FEDERAL REGISTER

Vol. 83 Monday,
No. 58 March 26, 2018

Pages 12849–13096

OFFICE OF THE FEDERAL REGISTER

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Postmaster: Send address changes to the Superintendent of Documents, Federal Register, U.S. Government Publishing Office, Washington, DC 20402, along with the entire mailing label from the last issue received.

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Rules and Regulations

Federal Register

Vol. 83, No. 58

Monday, March 26, 2018

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 125, 126, and 127

RIN 3245–AH02

Conforming Statutory Amendments and Technical Corrections to Small Business Government Contracting Regulations

AGENCY: U.S. Small Business Administration.

ACTION: Direct final rule; request for comments.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is amending its regulations to incorporate a provision of the National Defense Authorization Act of 2018 (NDAA 2018) and to update and provide several technical corrections to SBA's regulations. Specifically, the NDAA 2018 amended the Small Business Act by replacing fixed dollar amount thresholds with references to the micro-purchase and simplified acquisition thresholds. SBA is updating its regulations to conform to this new statutory language. SBA is also updating the sole source dollar amounts for the Service-Disabled Veteran-Owned (SDVO) small business and the Historically Underutilized Business Zone (HUBZone) small business regulations. The thresholds for sole source contracting are contained in the Small Business Act, SBA's regulations, and the Federal Acquisition Regulations (FAR). These thresholds are updated in the FAR for inflation periodically, and therefore, over time, SBA's regulations and the FAR's numbers diverge. SBA is making this change to conform the thresholds contained in SBA's regulations to those in the FAR. This rule also allows indirect ownership by United States citizens in the HUBZone program to more accurately align with the underlying statutory authority. Finally, SBA is making several technical changes to address mistakes and typos made in previous rulemakings. For example, this final rule will update some cross-references that were not updated when a previous rulemaking changed numbering. Other changes made are for errors, grammar, syntax, and clarity.

DATES: This rule is effective on May 25, 2018 without further action, unless significant adverse comment is received by April 25, 2018. If significant adverse comment is received, SBA will publish a timely withdrawal of the rule in the **Federal Register**.

ADDRESSES: You may submit comments, identified by RIN 3245–AH02, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Mail, for paper, disk, or CD–ROM submissions:* Kenneth Dodds, Director, Office of Procurement Policy and Liaison, 409 Third Street SW, Washington, DC 20416.
- *Hand Delivery/Courier:* Kenneth Dodds, Director, Office of Procurement Policy and Liaison, 409 Third Street SW, Washington, DC 20416.

SBA will post all comments on *www.regulations.gov*. If you wish to submit confidential business information (CBI) as defined in the User Notice at *www.Regulations.gov*, please submit the information to Brenda Fernandez, Office of Procurement Policy and Liaison, 409 Third Street SW, Washington, DC 20416, or send an email to *Brenda.fernandez@sba.gov*. Highlight the information that you consider CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination of whether it will publish the information or not.

FOR FURTHER INFORMATION CONTACT: Brenda Fernandez, Office of Procurement Policy and Liaison, 409 Third Street SW, Washington, DC 20416, 202–205–7337, *Brenda.fernandez@sba.gov*.

SUPPLEMENTARY INFORMATION: On December 12, 2017, President Trump signed into law the National Defense Authorization Act for Fiscal Year 2018 (NDAA 2018), Public Law 115–91, 131 Stat. 1283. Section 1702 of NDAA 2018 amended section 15(j)(1) of the Small Business Act, 15 U.S.C. 644(j)(1), by removing the $2,500 and $100,000 thresholds found in the Small Business Act and replacing them with references to the micro-purchase threshold and the simplified acquisition threshold, respectively. The Small Business Act previously required competition reserved exclusively for small business concerns for procurements with values falling between $2,500 and $100,000 (adjusted for inflation in regulations to $150,000). SBA also uses dollar value thresholds for the application of the limitations on subcontracting requirements and nonmanufacturer rule to small business set-asides. This direct final rule merely adopts the statutory change by replacing the dollar thresholds with references to the micro-purchase and simplified acquisition thresholds in an identical way that the Small Business Act was amended.

