supplemental information; or (3) either the FICU or the program office filed responsive materials, whichever was later. The

Board was required to reach a decision within 90 calendar days from the date of receipt of the appeal. If a written decision was not issued within 90 calendar days, the appeal was automatically deemed to have been denied. The proposed rule also required the Board to publish its decisions on the NCUA's Web site with appropriate redactions to protect confidential or exempt information. In cases where redaction was insufficient to prevent improper disclosure, published decisions could be presented in summary form. The Board did not receive substantive comments on this aspect of the proposed rule and is adopting § 746.110 with a slight modification to the provision regarding publication of decisions as discussed in the section analysis of § 746.107.

#### Section 746.111 Oral Hearing

Proposed § 746.111 set out procedures for appealing an adverse decision from the SRC to the Board through an oral hearing. Under the proposed rule, a petitioner was required to request an oral hearing before the Board as part of the initial appeal documents submitted in accordance with § 746.109. The proposed rule required the request for an oral hearing to take the form of a separate written document titled "Request for Oral Hearing" and show good cause why the appeal could not be presented adequately in writing. Similar to a decision to hear an appeal, the proposed rule required at least one Board Member to approve an oral hearing within 20 days after receiving the request for an oral hearing and direct the Secretary of the Board to serve notice of the Board's determination in writing to both the FICU and the program office. In the event that a request for an oral hearing was denied, the Board could review an appeal based entirely on the written record provided that at least one Board Member agreed to hear the appeal.

The proposed rule required the Secretary of the Board to notify the parties of the date and time for the oral hearing making sure to provide reasonable lead time and scheduling accommodations. In most cases the oral hearing was to be held at NCUA headquarters in Alexandria, Virginia. However, the proposed rule allowed the NCUA Chairman to permit an oral hearing to be conducted through teleconference or video conference in his or her sole discretion. The parties were required to submit a notice of appearance identifying the individuals who would be representing them in the oral hearing with each party designating no more than two individuals without

the prior consent of the NCUA Chairman. The oral hearing was to consist entirely of oral presentations. The proposed rule expressly prohibited the introduction of written evidence or witness testimony at the oral hearing. The proposed rule also required the oral hearing to be on the record and transcribed by a stenographer, who was to prepare a transcript of the proceedings. Finally, the proposed rule required the Board to maintain the confidentiality of any information or materials submitted in the course of the proceedings subject to applicable Federal disclosure laws.

The Board received one comment on this specific aspect of the proposed rule. The commenter raised concerns regarding the limitation on the introduction of written evidence or witness testimony at the oral hearing. The commenter argued that an oral presentation cannot provide the same level of detail as a written brief on the merits of a particular appeal and, therefore, the Board should permit the introduction of written evidence at the oral hearing. Furthermore, the commenter argued that the Board should permit witness testimony, where appropriate, to accommodate circumstances where an expert may have special knowledge that could assist the Board with a particular appeal. The commenter's arguments are misplaced. The proposed rule did not prohibit the submission of a written brief on the merits or expert testimony. Instead, the proposed rule simply required a written brief or expert testimony to be submitted as part of the initial appeal documents provided to the Secretary of the Board in accordance with § 746.109. The purpose of the prohibition on submitting written evidence or witness testimony at the oral hearing was to avoid conducting a full administrative trial in front of the Board. Rather, the Board was to serve as an appellate body hearing oral arguments and deciding a case on the administrative record and the written submissions of the parties, which could include written briefs and expert testimony presented before the oral hearing.

The Board is not convinced that a full administrative trial, including the submission of written evidence and witness testimony, is necessary to provide FICUs with enhanced due process. At various stages of the SRC appeals process, a FICU will have the opportunity to provide the appropriate reviewing authority with written and oral evidence which may include written briefs or expert testimony. This information should already be part of the administrative record presented to

<sup>40</sup> The commenter also suggested that the Board does not have the authority to delegate the ability to render a final agency decision to a subordinate official. It is a settled principle of Federal administrative law that a Federal agency has the authority to subdelegate responsibilities to a subordinate official absent affirmative evidence of a contrary Congressional intent. See *U.S. Telecom. Ass'n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004) (citing *United States v. Giordano*, 416 U.S. 505 (1974)).

<sup>41</sup> 82 FR 26391, 26397 (June 7, 2017).

the Board on appeal and it would be unnecessarily duplicative to allow the reintroduction of this kind of evidence at an oral hearing. The Board has reserved ample authority, either on its own initiative or through the Special Counsel, to request additional information from an expert witness or to request supplemental briefings from either party. Furthermore, allowing a full administrative trial would frustrate the overarching policy goal of the SRC appeals process to allow a FICU with an expeditious and fair method for appealing material supervisory determinations while also encouraging the FICU to work out most disputes at the examiner or program office-level. Accordingly, the Board is adopting § 746.111 as proposed.

#### Section 746.112 Retaliation Prohibited

Proposed § 746.112 allowed a FICU to file a complaint with the NCUA Office of Inspector General regarding retaliation, abuse, or retribution by NCUA staff in connection with an appeal to the SRC. The proposed rule required a complaint to include an explanation of the factual circumstances surrounding the complaint and any evidence of retaliation. Information submitted as part of a complaint would be kept strictly confidential. If the Office of Inspector General concluded that any NCUA staff had retaliated against a FICU for filing an appeal with the SRC, that staff member would be subject to disciplinary or remedial action by his or her appropriate supervisor including reprimand, suspension, or separation from employment depending on the facts and circumstances. The Board did not receive substantive comments on this aspect of the proposed rule and is adopting § 746.112 as proposed.

#### Section 746.113 Coordination With State Supervisory Authority

Proposed § 746.113 set out a framework for the appropriate reviewing authority to cooperate with the SSA regarding an appeal of a material supervisory determination by a FISCO that was the joint product of the NCUA and the SSA. The proposed rule required the reviewing authority to promptly notify the SSA of the appeal, provide the SSA with a copy of the appeal and any other related materials, solicit the SSA's views regarding the merits of the appeal before rendering a decision, and notify the SSA of the reviewing authority's decision. Once the NCUA reviewing authority had issued its decision, any other issues remaining between the FISCO and the SSA were left to those parties to resolve. The Board received one comment regarding

this aspect of the proposed rule. The commenter argued that the Board should permit an SSA to comment on an appeal in all cases involving a FISCO and not only when the appeal involves a material supervisory determination that is the joint product of the NCUA and the SSA. The Board disagrees. Congress vested the NCUA with exclusive authority to administer the FCU Act.<sup>42</sup> Accordingly, the Board believes that it would be inappropriate to allow an SSA to comment on matters that fall exclusively within the NCUA's exercise of its supervisory powers under the FCU Act. As a practical matter, the Board also finds little value in soliciting input from an SSA on matters that involve legal or factual issues that are entirely the result of an NCUA examination or exclusively involve matters of Federal law.

The commenter also argued that the Board should permit an SSA to make written submissions similar to amicus briefs that would become part of the administrative record. The proposed rule did not prohibit an SSA from expressing its views regarding the merits of an appeal in the form of written submissions. In fact, the Board anticipated that most comments from an SSA would be submitted in writing and become part of the administrative record reviewed by each successive reviewing authority before rendering a decision on appeal. While the Board believes that clarifications regarding the administrative record discussed above in the section analysis of § 746.104 may be sufficient to address commenter's concerns, the Board is also adopting a modification to § 746.113 to clarify that a reviewing authority is required to solicit an SSA's written views regarding the merits of an appeal before rendering a decision. Under § 746.104(f), the written submissions of the SSA will become part of the administrative record reviewed on appeal by the appropriate reviewing authority.

#### VI. Withdrawal of IRPS 12–1 “Supervisory Review Committee”

IRPS 11–1 “Supervisory Review Committee,” as amended by IRPS 12–1, sets out the current guidelines for appealing a material supervisory determination to the SRC. With the issuance of this final rule, the Board is withdrawing IRPS 11–1 effective January 1, 2018. IRPS 11–1 shall remain on the NCUA's Web site and govern the appeal of all material supervisory determinations appealed prior to January 1, 2018. The final rule will not have retroactive effect and will only

apply to material supervisory determinations appealed after January 1, 2018.

#### VII. Regulatory Procedures

##### *Regulatory Flexibility Act*

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a regulation may have on a substantial number of small entities (primarily those under \$100 million in assets).<sup>43</sup> This rule has no economic impact on small credit unions because it only impacts internal NCUA procedures and provides voluntary options for credit unions. Accordingly, NCUA certifies the final rule will not have a significant economic impact on a substantial number of small credit unions.

##### *Small Business Regulatory Enforcement Fairness Act*

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedure Act. NCUA does not believe this final rule is a “major rule” within the meaning of the relevant sections of SBREFA. As required by SBREFA, NCUA has filed the appropriate reports so that this final rule may be reviewed.

##### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or increases an existing burden.<sup>44</sup> For purposes of the PRA, a paperwork burden may take the form of a reporting or recordkeeping requirement, both referred to as information collections. Information collected as part of a civil action or administrative action, investigation, or audit, however, is not considered an information collection for purposes of the PRA. Subpart A to part 746 establishes procedures for appealing material supervisory determinations to the NCUA Supervisory Review Committee. Because the only paperwork burden in this final rule relates to activities that are not considered to be information collections, NCUA has determined that this rule is exempt from the requirements of the PRA.<sup>45</sup>

<sup>43</sup> 5 U.S.C. 603(a).

<sup>44</sup> 44 U.S.C. 3507(d); 5 CFR part 1320.

<sup>45</sup> 44 U.S.C. 3518(c)(1)(B)(ii).

<sup>42</sup> 12 U.S.C. 1766, 1784, 1789, and 1795b.

*Assessment of Federal Regulations and Policies on Families*

The NCUA has determined that this final rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999.<sup>46</sup>

*Executive Order 13132*

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on State and local interests.<sup>47</sup> The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. The final rule will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. The NCUA has therefore determined that this final rule does not constitute a policy that has federalism implications for purposes of the executive order.

**List of Subjects in 12 CFR Part 746**

Administrative practice and procedure, Claims, Credit Unions, Investigations.

By the National Credit Union Administration Board on October 19, 2017.  
**Gerard Poliquin,**  
*Secretary of the Board.*

For the reasons discussed above, the NCUA Board adds 12 CFR part 746 to read as follows:

**PART 746—APPEALS PROCEDURES**

**Subpart A—Procedures for Appealing Material Supervisory Determinations**

Sec.

- 746.101 Authority, purpose, and scope.
- 746.102 Definitions.
- 746.103 Material supervisory determinations.
- 746.104 General provisions.
- 746.105 Procedures for reconsideration from the appropriate program office.
- 746.106 Procedures for requesting review by the Director of the Office of Examination and Insurance.
- 746.107 Procedures for appealing to the Supervisory Review Committee.
- 746.108 Composition of Supervisory Review Committee.
- 746.109 Procedures for appealing to the NCUA Board.
- 746.110 Administration of the appeal.
- 746.111 Oral hearing.
- 746.112 Retaliation prohibited.

746.113 Coordination with State supervisory authority.

**Subpart B [Reserved]**

**Authority:** 12 U.S.C. 1766, 1787, and 1789.

**Subpart A—Procedures for Appealing Material Supervisory Determinations**

**§ 746.101 Authority, purpose, and scope.**

(a) *Authority.* This subpart is issued pursuant to section 309 of the Riegle Community Development and Regulatory Improvement Act of 1994 (12 U.S.C. 4806), which requires the NCUA Board to establish an independent intra-agency appeals process to review appeals of material supervisory determinations made by NCUA staff, and sections 120 and 209 of the Federal Credit Union Act (12 U.S.C. 1766, 1789).

(b) *Purpose.* The purpose of this subpart is to establish an expeditious review process for insured credit unions to appeal material supervisory determinations made by NCUA staff to an independent supervisory panel and, if applicable, to the NCUA Board. This subpart is also intended to establish appropriate safeguards for protecting insured credit unions from retaliation by NCUA staff.

(c) *Scope.* This subpart applies to the appeal of material supervisory determinations made by NCUA staff. This subpart does not apply to the appeal of determinations for which an independent right to appeal exists such as a decision to appoint a conservator or liquidating agent for an insured credit union or to take prompt corrective action pursuant to section 216 of the Federal Credit Union Act (12 U.S.C. 1790d) and part 702 of this chapter. This subpart also does not apply to enforcement-related actions and decisions, including determinations and the underlying facts and circumstances that form the basis of a pending enforcement action.

**§ 746.102 Definitions.**

For purposes of this subpart:  
*Board* means the NCUA Board.  
*Committee* means the Supervisory Review Committee.  
*Director of the Office of Examination and Insurance* has the same meaning as used in § 790.2 of this chapter but also includes individuals designated by the Director of the Office of Examination and Insurance from among senior staff in the Office of Examination and Insurance to handle requests for review pursuant to § 746.106 of this subpart.

*Material Supervisory Determination* is defined in § 746.103 of this subpart.

*Program office* means the office within NCUA responsible for rendering a material supervisory determination.

*Special Counsel to the General Counsel or Special Counsel* means an individual within the Office of General Counsel providing legal or procedural advice to the Committee in accordance with the procedures set forth in this subpart.

**§ 746.103 Material supervisory determinations.**

(a) *Material supervisory determination.* The term “material supervisory determination” means a written decision by a program office (unless ineligible for appeal) that may significantly affect the capital, earnings, operating flexibility, or that may otherwise affect the nature or level of supervisory oversight of an insured credit union. The term includes, but is not limited to:

- (1) A composite examination rating of 3, 4, or 5;
- (2) A determination relating to the adequacy of loan loss reserve provisions;
- (3) The classification of loans and other assets that are significant to an insured credit union;
- (4) A determination regarding an insured credit union’s compliance with Federal consumer financial law;
- (5) A determination on a waiver request or an application for additional authority where independent appeal procedures have not been specified in other NCUA regulations; and
- (6) A determination by the relevant reviewing authority that an appeal filed under this subchapter does not raise a material supervisory determination.

(b) *Exclusions from coverage.* The term “material supervisory determination” does not include:

- (1) A composite examination rating of 1 or 2;
- (2) A component examination rating unless the component rating has a significant adverse effect on the nature or level of supervisory oversight of an insured credit union;
- (3) The scope and timing of supervisory contacts;
- (4) A decision to appoint a conservator or liquidating agent for an insured credit union;
- (5) A decision to take prompt corrective action pursuant to section 216 of the Federal Credit Union Act (12 U.S.C. 1790d) and part 702 of this chapter;

(6) Enforcement-related actions and decisions, including determinations and the underlying facts and circumstances that form the basis of a pending enforcement action;

(7) Preliminary examination conclusions communicated to an insured credit union before a final exam

<sup>46</sup> Public Law 105–277, section 654, 112 Stat. 2681, 2681–581 (1998).

<sup>47</sup> 64 FR 43255 (Aug. 4, 1999).

report or other written communication is issued;

(8) Formal and informal rulemakings pursuant to the Administrative Procedure Act (5 U.S.C. 500 *et seq.*);

(9) Requests for NCUA records or information under the Freedom of Information Act (5 U.S.C. 552) and part 792 of this chapter and the submission of information to NCUA that is governed by this statute and this regulation; and

(10) Determinations for which other appeals procedures exist.

#### **§ 746.104 General provisions.**

(a) *Standard of review.* Each reviewing authority shall make an independent decision regarding whether a material supervisory determination by the program office subject to appeal was appropriate. The reviewing authority shall give no deference to the legal or factual conclusions of the program office or a subordinate reviewing authority; *provided, however*, that the burden of showing an error in a material supervisory determination shall rest solely with the insured credit union. An insured credit union shall not be prejudiced in any respect by electing to forgo optional review by the Director of the Office of Examination and Insurance pursuant to § 746.106 of this subpart.

(b) *Dismissal and withdrawal.* Any appeal under this subpart may be dismissed by written notice if it is not timely filed; if the basis for the appeal is not discernable; if an insured credit union asks to withdraw the request in writing; if an insured credit union fails to provide additional information requested pursuant to any authority granted in this subpart; if an insured credit union engages in bad faith; if the appeal fails to state a material supervisory determination as defined in § 746.103 of this subpart; or for reasons deemed appropriate by the reviewing authority.

(c) *Discovery.* No provision of this subpart is intended to create any right to discovery or similar process.

(d) *Supervisory or enforcement actions not affected.* No provision of this subpart is intended to affect, delay, or impede any formal or informal supervisory or enforcement action in progress or affect NCUA's authority to take any supervisory or enforcement action against an insured credit union. For purposes of this subpart, a supervisory or enforcement action is considered to be commenced when NCUA provides an insured credit union with written notice of a recommended or proposed enforcement action under the Federal Credit Union Act or other applicable law.

(e) *Additional authority and waiver requests during the pendency of an appeal.* A program office will not consider a waiver request or an application for additional authority that could be affected by the outcome of an appeal of a material supervisory determination unless specifically requested by an insured credit union appealing the material supervisory determination. Any deadline for a program office to decide a waiver request or an application for additional authority set forth in any part of this chapter shall be suspended until an insured credit union appealing a material supervisory determination has exhausted its administrative remedies under this subpart or may no longer appeal the material supervisory determination, whichever is later.

(f) *Administrative record.* A decision by the reviewing authority pursuant to this subpart shall be based exclusively on the administrative record. The administrative record shall consist of all written submissions by an insured credit union and a program office, decisions by subordinate reviewing authorities, and (where applicable) transcripts of an oral hearing before the SRC. For appeals where consultation with the appropriate State supervisory authority is required pursuant to § 746.113, the administrative record shall also consist of any written submissions by the State supervisory authority.

#### **§ 746.105 Procedures for reconsideration from the appropriate program office.**

(a) *Reconsideration.* An insured credit union must make a written request for reconsideration from the appropriate program office prior to requesting review by the Director of the Office of Examination and Insurance pursuant to § 746.106 or filing an appeal with the Committee pursuant to § 746.107. Such a request must be made within 30 calendar days after receiving an examination report containing a material supervisory determination or other official written communication of a material supervisory determination. A request for reconsideration must be in writing and filed with the appropriate program office.

(b) *Content of request.* Any request for reconsideration must include:

(1) A statement of the facts on which the request for reconsideration is based;

(2) A statement of the basis for the material supervisory determination to which the insured credit union objects and the alleged error in such determination; and

(3) Any other evidence relied upon by the insured credit union that was not

previously provided to the appropriate program office making the material supervisory determination.

(c) *Decision.* Within 30 calendar days after receiving a request for reconsideration, the appropriate program office shall issue a written decision, stating the reasons for the decision, and provide written notice of the right to file a request for review by the Director of the Office of Examination and Insurance pursuant to § 746.106 or file an appeal with the Committee pursuant to § 746.107. If a written decision is not issued within 30 calendar days, the request for reconsideration will be deemed to have been denied.

(d) *Subsequent requests for reconsideration.* Any subsequent request for reconsideration following an initial request made pursuant to this section will be treated as a request for review by the Director of the Office of Examination and Insurance pursuant to § 746.106 or an appeal to the Committee pursuant to § 746.107 as determined by the Secretary of the Board after consultation with the insured credit union.

#### **§ 746.106 Procedures for requesting review by the Director of Office of Examination and Insurance.**

(a) *Request for review.* Prior to filing an appeal with the Committee pursuant to § 746.107, but after receiving a written decision by the appropriate program office in response to a request for reconsideration pursuant to § 746.105, an insured credit union may make a written request for review by the Director of the Office of Examination and Insurance of the program office's material supervisory determination. Such a request must be made within 30 calendar days after a final decision on reconsideration is made by the appropriate program office. A request for review must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

(b) *Content of request.* Any request for review by an insured credit union must include:

(1) A statement that the insured credit union is requesting review by the Director of the Office of Examination and Insurance;

(2) A statement of the facts on which the request for review is based;

(3) A statement of the basis for the material supervisory determination to which the insured credit union objects and the alleged error in such determination;

(4) Any other evidence relied upon by the insured credit union that was not previously provided to the appropriate program office making the material supervisory determination; and

(5) A certification that the board of directors of the insured credit union has authorized the request for review to be filed.

(c) *Conduct of review.* Review of a material supervisory determination shall be based on the written submissions provided under paragraph (b) of this section. The Director of the Office of Examination and Insurance may request additional information from the appropriate program office or the insured credit union within 15 calendar days after the Secretary of the Board receives a request for review by the Director of the Office of Examination and Insurance. The relevant party must submit the requested information to the Director of the Office of Examination and Insurance within 15 calendar days after receiving such request for additional information. The Director of the Office of Examination and Insurance may consult with the parties jointly or separately before rendering a decision and may solicit input from any other pertinent program office as necessary.

(d) *Decision.* Within 30 calendar days after the Secretary of the Board receives a request for review, the Director of the Office of Examination and Insurance shall issue a written decision, stating the reasons for the decision, and provide written notice of the right to file an appeal with the Committee pursuant to § 746.107. The 30 calendar day deadline is extended by the time period during which the Director of the Office of Examination and Insurance is gathering additional information. If a written decision is not issued within 30 calendar days, as extended by additional time during which the information is being gathered, the request for review will be deemed to have been denied.

(e) *Subsequent requests for review.* No party may request reconsideration of the decision rendered by the Director of the Office of Examination and Insurance. Any subsequent request for review following the rendering of a decision by the Director of the Office of Examination and Insurance will be treated as an appeal to the Committee.

**§ 746.107 Procedures for appealing to the Supervisory Review Committee.**

(a) *Request for appeal.* After receiving a written decision by the appropriate program office in response to a request for reconsideration pursuant to § 746.105, an insured credit union may file an appeal with the Committee. Such

an appeal must be filed within 30 calendar days after receiving a written decision by the appropriate program office on reconsideration or, if the insured credit union requests review by the Director of the Office of Examination and Insurance pursuant to § 746.106, within 30 calendar days after a final decision is made by the Director of the Office of Examination and Insurance. An appeal must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314–3428.

(b) *Content of appeal.* Any appeal must include:

(1) A statement that the insured credit union is filing an appeal with the Committee;

(2) A statement of the facts on which the appeal is based;

(3) A statement of the basis for the determination to which the insured credit union objects and the alleged error in such determination;

(4) Any other evidence relied upon by the insured credit union that was not previously provided to the appropriate program office or, if applicable, the Director of the Office of Examination and Insurance; and

(5) A certification that the board of directors of the insured credit union has authorized the appeal to be filed.

(c) *Conduct of appeal.* The following procedures shall govern the conduct of an appeal to the Committee:

(1) *Submission of written materials.* The Committee may request additional information from either of the parties within 15 calendar days after the filing of an appeal. The parties must submit the requested information to the Committee within 15 calendar days after receiving a request for additional information.

(2) *Oral hearing; duration; location.* Except where an insured credit union has requested that an appeal be based entirely on the written record, an appeal shall also consist of oral presentations to the Committee at NCUA headquarters. The introduction of written evidence or witness testimony may also be permitted at the oral hearing. The insured credit union shall argue first. Each side shall be allotted a specified and equal amount of time for its presentation, of which a portion may be reserved for purposes of rebuttal. This time limit shall be set by the Committee and will be based on the complexity of the appeal. Committee members may ask questions of any individual appearing before it.