SBA is also updating the sole source dollar amounts for the Service-Disabled Veteran-Owned (SDVO) small business and the Historically Underutilized Business Zone (HUBZone) small business regulations. The thresholds for sole source contracting are contained in the Small Business Act, SBA's regulations (Title 13 of the Code of Federal Regulations), and the Federal Acquisition Regulations (FAR) (Title 48 of the Code of Federal Regulations). These thresholds are updated in the FAR for inflation periodically, and therefore over time, SBA's regulations and the FAR's numbers diverge. The dollar thresholds set forth in the FAR below which contracts may be awarded on a sole source basis, as adjusted for inflation, are as follows: For the 8(a) Business Development (BD) program (FAR 19.805–1), $7 million, including options, for contracts assigned a manufacturing North American Industrial Classification System (NAICS) code, and $4 million, including options, for all other contracts; for the SDVO small business program (FAR 19.1406) and Women-Owned Small Business (WOSB) program (FAR 19.1506), $6.5 million, including options, for contracts assigned a manufacturing NAICS code, and $4 million, including options, for all other contracts; and for the HUBZone program (FAR 19.1306), $7 million, including options, for contracts assigned a manufacturing NAICS code, and $4 million, including options, for all other contracts. SBA's regulations for the 8(a) BD and WOSB programs have previously been updated in 13 CFR 124.506(a)(2) and 127.503(c)(2), respectively, to synchronize those programs with the inflation adjustments made by the FAR. The sole source thresholds for the SDVO and HUBZone programs have not been similarly updated. This direct final rule merely incorporates the inflation adjustments made by the FAR for the SDVO and HUBZone programs into SBA's regulations.

The rule also amends the HUBZone regulations to allow indirect ownership by United States citizens to more accurately align with the underlying statutory authority. Direct ownership is not statutorily mandated, and SBA believes that the purposes of the HUBZone program—capital infusion in underutilized geographic areas and employment of individuals living in those areas—may be achieved whether ownership by U.S. citizens is direct or indirect. The regulations first implementing the HUBZone program were largely based on those governing the Small Disadvantaged Business (SDB) program, which is no longer in existence and which served different goals than the HUBZone program. The SDB program and SBA's other currently active socioeconomic programs (including the 8(a) BD program, the WOSB small business program, and the SDVO small business program) are intended to assist the business development of small concerns owned and controlled by certain individuals, so requiring direct ownership for these programs is consistent with their purposes. The HUBZone program differs in that the program's goals do not center on the socioeconomic status of the SBC owner but rather the location of the business and the residence of its employees. This direct final rule deletes the requirement that ownership by United States citizens in the HUBZone program must be direct, and instead it merely copies the statutory requirement that a HUBZone small business concern must be at least 51% owned and controlled by United States citizens.

Finally, SBA is making several technical changes to address mistakes and typos made in previous rulemakings. For example, this final rule will update some cross-references that were not updated when a previous rulemaking changed numbering.

Section by Section Analysis

Section 121.103(h)(3)(ii)

This section deals with exceptions to SBA's general affiliations rule for joint ventures. Specifically, the exception in subparagraph (ii) is for joint ventures participating in SBA's mentor protégé program. The rule is intended to classify a joint venture between a small business and its SBA-approved mentor as small, as long as the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the contract and meets SBA's general joint venture requirements for the type of contract at issue. In other words, the joint venture can qualify as small for any contract (8(a), small business set aside, WOSB, SDVO, or HUBZone) provided it meets SBA's joint venture rules for the type of contract to be performed. However, the current regulation is missing cross-references to the joint venture requirements for 8(a) contracts and small business set asides. These cross-references were inadvertently left out. This change merely fixes that error.

Sections 121.404(g), 125.18(e)(1), 126.601(h)(1), and 127.503(h)(1)

SBA is making a technical correction to these sections. The paragraphs in question deal with the identical issue, recertification of size and/or status. The language and intent of each regulation is the same; the only difference is that each section deals with a separate socio-economic contracting program. It has been brought to SBA's attention that as drafted, it is not clear which sentence or clause the final sentence is referencing. It was SBA's intent, as made clear in the proposed and final rule enacting this regulation, entitled Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, 78 FR 61114 (Oct. 2, 2013), that SBA wanted the sentence and the referenced exceptions to be applied to the entirety of the preceding paragraph. 78 FR 61114, 61119–20 (Oct. 2, 2013). Therefore, SBA is adding additional language to clearly align the paragraph to the intent of the regulation. This rule is not intended to make any substantive change to the paragraphs. SBA is also changing the heading to § 126.601(h), the recertification paragraph for the HUBZone program, in order to make it identical to the recertification paragraphs relating to the other programs. There is no intended difference regarding recertification between the programs, so there is no need for the additional language in the HUBZone paragraph after the word recertification.