(3) *Appearances; representation.* The parties shall submit a notice of appearance identifying the individual(s)

who will be representing them in the oral presentation. The insured credit union shall designate not more than two officers, employees, or other representatives including counsel, unless authorized by the Committee. The program office shall designate not more than two individuals, one of whom may be an enforcement attorney from NCUA's Office of General Counsel, unless authorized by the Committee.

(d) *Decision.* Within 30 calendar days after the oral presentation of the appeal to the Committee, the Committee shall issue a decision in writing, stating the reasons for the decision, and provide the insured credit union with written notice of the right to file an appeal with the NCUA Board (if applicable). If an insured credit union has requested that an appeal be entirely based on the written record, the Committee shall issue a decision within 30 calendar days from the date of receipt of an appeal by the Secretary of the Board. The 30 calendar day deadline to decide an appeal based entirely on the written record is extended by any time period during which the Committee is gathering additional information pursuant to paragraph (c)(1) of this section.

(e) *Publication.* The Committee shall publish its decisions on NCUA's Web site with appropriate redactions to protect confidential or exempt information. In cases where redaction is insufficient to prevent improper disclosure, published decisions may be presented in summary form. Published decisions may be cited as precedent in appeals to the Committee. Publication shall include a synopsis of each appeal and a summary of the final result.

(f) *Consultation with Office of Examination and Insurance or Office of General Counsel Required.* If an appeal involves the interpretation of material supervisory policy or generally accepted accounting principles, the Committee shall notify the Director of the Office of Examination and Insurance of the appeal and solicit input from the Office of Examination and Insurance. If an appeal involves the interpretation of legal requirements, including NCUA's regulations, the Committee shall notify the General Counsel of the appeal and solicit input from the Office of General Counsel.

(g) *Supplemental procedures authorized.* In addition to the procedures contained in this subpart, the Committee Chairman may adopt supplemental procedures governing the operations of the Committee, order that material be kept confidential, or consolidate appeals that present similar issues of law or fact.

**§ 746.108 Composition of Supervisory Review Committee.**

(a) *Formation and composition of committee pool.* The NCUA Chairman shall select not less than eight members from among senior staff in NCUA's regional and central offices as a Committee pool from which the Committee Chairman may select Committee members. None of the members appointed by the NCUA Chairman shall also serve as a Regional Director, Associate Regional Director, Executive Director, Deputy Executive Director, General Counsel, Director of the Office of Examination and Insurance, or a senior policy advisor or chief of staff to a Board Member.

(b) *Term of office for members of Committee pool.* Each member of the Committee pool shall serve for a two-year term and may be reappointed by the NCUA Chairman for additional terms.

(c) *Designation and role of Committee Chairman.* The Secretary of the Board shall serve as permanent Committee Chairman. The Committee Chairman shall be responsible for designating three Committee members (one of whom may be the Committee Chairman) from among the Committee pool to hear a particular appeal.

(d) *Selection criteria.* When selecting Committee members to hear an appeal pursuant to paragraph (c) of this section, the Committee Chairman shall consider any real or apparent conflicts of interest that may impact the objectivity of the Committee member as well as that individual's experience with the subject matter of the appeal.

(e) *Interested staff ineligible.* Members of the Committee pool from the program office that made the material supervisory determination that is the subject of the appeal are ineligible to serve on the Committee for that appeal. Members of the Committee pool from the Office of Examination and Insurance are ineligible to serve on the Committee for appeals where the insured credit union previously requested review by the Director of the Office of Examination and Insurance pursuant to § 746.106.

(f) *Role of the Special Counsel.* The Special Counsel to the General Counsel shall serve as a permanent nonvoting member of the Committee to advise on procedural and legal matters.

(g) *Quorum; meetings.* A quorum of two Committee members (excluding the Special Counsel to the General Counsel) shall be present at each Committee meeting and a majority vote of a quorum is required for an action on an appeal. Meetings of the Committee will not be open to the public.

**§ 746.109 Procedures for appealing to the NCUA Board.**

(a) *Request for appeal.* An insured credit union may file an appeal with the Board challenging a decision by the Committee within 30 calendar days after receiving that decision. An appeal must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

(b) *Granting an appeal.* At least one Board Member must agree to consider an appeal from a decision by the Committee. If a request for an oral hearing pursuant to § 746.111 is granted, the Secretary of the Board will notify the parties of the time and location where the oral hearing shall be heard. Except in unusual circumstances, any appeal shall be held at NCUA headquarters. If at least one Board Member does not agree to consider an appeal from a decision by the Committee within 20 days of receiving a request, the request will be deemed to have been denied.

(c) *Failure to file a timely appeal.* An insured credit union that fails to file an appeal within the specified 30-day period shall be deemed to have waived all claims pertaining to the matters in issue.

(d) *Certain actions not reviewable.* Notwithstanding any other provision of this subpart, Committee decisions on the denial of a technical assistance grant reimbursement are final decisions of NCUA and may not be appealed to the Board.

(e) *Content of appeal.* Any request for appeal must include:

(1) A statement of the facts on which the appeal is based;

(2) A statement of the basis for the determination to which the insured credit union objects and the alleged error in such determination; and

(3) A certification that the board of directors of the insured credit union has authorized the appeal to be filed.

(f) *Amending or supplementing the appeal.* The insured credit union may amend or supplement the appeal in writing within 15 calendar days from the date the Secretary of the Board receives an appeal. If the insured credit union amends or supplements the appeal, the program office will be permitted to file responsive materials within 15 calendar days.

(g) *Request for oral hearing.* In accordance with § 746.111, the insured credit union may request an opportunity to appear before the Board to make an oral presentation in support of the appeal.

**§ 746.110 Administration of the appeal.**

(a) *Conduct of appeal.* Except as otherwise provided in § 746.111, the following procedures shall govern the conduct of an appeal to the Board:

(1) *Review based on written record.* The appeal of a material supervisory determination shall be entirely based on the written record.

(2) *Submission of written materials.* The Board or the Special Counsel to the General Counsel may request additional information to be provided in writing from either of the parties within 15 calendar days after the filing of an appeal, any amendments or supplementary information to the appeal documents by the insured credit union, or any responsive materials by the program office, whichever is later. The parties must submit the requested information to the Board or the Special Counsel within 15 calendar days of receiving a request for additional information.

(b) *Decision.* The Board shall issue a decision within 90 calendar days, unless there is an oral hearing, from the date of receipt of an appeal by the Secretary of the Board. The decision by the Board shall be in writing, stating the reasons for the decision, and shall constitute a final agency action for purposes of chapter 7 of title 5 of the United States Code. Failure by the Board to issue a decision on an appeal within the 90-day period, unless there is an oral hearing, shall be deemed to be a denial of the appeal.

(c) *Publication.* The Board shall publish its decisions on NCUA's Web site with appropriate redactions to protect confidential or exempt information. In cases where redaction is insufficient to prevent improper disclosure, published decisions may be presented in summary form. Published decisions may be cited as precedent. Publication shall include a synopsis of each appeal and a summary of the final result.

**§ 746.111 Oral hearing.**

(a) *Request for oral hearing.* The insured credit union may request to appear before the Board to make an oral presentation in support of the appeal. The request must be submitted with the initial appeal documents and should be in the form of a separate written document titled "Request for Oral Hearing." The request must show good cause for an oral presentation and state reasons why the appeal cannot be presented adequately in writing.

(b) *Action on the request.* The Board shall determine whether to grant the request for oral hearing and shall direct the Secretary of the Board to serve



notice of the Board's determination in writing to the parties. A request for oral hearing shall be granted with the approval of any Board Member within 20 days of receiving a request for an oral hearing.

(c) *Effect of denial.* In the event a request for an oral hearing is denied, the appeal shall be reviewed by the Board on the basis of the written record.

(d) *Procedures for oral hearing.* The following procedures shall govern the conduct of any oral hearing:

(1) *Scheduling of oral hearing; location.* The Secretary of the Board shall notify the parties of the date and time for the oral hearing, making sure to provide reasonable lead time and schedule accommodations. The oral hearing will be held at NCUA headquarters; *provided, however*, that on its own initiative or at the request of the insured credit union, the NCUA Chairman may in his or her sole discretion allow for an oral hearing to be conducted via teleconference or video conference facilities.

(2) *Appearances; representation.* The parties shall submit a notice of appearance identifying the individual(s) who will be representing them in the oral presentation. The insured credit union shall designate not more than two officers, employees, or other representatives including counsel, unless authorized by the NCUA Chairman. The program office shall designate not more than two individuals one of whom may be an enforcement attorney from NCUA's Office of General Counsel, unless authorized by the NCUA Chairman.

(3) *Conduct of oral hearing.* The oral hearing shall consist entirely of oral presentations. The introduction of written evidence or witness testimony shall not be permitted at the oral hearing. The insured credit union shall argue first. Each side shall be allotted a specified and equal amount of time for its presentation, of which a portion may be reserved for purposes of rebuttal. This time limit shall be set by the Board and will be based on the complexity of the appeal. Members of the Board may ask questions of any individual appearing before the Board.

(4) *Transcript.* The oral hearing shall be on the record and transcribed by a stenographer, who will prepare a transcript of the proceedings. The stenographer will make the transcript available to the insured credit union upon payment of the cost thereof.

(e) *Confidentiality.* An oral hearing as provided for herein constitutes a meeting of the Board within the meaning of the Government in the Sunshine Act (5 U.S.C. 552b). The Chairman shall preside over the conduct of the oral hearing. The meeting will be closed to the public to the extent that one or more of the exemptions from public meetings apply as certified by NCUA's Office of General Counsel. The Board shall maintain the confidentiality of any information or materials submitted or otherwise obtained in the course of the procedures outlined herein, subject to applicable law and regulations.

(f) *Conclusion of the oral hearing.* The Board shall take the oral presentations under advisement. The Board shall render its decision on the appeal in accordance with § 746.110.

#### **§ 746.112 Retaliation prohibited.**

(a) *Retaliation prohibited.* NCUA staff may not retaliate against an insured credit union making any type of appeal. Alleged acts of retaliation should be reported to the NCUA Office of Inspector General, which is authorized to receive and investigate complaints and other information regarding abuse in agency programs and operations.

(b) *Submission of complaints.* Insured credit unions may submit complaints of suspected retaliation to the NCUA Office of Inspector General, 1775 Duke Street, Alexandria, VA 22314-3428. Complaints should include an explanation of the circumstances surrounding the complaint and evidence of any retaliation. Information submitted as part of a complaint shall be kept confidential.

(c) *Disciplinary action.* Any retaliation by NCUA staff will subject the employee to appropriate disciplinary or remedial action by the appropriate supervisor. Such disciplinary or remedial action may include oral or written warning or admonishment, reprimand, suspension or separation from employment, change in assigned duties, or disqualification from a particular assignment, including prohibition from participating in any examination of the insured credit union that was the subject of the retaliation.

#### **§ 746.113 Coordination with State supervisory authority.**

(a) *Coordination when request for review by the Director of the Office of Examination and Insurance filed.* In the event that a material supervisory

determination subject to a request for review by the Director of the Office of Examination and Insurance is the joint product of NCUA and a State supervisory authority, the Director of the Office of Examination and Insurance will promptly notify the appropriate State supervisory authority of the request for review, provide the State supervisory authority with a copy of the request for review and any other related materials, solicit the State supervisory authority's views regarding the merits of the request for review before making a determination, and notify the State supervisory authority of the Director's determination.

(b) *Coordination when appeal to Supervisory Review Committee filed.* In the event that a material supervisory determination appealed to the Committee is the joint product of NCUA and a State supervisory authority, the Committee will promptly notify the State supervisory authority of the appeal, provide the State supervisory authority with a copy of the appeal and any other related materials, solicit the State supervisory authority's views regarding the merits of the appeal before making a determination, and notify the State supervisory authority of the Committee's determination. Once the Committee has issued its determination, any other issues that may remain between the insured credit union and the State supervisory authority will be left to those parties to resolve.

(c) *Coordination when appeal to board filed.* In the event that a material supervisory determination appealed to the Board is the joint product of NCUA and a State supervisory authority, the Board will promptly notify the State supervisory authority of the appeal, provide the State supervisory authority with a copy of the appeal and any other related materials, solicit the State supervisory authority's views regarding the merits of the appeal before making a determination, and notify the State supervisory authority of the Board's determination. Once the Board has issued its determination, any other issues that may remain between the insured credit union and the State supervisory authority will be left to those parties to resolve.

#### **Subpart B—[Reserved]**

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Part IV

National Credit Union Administration

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12 CFR Parts 701, 703, 705, et al.  
Appeals Procedures; Final Rule

## NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Parts 701, 703, 705, 708a, 709,  
741, 745, 746, 747, and 750

RIN 3133-AE68

### Appeals Procedures

**AGENCY:** National Credit Union  
Administration (NCUA).

**ACTION:** Final rule.

**SUMMARY:** The NCUA Board (Board) is adopting this final rule to establish procedures to govern appeals to the Board. The rule establishes a uniform procedure that will apply to agency regulations that currently have their own embedded appeals provisions. Accordingly, this final rule will replace those current provisions. The procedures will apply in cases in which a decision rendered by a regional director or other program office director is subject to appeal to the Board. The procedures will result in greater efficiency, consistency, and a better understanding of the way in which matters under covered regulations may be appealed to the Board.

**DATES:** This final rule is effective on January 1, 2018.

**FOR FURTHER INFORMATION CONTACT:** Michael J. McKenna, General Counsel, Ross P. Kendall, Special Counsel to the General Counsel, or Benjamin M. Litchfield, Staff Attorney, at the above address, or telephone: (703) 518-6540.

### SUPPLEMENTARY INFORMATION:

#### Background

As outlined in its May 2017 proposed rule,<sup>1</sup> the Board intends for new 12 CFR part 746, subpart B, to govern most authorized appeals to the Board. The proposed rule identified which rules would be affected by these new procedures. In addition, the Board specifically requested comment on any other agency rules that should be covered under the proposal. The proposed rule also specifically identified certain categories of actions or determinations that would not be covered under the proposal because appeals relating to them are already covered under different agency procedures. The Board invited comment on these proposed exclusions as well.

As reflected in the proposed rule and as finalized herein, the Board is committed to providing credit unions, and other persons or entities that are affected by agency decisions, with an opportunity to obtain meaningful

review of those decisions. The Board believes this final rule strikes an appropriate balance that will afford a petitioner fair consideration of the issues while avoiding procedures that are overly burdensome, time consuming, and expensive.

#### Comment Summary

The Board received a total of seven comments to the proposed rule. All commenters noted broad, general support for the proposal. Beneficial results from the proposal identified by commenters included clearer and improved processes, the introduction of consistency into a process that is currently varied, a more uniform set of procedures to govern those rules in which an appeal is permitted, and the promotion of a more streamlined and efficient appeals process. One commenter applauded NCUA for what the commenter characterized as a visible and forceful commitment to the practice of transparency.

As discussed more fully below, the Board received one comment suggesting that the appeals process be extended to include decisions involving capital planning and stress testing. There were no other suggestions of additional rules that should be covered. Similarly, the Board did not receive any comments on its proposal to exclude certain categories of actions or determinations from coverage under the new procedures. Accordingly, all of the proposed changes to existing regulations are adopted as proposed and without change. In addition, the Board confirms the exclusion of the following categories of actions from the scope of new part 746, subpart B:

- Formal enforcement actions;
- Creditor claims in liquidation, to the extent that the claimant has requested and the Board has agreed to consider the appeal formally on the record;
- Material supervisory determinations within the jurisdiction of the Supervisory Review Committee (SRC);
- Challenges to actions imposed under the prompt corrective action regime; and
- Appeals of matters that are delegated by rule to an officer or position below the Board for final, binding agency action.

#### Section by Section Analysis; Discussion of Specific Comments

*Section 746.201—Authority, Purpose, and Scope.* No comments were received concerning this first section of proposed subpart B to part 746, which outlines the Board's authority for issuing the rule

as well as its scope and purpose. Accordingly, this section of the proposed rule is adopted in full without change from the proposal.

*Section 746.202—Definitions.* One commenter recommended that the rule be modified to include a specific definition of the term "reconsideration" in the definitions section. As proposed, this term is defined on a functional basis in § 746.203, which describes the concept of reconsideration in detail. While the Board understands that the commenter believes including a definition of the term in the definitions section would be useful, the Board believes that the description of this term, as set out in detail in § 746.203(a), provides a more useful, functional definition of the concept and should not be changed. Accordingly, this section of the proposed rule is adopted in full without change from the proposal.

*Section 746.203—Request for Reconsideration.* As proposed, this section would set forth procedures for requesting reconsideration from a program office prior to filing an appeal with the Board. The rule specifies that the program office must make its determination on a request for reconsideration within 30 days, and that failure by the program office to do so within that time frame shall be deemed an affirmation of the initial agency determination. One commenter suggested that the rule as proposed was insufficient and should go further as to this point. According to the commenter, the rule should require the program office to notify the petitioner of its failure to timely act on the reconsideration request, provide a substantive response, and again notify the petitioner of the right to file an appeal with the Board.

The Board believes that the proposal adequately covers this scenario. The Board anticipates that instances of failure by the program office to respond to a reconsideration request within the prescribed time frame will be rare. Furthermore, the Board notes that the provisions in § 746.203(g) are designed to protect the petitioner from circumstances in which delay at the program office level would thwart the petitioner's ability to secure a higher level of review. As drafted, the provision effectively imposes an operational deadline for the program office to act. Accordingly, this section of the proposed rule is adopted in full without change from the proposal.

*Section 746.204—Appeal to the Board.* As proposed, this section describes the procedures for filing an appeal with the Board, including timing constraints and a listing of the

<sup>1</sup> 82 FR 26378 (June 7, 2017).

information that must be included as part of the appeal. These requirements are similar to the current requirements for creditor claims and share insurance claims, including the requirement that any appeal must be filed with the Secretary of the Board within 60 calendar days of the date of the initial agency determination or, if applicable, any determination following a request for reconsideration. As proposed, the 60-day deadline would not apply to a decision rejecting a request by a troubled or newly chartered credit union to make a change at the senior official level. In such cases, a 15-day deadline would govern the appeal process.

One commenter recommended that, for the sake of consistency, this appeals period should also be established at 60 days. Alternatively, according to the commenter, the rule should explicitly require the program office to notify credit unions affected by this provision of the notably shorter time frame for taking an appeal. Otherwise, according to the commenter, the movement toward standardization reflected in the rule could lead a credit union to assume that all appeals have the same 60-day deadline.

The Board is not persuaded by this comment. Preserving the shorter time frame in this area recognizes the exigencies associated with management changes and helps assure that decisions affecting personnel are made quickly and subject to review within reasonable time frames. In this respect, the Board notes that the relatively shorter timeframe governing the change of officials is currently reflected in the existing rules that governs this area (§ 701.14 and part 747, subpart J) and is therefore familiar to credit unions generally. Furthermore, the Board notes that program offices include explicit references to this deadline in correspondence dealing with this issue currently, further minimizing the likelihood of confusion in this area. Accordingly, this section of the proposed rule is adopted in full without change from the proposal.

**Section 746.205—Preliminary Considerations Regarding the Appeal.** As proposed, this section of the rule describes preliminary internal processes for reviewing appeals, and includes a description of the role of the Special Counsel to the General Counsel (Special Counsel) at this stage of the proceedings. Two commenters sought clarification as to this aspect. The proposed rule provides that the Special Counsel will conduct a preliminary review of the materials filed with the appeal (§ 746.205) and also perform a

substantive, de novo review of the program office file and the materials submitted by the petitioner to make a recommendation to the Board regarding the disposition of the appeal (§ 746.206). Both commenters requested that the final rule provide clarification as to the distinction between these two functions and provide greater clarity as to the nature and purpose of the preliminary review. The Board acknowledges the validity of the point made by these commenters. In the final version of § 746.205(a), language is now included that specifies in greater detail the nature of the preliminary review conducted by the Special Counsel, which is focused on whether the appeal is in good order procedurally. For example, the Special Counsel will assess the timeliness of the appeal and whether the issues identified in the appeal have become moot.

**Section 746.206 Administration of the Appeal.** Aside from the comment, discussed above, seeking clarification as to the nature of the role of the Special Counsel, the Board did not receive any comments regarding § 746.206. Accordingly, this section of the proposed rule is adopted in full without change from the proposal.

**Section 746.207—Procedures for Oral Hearing.** This section sets out a detailed process by which a petitioner may request to appear before the Board to argue its appeal in person. As proposed, the rule requires that a petitioner make its request for an oral hearing through a separate writing that must be submitted at the time of the initial appeal (§ 746.207(a)). Two commenters opposed this requirement, and advocated that the Board should change the rule so that a petitioner might make its request for an oral hearing at any time before the Board has issued its decision on the appeal. One commenter opposed limiting the number of persons to two who may appear as representatives for the petitioner at the oral hearing. The commenter asserted that two would be insufficient, and advocated that the number be changed to five.

The Board declines to make the changes requested by these commenters. In its proposed form, the rule recognizes that an oral hearing can be a logistical challenge requiring significant planning and effort, particularly in view of the goal of having the Board render its decision within 90 days of the filing of an appeal. This requirement also helps to prevent a petitioner from requesting a hearing as a device to delay or prolong appeal proceedings. Similarly, with regard to the request to allow more personnel to participate in the hearing, the Board believes the limitations as

proposed will help to keep the oral hearing procedures manageable. The Board notes, however, that the rule grants the NCUA Chairman discretion to allow a greater number of representatives to participate in the oral hearing. Accordingly, this section of the proposed rule is adopted in full without change from the proposal.

#### Other Comments

**Role of the Ombudsman.** Although the proposed rule made no mention of the NCUA Ombudsman and neither provided nor contemplated a role for the Ombudsman in the appeals process, two commenters recommended that consideration be given for such a role. One commenter opined that the full potential of the Ombudsman office is not being met, and that some role for the Ombudsman should be developed. In a similar vein, another commenter advocated a more robust role for the Ombudsman in the appeals process, but noted that greater independence of the Ombudsman, both in terms of appearance and in fact, would be necessary in order to further a fair and balanced appeals process. After due consideration, the Board concludes that, while the Ombudsman plays a valuable role in other contexts, a role for the Ombudsman is not necessary or useful in the appeals context. Accordingly, the Board has determined not to adopt this recommendation.

**Advisory Council.** One commenter recommended the Board consider establishing an advisory council, comprised of credit unions, which could fulfill a role in the appeals process. After due consideration, the Board has determined that administration of the appeals process as contemplated by the rule does not lend itself to the involvement of an advisory council and so has elected not to adopt this recommendation.

**Operational Improvements.** Although not directly related to the present proposal, one commenter suggested that NCUA focus on current operations in areas such as FOM-related applications to achieve improved efficiency and transparency in that area. In the view of the commenter, this would help to reduce the need for an eventual appeal of an adverse decision. The Board has taken this recommendation under advisement.