Section 121.406(a)

SBA is making a correction to paragraph (a) of this section in order to correct a missing word. With reference to the clause dealing with SDVO SBC contracting, SBA left out the modifier ''sole'' before ''source contract'' in the final rule enacting this regulation, entitled Small Business Government Contracting and National Defense Authorization Act of 2013 Amendments, 81 FR 34243, 34259 (May 31, 2016).

Section 121.406(d)

SBA is making a change to paragraph (d) of this section. This change removes the dollar value thresholds and replaces them with references to the micro-purchase and simplified acquisition thresholds, respectively. As explained above, the NDAA 2018 modified the Small Business Act by changing the dollar thresholds to references to the micro-purchase threshold and the simplified acquisition threshold. This direct final rule merely conforms the regulation to the statutory changes made by the NDAA 2018.

Section 125.3

This change removes the term ''$150,000'' in paragraphs (c)(1)(viii) and (ix) and replaces it with a reference to the simplified acquisition threshold. As explained above, the NDAA 2018 modified the Small Business Act by changing the dollar thresholds to references to the micro-purchase threshold and the simplified acquisition threshold. Thus, this direct final rule merely conforms the regulation to the statutory changes made by the NDAA 2018 and does not make any substantive change to the regulations.

Section 125.6

This change removes the dollar value thresholds and replaces them with references to the micro-purchase and simplified acquisition thresholds, respectively. As explained above, the NDAA 2018 modified the Small Business Act by changing the dollar thresholds to references to the micro-purchase threshold and the simplified acquisition threshold. Thus, this direct final rule merely conforms the regulation to the statutory changes made by the NDAA 2018 and does not make any substantive change to the regulations.

Sections 125.22 and 125.23

This direct final rule changes §§ 125.22 and 125.23 to correct cross-reference citations that were not updated when SBA renumbered its regulations. SBA is also amending the values authorized for SDVO small business sole source awards in order to be consistent with the current values set forth in FAR 19.1406, as adjusted for inflation.

Section 126.200(b)(1)

As set forth above in more detail, this rule deletes the requirement that ownership by United States citizens in the HUBZone program must be direct, and instead it merely copies the statutory requirement that a HUBZone small business concern must be at least 51% owned and controlled by United States citizens.

Section 126.612(b)(1) and (2)

SBA is amending these paragraphs to update the values authorized for HUBZone sole source awards in order to be consistent with the current values set forth in FAR 19.1306, as adjusted for inflation.

Section 126.616(d)(2)

SBA is amending this paragraph by replacing the word protégé with the term SBC. The inclusion of the word protégé was a mistake. The mistake could be interpreted to mean the availability of the benefits of this provision were available only to HUBZone SBCs partaking in the SBA's mentor-protégé program. However, the clear intent of the final rule entitled ''Small Business Mentor Protégé Programs, 81 FR 48557 (July 25, 2016), was for the joint venture benefits to be available to all certified HUBZone SBCs. In this regard, the supplementary information to the Small Business Mentor Protégé Programs rule, in which this provision was adopted, provided that ''the final rule revises the joint venture provisions contained in § 125.15(b) (for SDVO SBCs, which are now contained in § 125.18(b)), § 126.616 (for HUBZone SBCs), and § 127.506 (for WOSB and Economically Disadvantaged Women-Owned Small Business (EDWOSB) concerns) to more fully align those requirements to the requirements of the 8(a) BD program.'' 81 FR 48557, 48558, 48559 (July 25, 2016) (Emphasis added). This direct final rule merely conforms the HUBZone regulatory language to that of the other programs, something that was specifically intended in the original regulatory authority.

Compliance With Executive Orders 12866, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35) and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this direct final rule does not constitute a significant regulatory action under Executive Order 12866. This rule is also not a major rule under the Congressional Review Act, 5 U.S.C. 800.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

For the purposes of Executive Order 13132, SBA has determined that this direct 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. Therefore, for the purpose of Executive Order 13132, Federalism, SBA has determined that this direct final rule has no federalism implications warranting preparation of a Federalism assessment.

Executive Order 13771

This final rule is not an Executive Order 13771 regulatory action because it is not significant under Executive Order 12866.

Paperwork Reduction Act, 44 U.S.C., Ch. 35

SBA has determined that this direct final rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., Chapter 35.

Regulatory Flexibility Act, 5 U.S.C. 601–612

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small non-profit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis, which describes the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. Within the meaning of RFA, SBA certifies that this direct final rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects

13 CFR Part 121

Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

13 CFR Part 126

Administrative practice and procedure, Government procurement, Penalties, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 127

Government contracts, Reporting and recordkeeping requirements, Small businesses.