**Expansion of Scope of Proposal.** One commenter recommended that the Board expand the scope of the proposed rule so that it would extend to both capital planning and stress testing,<sup>2</sup>

<sup>2</sup> See 12 CFR part 702, subpart E.

such that program office decisions in each of these areas would be specifically subject to appeal to the Board. After due consideration of this recommendation, the Board has determined that an adverse determination at the program office level concerning a credit union's capital plan would qualify as a material supervisory determination, within the meaning of NCUA's Supervisory Review Committee rule (part 746, subpart A) (the rule is published elsewhere in this issue of the **Federal Register**). Similarly, a program office determination concerning the outcome of a required stress test carries with it potentially adverse consequences, in the event the credit union is determined to have failed the stress test. As such, either determination should be subject to appeal to the SRC. Corresponding adjustments to that rule to accommodate this approach are being made in coordination with the adoption of this rule.

*Publication of Decisions.* One commenter encouraged NCUA to publish its appeal decisions (as well as its SRC appeal decisions), so that the industry can better understand the Board's policy goals and statutory and regulatory interpretations. Another commenter suggested that NCUA should establish an annual reporting requirement that would inform stakeholders of the utility of pursuing an appeal by including an evaluation of results of appeals that have been taken during the reporting period. The Board does, in fact, routinely publish on the NCUA Web site its decisions concerning matters that have been appealed. The Board has taken under advisement the suggestion to include results of appeals in its regular annual report.

*Codification in part 741.* One commenter, whose focus is principally on the regulation of federally insured, State-chartered credit unions, recommended that the appeals rule be codified as a new subpart to part 741, instead of in new part 746. The commenter notes that because part 741 is ostensibly designed to contain all regulations to which such credit unions are subject, including the appeals rule in that part would be more convenient and useful to them. After due consideration of this suggestion, the Board concludes that this is best handled through a separate part (*i.e.*, new part 746) devoted exclusively to appeals.

*Notice to State Supervisory Authorities.* One commenter suggested that, with respect to federally insured, State-chartered credit unions, the rule should include a requirement that the State regulator be provided with a copy

of any correspondence between NCUA and the credit union relating to an appeal. In view of the close relationship that NCUA enjoys with State regulatory authorities, the Board believes inclusion of a provision mandating cooperation and information sharing is unnecessary.

## V. Regulatory Procedures

### *Regulatory Flexibility Act*

The Regulatory Flexibility Act requires NCUA to prepare an analysis to describe any significant economic impact a rule may have on a substantial number of small entities (primarily those under \$100 million in assets). This rule only provides enhanced voluntary opportunities for credit unions to appeal agency determinations. Accordingly, it will not have a significant economic impact on a substantial number of small credit unions, and therefore, no regulatory flexibility analysis is required.

### *Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a current, valid OMB control number.

In accordance with the PRA, the information collection requirements included in this final rule has been submitted to OMB for approval under control number 3133-0198.

### *The Treasury and General Government Appropriations Act, 1999—Assessment of Federal Regulations and Policies on Families*

NCUA has determined that this rule will not affect family well-being within the meaning of sec. 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105-277, 112 Stat. 2681 (1998).

### *Executive Order 13132*

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

determined that this proposal does not constitute a policy that has federalism implications for purposes of the executive order.

### *Small Business Regulatory Enforcement Fairness Act*

The Small Business Regulatory Enforcement Fairness Act of 1996<sup>3</sup> (SBREFA) provides generally for congressional review of agency rules. A reporting requirement is triggered in instances where NCUA issues a final rule as defined by Section 551 of the Administrative Procedure Act.<sup>4</sup> NCUA does not believe this final rule is a "major rule" within the meaning of the relevant sections of SBREFA. NCUA has submitted the rule to the Office of Management and Budget for its determination in that regard.

## List of Subjects

### *12 CFR Part 701*

Credit, Credit unions, Reporting and recordkeeping requirements.

### *12 CFR Part 703*

Credit unions, Investments.

### *12 CFR Part 705*

Credit unions, Grants, Loans, Revolving fund.

### *12 CFR Part 708a*

Credit unions, Reporting and recordkeeping requirements.

### *12 CFR Part 709*

Claims, Credit unions.

### *12 CFR Part 741*

Credit unions, Reporting and recordkeeping requirements, Share insurance.

### *12 CFR Part 745*

Administrative practice and procedure, Claims, Credit unions, Share insurance.

### *12 CFR Part 746*

Administrative practice and procedure, Claims, Credit unions, Investigations.

### *12 CFR Part 747*

Administrative practice and procedure, Claims, Credit unions, Investigations.

### *12 CFR Part 750*

Credit unions, Golden parachute payments, Indemnity payments.

<sup>3</sup>Public Law 104-121.

<sup>4</sup>5 U.S.C. 551.

By the National Credit Union Administration Board, this 19th day of October 2017.

**Gerard Poliquin,**  
*Secretary of the Board.*

For the reasons discussed above, the NCUA Board amends 12 CFR parts 701, 703, 705, 708a, 709, 741, 745, 746, 747, and 750 as follows:

**PART 701—ORGANIZATION AND OPERATION OF FEDERAL CREDIT UNIONS**

■ 1. The authority citation for part 701 is revised to read as follows:

**Authority:** 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1786, 1787, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.*; 42 U.S.C. 1981 and 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

■ 2. Revise § 701.14(e) to read as follows:

**§ 701.14 Change in official or senior executive officer in credit unions that are newly chartered or are in troubled condition.**

\* \* \* \* \*

(e) *Notice of disapproval.* NCUA may disapprove the individual serving as a director, committee member or senior executive officer if it finds that the competence, experience, character, or integrity of the individual with respect to whom a notice under this section is submitted indicates that it would not be in the best interests of the members of the credit union or of the public to permit the individual to be employed by, or associated with, the credit union. The Notice of Disapproval will advise the parties of their rights to request reconsideration from the Regional Director and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

■ 3. Revise § 701.21(h)(3) to read as follows:

**§ 701.21 Loans to members and lines of credit to members.**

\* \* \* \* \*

(h) \* \* \*

(3) A regional director will provide a written determination on a waiver request within 45 calendar days after receipt of the request; however, the 45-day period will not begin until the requesting credit union has submitted all necessary information to the regional director. If the regional director does not provide a written determination within the 45-day period the request is deemed denied. A credit union may request the

regional director to reconsider a denied waiver request and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

\* \* \* \* \*

■ 4. Revise § 701.22(c) to read as follows:

**§ 701.22 Loan participations.**

\* \* \* \* \*

(c) To seek a waiver from any of the limitations in paragraph (b) of this section, a federally insured credit union must submit a written request to its regional director with a full and detailed explanation of why it is requesting the waiver. Within 45 calendar days of receipt of a completed waiver request, including all necessary supporting documentation and, if appropriate, any written concurrence, the regional director will provide the federally insured credit union a written response. The regional director's decision will be based on safety and soundness and other considerations; however, the regional director will not grant a waiver to a federally insured, State-chartered credit union without the prior written concurrence of the appropriate State supervisory authority. A federally insured credit union may request the regional director to reconsider a denied waiver request and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

\* \* \* \* \*

■ 5. Revise § 701.23(h)(3) to read as follows:

**§ 701.23 Purchase, sale, and pledge of eligible obligations.**

\* \* \* \* \*

(h) \* \* \*

(3) *Appeal to NCUA Board.* A Federal credit union may request the regional director to reconsider a denied request for expanded authority and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

■ 6. Revise § 701.32(b)(5) to read as follows:

**§ 701.32 Payment on shares by public units and nonmembers.**

\* \* \* \* \*

(b) \* \* \*

(5) The regional director will provide a written determination on an exemption request within 30 calendar days after receipt of the request. The 30-day period will not begin to run until all necessary information has been submitted to the Regional Director. A

credit union may request the Regional Director to reconsider a denied exemption request and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

\* \* \* \* \*

■ 7. Revise § 701.34(a)(4) to read as follows:

**§ 701.34 Designation of low income status; Acceptance of secondary capital accounts by low-income designated credit unions.**

(a) \* \* \*

(4) If NCUA determines a low-income designated Federal credit union no longer meets the criteria for the designation, NCUA will notify the Federal credit union in writing, and the Federal credit union must, within five years, meet the criteria for the designation or come into compliance with the regulatory requirements applicable to Federal credit unions that do not have a low-income designation. The designation will remain in effect during the five-year period. If a Federal credit union does not requalify and has secondary capital or nonmember deposit accounts with a maturity beyond the five-year period, NCUA may extend the time for a Federal credit union to come into compliance with regulatory requirements to allow the Federal credit union to satisfy the terms of any account agreements. A Federal credit union may request NCUA to reconsider a determination that it no longer meets the criteria for the designation and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

\* \* \* \* \*

■ 8. Appendix B to part 701 is amended as follows:

- a. Section VII.D of Chapter 1 is revised.
- b. Section II.C.5 of Chapter 2 is revised.
- c. Section III.C.5 of Chapter 2 is revised.
- d. Section IV.C.5 of Chapter 2 is revised.
- e. Section V.C.5 of Chapter 2 is revised.
- f. Section IV.B of Chapter 3 is revised.
- g. Section II.C.6 of Chapter 4 is revised.
- h. Section II.D—Application for a Federal Charter of Chapter 4 is redesignated as Section II.D.2—Application for a Federal Charter and revised.
- i. Section III.D.6 of Chapter 4 is revised.

The revisions read as follows:

**Appendix B to Part 701—Chartering and Field of Membership Manual**

**Chapter 1—Federal Credit Union Chartering**  
\* \* \* \*

*VII.D—Appeal of Office of Consumer Financial Protection and Access Director Decision*

If the Office of Consumer Financial Protection and Access Director denies a charter application, in whole or in part, that decision may be appealed to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the prospective group may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for the initial denial. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial.

\* \* \* \*

**Chapter 2—Field of Membership Requirements for Federal Credit Unions**  
\* \* \* \*

*II.C.5—Appeal of Office of Consumer Financial Protection and Access Director Decision*

If the Office of Consumer Financial Protection and Access Director denies a field of membership expansion request, merger, or spin-off, that decision may be appealed to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for the initial denial. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial.

\* \* \* \*

*III.C.5—Appeal of Office of Consumer Financial Protection and Access Director Decision*

If the Office of Consumer Financial Protection and Access Director denies a field of membership expansion request, merger, or spin-off, that decision may be appealed to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of

Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for the initial denial or explain extenuating circumstances that precluded the inclusion of existing material evidence or information that should have been filed with the request for reconsideration. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A petitioner may seek a second reconsideration based on new material evidence or information or extenuating circumstances that precluded the inclusion of such information in the previous request.

\* \* \* \*

*IV.C.5—Appeal of Office of Consumer Financial Protection and Access Director Decision*

If the Office of Consumer Financial Protection and Access Director denies a field of membership expansion request, merger, or spin-off, that decision may be appealed to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for the initial denial or explain extenuating circumstances that precluded the inclusion of existing material evidence or information that should have been filed with the request for reconsideration. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A petitioner may seek a second reconsideration based on new material evidence or information or extenuating circumstances that precluded the inclusion of such information in the previous request.

\* \* \* \*

*V.C.5—Appeal of Office of Consumer Financial Protection and Access Director Decision*

If the Office of Consumer Financial Protection and Access Director denies a field of membership expansion request, merger, or spin-off, that decision may be appealed to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for the initial denial or explain extenuating circumstances that precluded the inclusion

of existing material evidence or information that should have been filed with the request for reconsideration. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A petitioner may seek a second reconsideration based on new material evidence or information or extenuating circumstances that precluded the inclusion of such information in the previous request.

\* \* \* \*

**Chapter 3—Low-Income Credit Unions and Credit Unions Serving Underserved Areas**  
\* \* \* \*

*IV.B—Appeal of Office of Consumer Financial Protection and Access Director Decision*  
\* \* \* \*

If the Office of Consumer Financial Protection and Access Director denies an “underserved area” request, the Federal credit union may appeal that decision to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for the initial denial or explain extenuating circumstances that precluded the inclusion of existing material evidence or information that should have been filed with the request for reconsideration. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A petitioner may seek a second reconsideration based on new material evidence or information or extenuating circumstances that precluded the inclusion of such information in the previous request.

\* \* \* \*

**Chapter 4—Charter Conversions**  
\* \* \* \*

*II.C.6—Appeal of the Office of Consumer Financial Protection and Access Director Decision*

If a conversion to a Federal charter is denied by the Office of Consumer Financial Protection and Access Director, the applicant credit union may appeal that decision to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. A request for reconsideration should contain new and material evidence addressing the reasons for

the initial denial or explain extenuating circumstances that precluded the inclusion of existing material evidence or information that should have been filed with the request for reconsideration. The Office of Consumer Financial Protection and Access Director will have 30 days from the date of the receipt of the request for reconsideration to make a final decision. If the request is again denied, the applicant may proceed with the appeal process within 60 days of the date of the last denial. A petitioner may seek a second reconsideration based on new material evidence or information or extenuating circumstances that precluded the inclusion of such information in the previous request.

\* \* \* \* \*

*II.D.2—Application for a Federal Charter*

When the Office of Consumer Financial Protection and Access Director has received evidence that the board of directors has satisfactorily completed the actions described above, the Federal charter and new Certificate of Insurance will be issued.

The credit union may then complete the conversion as discussed in the following section. A credit union may request the Office of Consumer Financial Protection and Access Director to reconsider a denial of a conversion application and/or appeal a denial to the NCUA Board. For more information, refer to Section II.C.6 of this chapter.

\* \* \* \* \*

*III.D.6—Appeal of Office of Consumer Financial Protection and Access Director Decision*

If the Office of Consumer Financial Protection and Access Director denies a conversion to a State charter, the Federal credit union may appeal that decision to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

Before appealing, the credit union may, within 30 days of the denial, provide supplemental information to the Office of Consumer Financial Protection and Access Director for reconsideration. The Office of Consumer Financial Protection and Access Director will have 30 business days from the date of the receipt of the request for reconsideration to make a final decision. If the application is again denied, the credit union may proceed with the appeal process to the NCUA Board within 60 days of the date of the last denial by the Office of Consumer Financial Protection and Access Director.

\* \* \* \* \*

**PART 703—INVESTMENT AND DEPOSIT ACTIVITIES**

■ 9. The authority citation for part 703 continues to read as follows:

**Authority:** 12 U.S.C. 1757(7), 1757(8), 1757(15).

■ 10. Revise § 703.20(d) to read as follows:

**§ 703.20 Request for additional authority.**

\* \* \* \* \*

(d) *Appeal to NCUA Board.* A Federal credit union may request the regional director to reconsider any part of the determination made under paragraph (c) of this section and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

■ 11. Revise § 703.111(d) to read as follows:

**§ 703.111 NCUA approval.**

\* \* \* \* \*

(d) *Right to appeal.* A Federal credit union may request the field director to reconsider a determination made under paragraph (a) or (c) of this section and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

■ 12. Revise § 703.112(c) to read as follows:

**§ 703.112 Applying for additional products or characteristics.**

\* \* \* \* \*

(c) A Federal credit union may request the regional director to reconsider a denial of an application for additional products or characteristics and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

■ 13. Revise § 703.114(c) to read as follows:

**§ 703.114 Regulatory violation.**

\* \* \* \* \*

(c) A Federal credit union may request the regional director to reconsider a revocation of derivatives authority or an order to terminate existing derivatives positions and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

\* \* \* \* \*

**PART 705—COMMUNITY DEVELOPMENT REVOLVING LOAN FUND ACCESS FOR CREDIT UNIONS**

■ 14. The authority citation for part 705 continues to read as follows:

**Authority:** 12 U.S.C. 1756, 1757(5)(D), and (7)(I), 1766, 1782, 1784, 1785 and 1786.

■ 15. Revise § 705.10(a) to read as follows:

**§ 705.10 Appeals.**

(a) *Appeals of non-qualification.* A Qualifying Credit Union whose application for a loan or technical assistance grant has been denied under § 705.7(f) for failure to satisfy any of the conditions set forth in § 705.7(c),

including any additional criteria set forth in the related notice of funding opportunity, may request the Director of the Office of Small Credit Union Initiatives to reconsider the denial and/or appeal that decision to the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter, subject to the following limitations:

(1) *Scope.* The scope of the Board's review is limited to the threshold question of qualification and not the issue of whether, among qualified applicants, a particular loan or technical assistance grant is funded.

(2) *Appeals procedures inapplicable.* The foregoing procedure applies during an open period in which funds are available and NCUA has called for applications. NCUA will reject any application submitted during a period in which NCUA has not called for applications, except for applications submitted under § 705.8. Such rejections are not subject to appeal or review by the NCUA Board.

\* \* \* \* \*

**PART 708a—BANK CONVERSIONS AND MERGERS**

■ 16. The authority citation for part 708a continues to read as follows:

**Authority:** 12 U.S.C. 1766, 1785(b), and 1785(c).

■ 17. Revise § 708a.108(d) to read as follows:

**§ 708a.108 NCUA oversight of methods and procedures of membership vote.**

\* \* \* \* \*

(d) A converting credit union may request the regional director to reconsider a determination regarding the methods and procedures of the membership vote and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

■ 18. Revise § 708a.304(h) to read as follows:

**§ 708a.304 Notice to NCUA and request to proceed with member vote.**

\* \* \* \* \*

(h) *Appeal of adverse decision.* If the Regional Director disapproves a merger proposal, the credit union may request reconsideration and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

■ 19. Revise § 708a.308(d) to read as follows:

**§ 708a.308 NCUA approval of the merger.**

\* \* \* \* \*



(d) A merging credit union may request the Regional Director to reconsider the disapproval of a merger proposal and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

**PART 709—INVOLUNTARY LIQUIDATION OF FEDERAL CREDIT UNIONS AND ADJUDICATION OF CREDITOR CLAIMS INVOLVING FEDERALLY INSURED CREDIT UNIONS IN LIQUIDATION**

■ 20. The authority citation for part 709 continues to read as follows:

**Authority:** 12 U.S.C. 1757, 1766, 1767, 1786(h), 1787, 1788, 1789, 1789a.

■ 21. Revise § 709.7 to read as follows:

**§ 709.7 Procedures for agency review or judicial determination of claims.**

(a) *General.* A claimant may either request agency review of an initial determination of the liquidating agent to disallow a claim or seek a de novo judicial determination of claims. In order to receive agency review of an initial determination, a claimant must request an administrative appeal before the NCUA Board. In order to seek a judicial determination, a claimant must file suit (or continue an action commenced before the appointment of the liquidating agent) in the district or territorial court of the United States for the district within which the credit union's principal place of business is located or the United States District Court for the District of Columbia.

(b) *Procedures for agency review.* A claimant requesting an administrative appeal may request a hearing on the record conducted pursuant to the procedures set forth in subpart A of part 747 of this chapter. The determination of whether to agree to a request for a hearing on the record shall rest solely with the NCUA Board, which shall notify the claimant of its decision in writing. Alternatively, a claimant may request an appeal before the NCUA Board pursuant to the procedures set forth in subpart B to part 746 of this chapter.

(c) *Deadline to request agency review or file suit.* A claimant must request agency review of an initial determination or file suit (or continue an action commenced before the appointment of the liquidating agent) within 60 days from the mailing of the initial determination or the expiration of the time period for the liquidating agent to determine claims under § 709.6(c), whichever is earlier. A request for a hearing on the record will suspend the 60-day period for filing a lawsuit (or

continuing an action commenced before the appointment of the liquidating agent) from the date of the claimant's request to the date of the NCUA Board's decision regarding that request. If a claimant fails to either request a hearing on the record or an appeal to the Board or file suit (or continue an action commenced before the appointment of the liquidating agent) within the 60-day period, any disallowance of claims shall be final and the claimant shall have no further rights or remedies with respect to such claims.

(d) *Reconsideration.* Prior to requesting agency review or filing or continuing a lawsuit, a claimant may request reconsideration of the initial determination of the liquidating agent in accordance with the procedures set forth in subpart B to part 746 of this chapter. The deadline to request agency review or file suit (or continue an action commenced before the appointment of the liquidating agent) in paragraph (c) of this section will be suspended from the date of the claimant's request to the date of the liquidating agent's decision regarding that request.

**§ 709.8 [Removed]**

■ 22. Remove § 709.8.

**§§ 709.9 through 709.13 [Redesignated as § 709.8 through 709.12]**

■ 23. Redesignate §§ 709.9 through 709.13 as §§ 709.8 through 709.12, respectively.

**PART 741—REQUIREMENTS FOR INSURANCE**

■ 24. The authority citation for part 741 continues to read as follows:

**Authority:** 12 U.S.C. 1757, 1766(a), 1781–1790, and 1790d; 31 U.S.C. 3717.

■ 25. Revise § 741.11(d) to read as follows:

**§ 741.11 Foreign branching.**

\* \* \* \* \*

(d) *Revocation of approval.* A State regulator that revokes approval of the branch office must notify NCUA of the action once it issues the notice of revocation. The regional director may revoke approval of the branch office for failure to follow the business plan in a material respect or for substantive and documented safety and soundness reasons. If the regional director revokes the approval, the credit union will have six months from the date of the revocation letter to terminate the operations of the branch. The credit union can request reconsideration of the revocation and/or appeal this revocation to the NCUA Board in accordance with

the procedures set forth in subpart B to part 746 of this chapter.

\* \* \* \* \*

**PART 745—SHARE INSURANCE AND APPENDIX**

■ 26. The authority citation for part 745 continues to read as follows:

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

■ 27. Revise § 745.201(c) to read as follows:

**§ 745.201 Processing of insurance claims.**

\* \* \* \* \*

(c) *Reconsideration and appeals.* An account holder may request reconsideration from the Liquidating Agent of the initial determination and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

**§ 745.202 [Removed]**

■ 28. Remove § 745.202.

**§ 745.203 [Redesignated as § 745.202]**

■ 29. Redesignate § 745.203 as § 745.202.

**PART 746—APPEALS PROCEDURES**

■ 30. The authority citation for part 746 continues to read as follows:

**Authority:** 12 U.S.C. 1766, 1787, and 1789.

■ 31. Add subpart B to read as follows:

**Subpart B—Appeals Procedures That Do Not by Law Require a Board Hearing**

Sec.

746.201 Authority, purpose, and scope.

746.202 Definitions.

746.203 Request for reconsideration.

746.204 Appeal to the Board.

746.205 Preliminary considerations regarding the appeal.

746.206 Administration of the appeal.

746.207 Procedures for oral hearing.

**Subpart B—Appeals Procedures That Do Not by Law Require a Board Hearing**

**§ 746.201 Authority, purpose, and scope.**

(a) *Authority.* This subpart is issued pursuant to sections 120, 207, and 209 of the Federal Credit Union Act (12 U.S.C. 1766, 1787, and 1789).

(b) *Purpose.* This subpart provides generally uniform procedures by which petitioners may appeal initial agency determinations to the NCUA Board under this part.