Accordingly, for the reasons stated in the preamble, SBA amends 13 CFR parts 121, 125, 126, and 127 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 662 and 694a(9).

■ 2. Amend § 121.103 by revising paragraph (h)(3)(ii) to read as follows:

§ 121.103 How does SBA determine affiliation?

* * * * *

(h) * * *

(3) * * *

(ii) Two firms approved by SBA to be a mentor and protégé under § 125.9 of this chapter may joint venture as a small business for any Federal government prime contract or subcontract, provided the protégé qualifies as small for the size standard corresponding to the NAICS code assigned to the procurement, and the joint venture meets the requirements of §§ 124.513 (c) and (d), §§ 125.8(b) and (c), §§ 125.18(b)(2) and (3), §§ 126.616(c) and (d), or §§ 127.506(c) and (d) of this chapter, as appropriate.

* * * * *

■ 3. Amend § 121.404 by revising the last sentence of the introductory text of paragraph (g) to read as follows:

§ 121.404 When is the size status of a business concern determined?

* * * * *

(g) * * * However, the following exceptions apply to this paragraph (g):

* * * * *

■ 4. Amend § 121.406 by:

■ a. Adding the word ''sole'' after the words ''veteran-owned small business set-aside or'' and before the words ''source contract,'' in paragraph (a); and

■ b. Revising paragraph (d) to read as follows:

§ 121.406 How does a small business concern qualify to provide manufactured products or other supply items under a small business set-aside, service-disabled veteran-owned small business, HUBZone, WOSB or EDWOSB, or 8(a) contract?

* * * * *

(d) The performance requirements (limitations on subcontracting) and the nonmanufacturer rule do not apply to small business set-aside acquisitions with an estimated value between the micro-purchase threshold and the simplified acquisition threshold (as both terms are defined in the FAR at 48 CFR 2.101).

* * * * *

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 5. The authority citation for part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q); 634(b)(6); 637; 644; 657f; 657r.

§ 125.3 [Amended]

■ 6. Amend § 125.3 by removing the term ''$150,000'' and adding in its place the phrase ''the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101)'' in paragraphs (c)(1)(viii) and (ix).

■ 7. Amend § 125.6 by:

■ a. Removing the term ''$150,000'' and adding in its place the phrase ''the simplified acquisition threshold (as defined in the FAR at 48 CFR 2.101)'' in paragraph (a) introductory text; and

■ b. Revising paragraph (f)(1) to read as follows:

§ 125.6 What are the prime contractor's limitations on subcontracting?

* * * * *

(f) * * *

(1) Small business set-aside contracts with a value that is greater than the micro-purchase threshold but less than or equal to the simplified acquisition threshold (as both terms are defined in the FAR at 48 CFR 2.101); or

* * * * *

■ 8. Amend § 125.18 by revising the last sentence of paragraph (e)(1) to read as follows:

§ 125.18 What requirements must an SDVO SBC meet to submit an offer on a contract?

* * * * *

(e) * * * (1) * * * However, the following exceptions apply to this paragraph (e)(1):

* * * * *

■ 9. Amend § 125.22 by revising paragraph (a) to read as follows:

§ 125.22 When may a contracting officer set-aside a procurement for SDVO SBCs?

(a) The contracting officer first must review a requirement to determine whether it is excluded from SDVO contracting pursuant to § 125.21.

* * * * *

■ 10. Amend § 125.23 by revising paragraphs (a), and (b)(1) and (2) to read as follows:

§ 125.23 When may a contracting officer award sole source contracts to SDVO SBCs?

* * * * *

(a) None of the provisions of §§ 125.21 or 125.22 apply;

(b) * * *

(1) $6,500,000 for a contract assigned a manufacturing NAICS code, or

(2) $4,000,000 for all other contracts;

* * * * *

PART 126—HUBZONE PROGRAM

■ 11. The authority citation for part 126 continues to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p), 644, and 657a.

§ 126.200 [Amended]

■ 12. Amend § 126.200 by removing the words ''unconditionally and directly'' in paragraph (b)(1)(i).

■ 13. Amend § 126.601 by revising the heading of paragraph (h) and the last sentence of the introductory text of paragraph (h)(1) to read as follows:

§ 126.601 What additional requirements must a qualified HUBZone SBC meet to bid on a contract?

* * * * *

(h) *Recertification.* (1) * * * However, the following exceptions apply to this paragraph (h)(1):

* * * * *

■ 14. Amend § 126.612 by revising paragraphs (b)(1) and (2) to read as follows:

§ 126.612 When may a CO award sole source contracts to qualified HUBZone SBCs?