(c) *Scope.* This subpart covers the appeal of initial agency determinations by a program office which the petitioner has a right to appeal to the NCUA Board

under the following regulations: §§ 701.14(e), 701.21(h)(3), 701.22(c), 701.23(h)(3), 701.32(b)(5), and 701.34(a)(4), appendix B to part 701 of this chapter, Chapters 1–4, §§ 703.20(d), 703.111(d), 703.112(c), 703.114(c), 705.10(a), 708a.108(d), 708a.304(h), 708a.308(d), 709.7, 741.11(d), and 745.201(c), subpart J to part 747 of this chapter, and § 750.6(b).

(d) *Exclusions.* This subpart does not apply to:

(1) Actions by the agency to develop regulations, policy statements, or guidance documents;

(2) Formal enforcement actions, the review of material supervisory determinations that come under the jurisdiction of NCUA's Supervisory Review Committee, or the appeal of any agency determination made pursuant to part 792 of this chapter;

(3) Challenges to determinations under the prompt corrective action regime in parts 702 and 704 of this chapter and subparts L and M to part 747 of this chapter; and

(4) Creditor claims arising from the liquidation of an insured credit union to the extent that the creditor has requested, and the NCUA Board has agreed, for the claim to be handled through a hearing on the record pursuant to 12 U.S.C. 1787(b)(7)(A) and subpart A of part 747 of this chapter.

#### § 746.202 Definitions.

For purposes of this subpart:

*Appeal* means a process by which a petitioner may obtain the review by the Board of an initial agency determination.

*Board* means the NCUA Board.

*Initial agency determination* means an agency action taken at a level below the Board with respect to an application, request, claim, or other matter in which a determination of rights or resolution of issues is rendered and the party affected by the determination has been provided with a right to appeal the determination to the NCUA Board. The initial agency determination shall notify the Petitioner of the right to request reconsideration or to file an appeal with the Board, and shall include a description of applicable filing deadlines and time frames for agency responses. Agency determinations involving the formulation of a regulation, guidance document, or policy statement are excluded from this definition.

*Oral hearing* means an opportunity, granted at the sole discretion of the Board, by which a petitioner may make an oral presentation to the Board concerning issues pertinent to an appeal.

*Petitioner* means the person or entity seeking Board review of an initial agency determination.

*Program office* means the office within NCUA responsible for making an initial agency determination.

*Special Counsel to the General Counsel* means an individual (referred to herein as the "Special Counsel") within NCUA's Office of General Counsel charged with administering appeals in accordance with the procedures set forth in this part.

#### § 746.203 Request for reconsideration.

(a) *Reconsideration.* Prior to submitting an appeal in accordance with § 746.204, the petitioner may in its sole discretion make a written request to the appropriate program office to reconsider the initial agency determination.

(b) *Deadline to file.* A request for reconsideration must be sent to the appropriate program office within 30 calendar days of the date of the initial agency determination. A petitioner who does not file a request for reconsideration in a timely manner is considered to have waived the right to request reconsideration.

(c) *Special rule regarding change in officials.* Notwithstanding paragraph (a) of this section, a request for reconsideration of an initial agency determination disapproving an individual serving as a director, committee member or senior executive officer pursuant to § 701.14 of this chapter must be sent to the appropriate program office within 15 calendar days of the date of the initial agency determination.

(d) *Content of request.* Any request for reconsideration must include:

(1) A statement of the facts on which the request for reconsideration is based;

(2) A statement of the basis for the initial agency determination to which the petitioner objects and the alleged error in such determination; and

(3) Any other support or evidence relied upon by the petitioner which was not previously provided to the appropriate program office.

(e) *Determination of program office.* The appropriate program office will review its initial agency determination and reconsider the position initially taken in the light of the arguments and additional materials provided in the request for reconsideration. Within 30 calendar days of its receipt of a request for reconsideration, the appropriate program office shall issue its determination either affirming in whole or in part the initial agency determination or rejecting it.

(f) *Notice of determination.* The appropriate program office shall provide its decision concerning the reconsideration request to the petitioner in writing, stating the reasons for the decision. The decision shall be treated as an initial agency determination for purposes of § 746.204(a).

(1) In addition to a written statement of reasons for the decision, the appropriate program office shall provide the petitioner with written notice of the right to appeal the decision, in whole or in part, to the Board in accordance with the procedures set forth in § 746.204.

(2) For creditor claims brought pursuant to sec. 207 of the Federal Credit Union Act (12 U.S.C. 1787), the appropriate program office shall provide the petitioner with written notice of the right, in the alternative to filing an appeal with the Board, to file suit or continue an action commenced before the appointment of the liquidating agent in the district or territorial court of the United States for the district within which the credit union's principal place of business was located or the United States District Court for the District of Columbia. For such claims, the 60-day period for filing a lawsuit in United States district court provided in 12 U.S.C. 1787(b)(6) shall be tolled from the date of the petitioner's request for reconsideration to the date of a determination pursuant to paragraph (e) of this section.

(3) Upon a showing of extenuating circumstances, as determined by the program office in its reasonable judgment, a petitioner may be allowed to submit a second reconsideration request before filing an appeal with the Board. In such cases, the deadline for filing an appeal with the Board shall begin to run from the earlier of the date of the decision of the program office regarding the second reconsideration request or thirty calendar days from the date the second reconsideration request was accepted by the program office.

(g) *Failure to make a determination.* Failure by the appropriate program office to issue a decision within the timeframe specified in paragraph (e) of this section shall be an affirmation of the original initial agency determination and shall be treated as an initial agency determination for purposes of § 746.204(a).

(h) *Burden of proof.* The burden of proof to lead the appropriate program office to modify or reverse an initial agency determination shall rest solely upon the petitioner.

#### § 746.204 Appeal to the Board.

(a) *Filing.* Within 60 calendar days of the date of an initial agency

determination, or, as applicable, a determination by the program office on any request for reconsideration, a petitioner may file an appeal seeking review of the determination by the Board. The request must be in writing and filed with the Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, VA 22314-3428.

(b) *Special rule regarding change in officials.* Notwithstanding paragraph (a) of this section, an appeal of an initial agency determination disapproving an individual serving as a director, committee member or senior executive officer pursuant to § 701.14 of this chapter must be filed with the Secretary of the Board within 15 calendar days of the date of the initial agency determination.

(c) *Failure to file a timely appeal.* Absent extenuating circumstances, as determined by the Board in its sole discretion, a petitioner who fails to file an appeal within the specified 60-day period shall be deemed to have waived all claims pertaining to the matters in issue.

(d) *Content of request.* Any appeal filed with the Board must include:

(1) A statement summarizing the underlying facts that form the basis of the appeal, together with copies of all pertinent documents, records, and materials on which the petitioner relies in support of the appeal.

(2) A statement outlining why the petitioner objects to the conclusions in the initial agency determination, including any errors alleged to have been made by the program office in reaching its determination.

(3) Any other materials or evidence relied upon by the petitioner that were not previously provided to the appropriate program office.

(e) *Burden of proof.* The burden of proof to lead the Board to modify or reverse an initial agency determination shall rest solely upon the petitioner.

(f) *Amending or supplementing the appeal.* Within 45 calendar days from the date the Secretary of the Board receives an appeal, the petitioner may amend or supplement the appeal in writing.

(g) *Request for oral hearing.* In accordance with § 746.207, the petitioner may request an opportunity to appear before the Board, in person, or via teleconference or videoconference, to make an oral presentation in support of the appeal.

#### **§ 746.205 Preliminary considerations regarding the appeal.**

(a) *Initial review.* The Special Counsel shall review all appeals filed with the

Secretary of the Board for conformance with the rules set forth in this subpart, including deadlines for submission of an appeal. The Special Counsel shall also make an evaluation concerning whether an appeal is moot or is otherwise not in good order, and shall make a recommendation for the disposition of all such appeals to the Board. The Special Counsel shall have the authority to dismiss an appeal upon the request of the petitioner.

(b) *Supplemental materials.* Within 30 calendar days from the date the Secretary of the Board receives an appeal, the Special Counsel may request in writing that the petitioner submit additional evidence in support of the appeal. If additional evidence is requested, the petitioner shall have 30 calendar days from the date of issuance of such request to provide the requested information. Failure by the petitioner to provide such information may result in denial of the petitioner's appeal. The Special Counsel shall have the authority to request additional information from any other relevant source in order to provide the Board with a full and complete administrative record. All requests by the Special Counsel pursuant to this section must be reasonable and designed to facilitate the processing of the appeal, not to delay it.

#### **§ 746.206 Administration of the appeal.**

(a) *De novo review by Special Counsel.* After receipt of a timely appeal, the Special Counsel shall contact the relevant NCUA program office and request a complete set of all pertinent materials, including internal memoranda, correspondence, and records having a bearing on the initial agency determination being appealed. The Special Counsel will conduct an independent review of these materials, along with all materials submitted by the petitioner in support of the appeal. The Special Counsel will make a recommendation to the Board as to the appropriate disposition of the appeal after having evaluated the applicable legal arguments and considered the facts and circumstances that pertain to the appeal. As directed by the Board, the Special Counsel may provide his or her recommendation in writing to the Board and may make an oral presentation before the Board.

(b) *Determination on appeal.* Within 90 calendar days from the date of receipt of an appeal by the Secretary of the Board, or within any extension of time as established by the Chairman, the Board shall issue a decision allowing, in whole or in part, or disallowing the petitioner's appeal. The decision by the Board shall be in writing, stating the

reasons for the decision, and shall constitute a final agency action for purposes of chapter 7 of title 5 of the United States Code. Failure by the Board to issue a decision on an appeal within the 90-day period or within any extension of time as established by the Chairman shall be deemed to be a denial of the appeal.

(c) *Extension of time.* In the discretion of the Chairman, the time frame for the Board's decision may be extended as the Chairman may consider necessary or appropriate for a full and fair consideration of the issues. For purposes of this paragraph (c), the Special Counsel is authorized to act on behalf of the Chairman and may, in that capacity, grant an extension of time.

#### **§ 746.207 Procedures for oral hearing.**

(a) *Request for oral hearing.* The petitioner may request to appear before the Board to make an oral presentation in support of the appeal. The request must be submitted with the initial appeal documents and should be in the form of a separate written document titled "Request for Oral Hearing." The request must show good cause for an oral presentation and state reasons why the appeal cannot be presented adequately in writing.

(b) *Action on the request.* The Board shall determine whether to grant the request for oral hearing and shall direct the Special Counsel to serve notice of the Board's determination in writing to the petitioner. A request for oral hearing shall be granted with the approval of any Board member. The determination by a Board member approving an oral hearing must be taken within 20 days of the Board Secretary's receipt of the appeal.

(c) *Effect of denial.* In the event no Board member approves of holding an oral hearing, the request for an oral hearing is deemed to be denied, and the appeal shall be reviewed and determined by the Board on the basis of the written record.

(d) *Procedures for oral hearing.* The following procedures shall govern the conduct of any oral hearing:

(1) *Scheduling of oral hearing; location.* The Special Counsel shall notify the petitioner and the program office of the date and time for the oral hearing, making sure to provide reasonable lead time and schedule accommodations. The oral hearing will be held at NCUA headquarters in Alexandria, Virginia; *provided, however,* that on his or her own initiative or at the request of the petitioner, the Chairman may in his or her sole discretion allow for a hearing

to be conducted via teleconference or video conference facilities.

(2) *Appearances; representation.* The petitioner and the NCUA program office shall submit a notice of appearance identifying the individual(s) who will be representing them at the oral presentation. The petitioner shall designate not more than two officers, employees, or other representatives (including counsel), unless otherwise authorized by the Chairman. The NCUA program office shall designate not more than two individuals (one of whom may be a litigation and enforcement attorney from NCUA's Office of General Counsel), unless otherwise authorized by the Chairman.

(3) *Conduct of oral hearing.* The oral hearing shall consist entirely of oral presentations. The introduction of written evidence or witness testimony at the hearing shall not be permitted. The petitioner shall present first, followed by the NCUA program office. Each side shall be allotted a specified and equal amount of time for its presentation, of which a portion may be reserved for purposes of rebuttal. This time limit shall be set by the Board and will be based on the complexity of the appeal. Members of the Board may ask questions of any individual appearing before the Board.

(4) *Transcript.* The oral hearing shall be on the record and transcribed by a

stenographer, who will prepare a transcript of the proceedings. The stenographer will make the transcript available to the petitioner upon payment of the cost thereof.

(e) *Confidentiality.* An oral hearing as provided for herein constitutes a meeting of the Board within the meaning of the Government in the Sunshine Act (5 U.S.C. 552b). The NCUA Chairman shall preside over the conduct of the oral hearing. The meeting will be closed to the public to the extent that one or more of the exemptions from public meetings apply as certified by NCUA's Office of General Counsel. The Board shall maintain the confidentiality of any information or materials submitted or otherwise obtained in the course of the procedures outlined herein, subject to applicable law and regulations.

(f) *Conclusion of the oral hearing.* The Board shall take the oral presentations under advisement. The Board shall render its decision on the appeal in accordance with § 746.206.

#### **PART 747—ADMINISTRATIVE ACTIONS, ADJUDICATIVE HEARINGS, RULES OF PRACTICE AND PROCEDURE, AND INVESTIGATIONS**

■ 32. The authority citation for part 747 continues to read as follows:

**Authority:** 12 U.S.C. 1766, 1782, 1784, 1785, 1786, 1787, 1790a, 1790d; 15 U.S.C. 1639e; 42 U.S.C. 4012a; Pub. L. 101-410; Pub. L. 104-134; Pub. L. 109-351; Pub. L. 114-74.

#### **Subpart J—[Removed and Reserved]**

■ 33. Remove and reserve subpart J.

#### **PART 750—GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS**

■ 34. The authority citation for part 750 continues to read as follows:

**Authority:** 12 U.S.C. 1786(t).

■ 35. Revise § 750.6(b) to read as follows:

#### **§ 750.6 Filing instructions; appeal.**

\* \* \* \* \*

(b) A FICU whose request for approval by NCUA, in accordance with paragraph (a) of this section, has been denied may seek reconsideration of the request and/or file an appeal with the NCUA Board in accordance with the procedures set forth in subpart B to part 746 of this chapter.

[FR Doc. 2017-23211 Filed 10-27-17; 8:45 am]

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# FEDERAL REGISTER

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Part V

The President

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Memorandum of October 25, 2017—Unmanned Aircraft Systems Integration Pilot Program



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# Presidential Documents

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Title 3—

Memorandum of October 25, 2017

The President

## Unmanned Aircraft Systems Integration Pilot Program

### Memorandum for the Secretary of Transportation

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

**Section 1. Policy.** It shall be the policy of the United States to promote the safe operation of unmanned aircraft systems (UAS) and enable the development of UAS technologies for use in agriculture, commerce, emergency management, human transportation, and other sectors. Compared to manned aircraft, UAS provide novel, low-cost capabilities for both public and private applications. UAS present opportunities to enhance the safety of the American public, increase the efficiency and productivity of American industry, and create tens of thousands of new American jobs.

The private sector has rapidly advanced UAS capabilities to address the needs of recreational, commercial, and public users. To promote continued technological innovation and to ensure the global leadership of the United States in this emerging industry, the regulatory framework for UAS operations must be sufficiently flexible to keep pace with the advancement of UAS technology, while balancing the vital Federal roles in protecting privacy and civil liberties; mitigating risks to national security and homeland security; and protecting the safety of the American public, critical infrastructure, and the Nation's airspace. Well-coordinated integration of UAS into the national airspace system (NAS) alongside manned aircraft will increase the safety of the NAS and enable the authorization of more complex UAS operations.

The Federal Aviation Administration (FAA) has taken steps to integrate UAS into the NAS at specific test sites and has issued operational requirements for small UAS operations in the NAS. Further integration will require continued private-sector cooperation and the involvement of State, local, and tribal governments in Federal efforts to develop and enforce regulations on UAS operations in their jurisdictions. Input from State, local, tribal, and private-sector stakeholders will be necessary to craft an optimal strategy for the national management of UAS operations. A coordinated effort between the private sector and among these governments will provide certainty and stability to UAS owners and operators, maximize the benefits of UAS technologies for the public, and mitigate risks to public safety and security.

**Sec. 2. UAS Integration Pilot Program.** (a) Within 90 days of the date of this memorandum, the Secretary of Transportation (Secretary), in consultation with the Administrator of the FAA (Administrator), shall establish a UAS Integration Pilot Program (Program) to test the further integration of UAS into the NAS in a select number of State, local, and tribal jurisdictions.

(b) The objectives of the Program shall be to:

- (i) test and evaluate various models of State, local, and tribal government involvement in the development and enforcement of Federal regulations for UAS operations;
- (ii) encourage UAS owners and operators to develop and safely test new and innovative UAS concepts of operations; and

(iii) inform the development of future Federal guidelines and regulatory decisions on UAS operations nationwide.

**Sec. 3. Implementation.** (a) To implement the Program, the Secretary or the Administrator, as appropriate, shall:

(i) solicit proposals from State, local, and tribal governments to test within their jurisdictions the integration of civil and public UAS operations into the NAS below 200 feet above ground level, or up to 400 feet above ground level if the Secretary determines that such an adjustment would be appropriate;

(ii) select proposals by State, local, and tribal governments for participation in the Program according to the criteria listed in subsection (b) of this section;

(iii) enter into agreements with the selected governments to establish the terms of their involvement in UAS operations within their jurisdictions, including their support for Federal enforcement responsibilities; describe the proposed UAS operations to be conducted; and identify the entities that will conduct such operations, including, if applicable, the governments themselves; and

(iv) as necessary, use existing authorities to grant exceptions, exemptions, authorizations, and waivers from FAA regulations to the entities identified in the agreements described in subsection (iii) of this section, including through the issuance of waivers under 14 CFR Part 107 and Certificates of Waiver or Authorization under section 333 of the FAA Modernization and Reform Act of 2012 (FMRA) (Public Law 112–95).

(b) In selecting proposals for participation in the Program under subsection (a) of this section, the Secretary shall consider:

(i) overall economic, geographic, and climatic diversity of the selected jurisdictions;

(ii) overall diversity of the proposed models of government involvement;

(iii) overall diversity of the UAS operations to be conducted;

(iv) the location of critical infrastructure;

(v) the involvement of commercial entities in the proposal, and their ability to advance objectives that may serve the public interest as a result of further integration of UAS into the NAS;

(vi) the involvement of affected communities in, and their support for, participating in the Program;

(vii) the commitment of the governments and UAS operators involved in the proposal to comply with requirements related to national defense, homeland security, and public safety, and to address competition, privacy, and civil liberties concerns; and

(viii) the commitment of the governments and UAS operators involved in the proposal to achieve the following policy objectives:

(A) promoting innovation and economic development;

(B) enhancing transportation safety;

(C) enhancing workplace safety;

(D) improving emergency response and search and rescue functions; and

(E) using radio spectrum efficiently and competitively.

(c) Within 180 days of the establishment of the Program, the Secretary shall enter into agreements with State, local, or tribal governments to participate in the Program, with the goal of entering into at least 5 such agreements by that time.

(d) In carrying out subsection (c) of this section, the Secretary shall select State, local, or tribal governments that plan to begin integration of UAS



into the NAS in their jurisdictions within 90 days after the date on which the agreement is established.

(e) The Secretary shall consider new proposals for participation in the Program up to 1 year before the Program is scheduled to terminate.

(f) The Secretary shall apply best practices from existing FAA test sites, waivers granted under 14 CFR part 107, exemptions granted under section 333 of the FMRA, the FAA Focus Area Pathfinder Program, and any other relevant programs in order to expedite the consideration of exceptions, exemptions, authorizations, and waivers from FAA regulations to be granted under the Program, as described in subsection (a)(iv) of this section.

(g) The Secretary shall address any non-compliance with the terms of exceptions, exemptions, authorizations, waivers granted, or agreements made with UAS users or participating jurisdictions in a timely and appropriate manner, including by revoking or modifying the relevant terms.

**Sec. 4. *Coordination.*** (a) The Administrator, in coordination with the Administrator of the National Aeronautics and Space Administration, shall apply relevant information collected during the Program and preliminary findings to inform the development of the UAS Traffic Management System under section 2208 of the FAA Extension, Safety, and Security Act of 2016 (Public Law 114–190).

(b) The Secretary, in coordination with the Secretaries of Defense and Homeland Security and the Attorney General, shall take necessary and appropriate steps to:

(i) mitigate risks to public safety and homeland and national security when selecting proposals and implementing the Program; and

(ii) monitor compliance with relevant laws and regulations to ensure that Program activities do not interfere with national defense, homeland security, or law enforcement operations and missions.

(c) The heads of executive departments and agencies with relevant law enforcement responsibilities (Federal law enforcement agencies), including the Attorney General and the Secretary of Homeland Security, shall develop and implement best practices to enforce the laws and regulations governing UAS operations conducted under the Program.

(d) In carrying out the responsibilities set forth in subsection (c) of this section, the heads of Federal law enforcement agencies shall coordinate with the Secretaries of Defense and Transportation, as well as with the relevant State, local, or tribal law enforcement agencies.

(e) In implementing the Program, the Secretary shall coordinate with the Secretaries of Defense and Homeland Security and the Attorney General to test counter-UAS capabilities, as well as platform and system-wide cybersecurity, to the extent appropriate and consistent with law.

**Sec. 5. *Evaluation and Termination of UAS Integration Pilot Program.*** (a) The Program shall terminate 3 years from the date of this memorandum, unless extended by the Secretary.

(b) Before and after the termination of the Program, the Secretary shall use the information and experience yielded by the Program to inform the development of regulations, initiatives, and plans to enable safer and more complex UAS operations, and shall, as appropriate, share information with the Secretaries of Defense and Homeland Security, the Attorney General, and the heads of other executive departments and agencies.

(c) After the date of this memorandum and until the Program is terminated, the Secretary, in consultation with the Secretaries of Defense and Homeland Security and the Attorney General, shall submit an annual report to the President setting forth the Secretary's interim findings and conclusions concerning the Program. Not later than 90 days after the Program is terminated, the Secretary shall submit a final report to the President setting forth the Secretary's findings and conclusions concerning the Program.

**Sec. 6. Definitions.** As used in this memorandum, the next stated terms, in singular and plural, are defined as follows:

(a) The term “unmanned aircraft system” has the meaning given that term in section 331 of the FMRA.

(b) The term “public unmanned aircraft system” has the meaning given that term in section 331 of the FMRA.

(c) The term “civil unmanned aircraft system” means an unmanned aircraft system that meets the qualifications and conditions required for operation of a civil aircraft, as defined in 49 U.S.C. 40102.

**Sec. 7. General Provisions.** (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof;

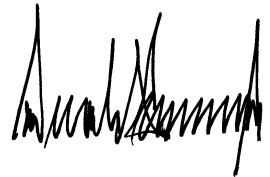
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals; or

(iii) the conduct of public aircraft operations, as defined in 49 U.S.C. 40102(a)(41) and 40125, by executive departments and agencies, consistent with applicable Federal law.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary is authorized and directed to publish this memorandum in the *Federal Register*.

A handwritten signature in black ink, appearing to be the signature of Donald Trump, located in the lower right quadrant of the page.

THE WHITE HOUSE,  
Washington, October 25, 2017

# Reader Aids

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