* * * * *

(b) * * *

(1) $7,000,000 for a contract assigned a manufacturing NAICS code, or

(2) $4,000,000 for all other contracts.

* * * * *

§ 126.616 [Amended]

■ 15. Amend § 126.616 by removing the words ''HUBZone protégé'' and adding in their place the words ''HUBZone SBC'' in paragraph (d)(2).

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

■ 16. The authority citation for part 127 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

■ 17. Amend § 127.503 by revising the last sentence of the introductory text of paragraph (h)(1) to read as follows:

§ 127.503 When is a contracting officer authorized to restrict competition or award a sole source contract or order under this part?

* * * * *

(h) * * *

(1) * * * However, the following exceptions apply to this paragraph (h)(1):

* * * * *

Dated: March 19, 2018.

Linda E. McMahon,

Administrator.

[FR Doc. 2018–06033 Filed 3–23–18; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2017–1096; Product Identifier 2017–NM–072–AD; Amendment 39–19221; AD 2018–06–01]

RIN 2120–AA64

Airworthiness Directives; Airbus Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Airbus Model A318, A319, A320, and A321 series airplanes; all Model A330–200 Freighter, –200, and –300 series airplanes; and all Model A340–200, –300, –500, and –600 series airplanes. This AD was prompted by reports of false traffic collision avoidance system (TCAS) resolution advisories. This AD requires modifying the software in the TCAS computer processor or replacing the TCAS computer with a new TCAS computer. We are issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective April 30, 2018.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of April 30, 2018.

ADDRESSES: For service information identified in this final rule, contact Airbus, Airworthiness Office—EIAS, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 44 51; email *account.airworth-eas@airbus.com;* internet *http://www.airbus.com.* You may view this referenced service information at the FAA, Transport Standards Branch, 2200 South 216th St., Des Moines, WA. For information on the availability of this material at the FAA, call 206–231–3195. It is also available on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2017–1096.

Examining the AD Docket

You may examine the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2017–1096; or in person at the Docket Management Facility between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this AD, the regulatory evaluation, any comments received, and other information. The street address for the Docket Office (telephone 800–647–5527) is Docket Management Facility, U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Section, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3223.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain Airbus Model A318, A319, A320, and A321 series airplanes; all Model A330–200 Freighter, –200, and –300 series airplanes; and all Model A340–200, –300, –500, and –600 series airplanes. The NPRM published in the **Federal Register** on November 30, 2017 (82 FR 56749) (''the NPRM''). The NPRM was prompted by reports of false TCAS resolution advisories. The NPRM proposed to require modifying the software in the TCAS computer processor or replacing the TCAS computer with a new TCAS computer. We are issuing this AD to prevent false TCAS resolution advisories. False TCAS resolution advisories could lead to a loss of separation with other airplanes, possibly resulting in a mid-air collision.

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Union, has issued EASA Airworthiness Directive 2017–0091R2, dated June 2, 2017 (referred to after this as the Mandatory Continuing Airworthiness Information, or ''the MCAI''), to correct an unsafe condition for certain Airbus Model A318, A319, A320, and A321 series airplanes; all Model A330–200 Freighter, –200, and –300 series airplanes; and all Model A340–200, –300, –500, and –600 series airplanes. The MCAI states:

Since 2012, a number of false TCAS [traffic collision avoidance system] resolution advisories (RA) have been reported by various European Air Navigation Service Providers. EASA has published certification guidance material for collision avoidance systems (AMC 20–15) which defines a false TCAS RA as an RA that is issued, but the RA condition does not exist. It is possible that more false (or spurious) RA events have occurred, but were not recorded or reported. The known events were mainly occurring on Airbus single-aisle (A320 family) aeroplanes, although several events have also occurred on Airbus A330 aeroplanes. Investigation determined that the false RAs are caused on aeroplanes with a certain Honeywell TPA–100B TCAS processor, P/N [part number] 940–0351–001, installed, through a combination of three factors: (1) Hybrid surveillance enabled; (2) processor connected to a hybrid GPS source, without a direct connection to a GPS source; and (3) an encounter with an intruder aeroplane with noisy (jumping) ADS–B Out position.

EASA previously published Safety Information Bulletin (SIB) 2014–33 to inform owners and operators of affected aeroplanes about this safety concern. At that time, the false RAs were not considered an unsafe condition. Since the SIB was issued, further events have been reported, involving a third aeroplane.

This condition, if not corrected, could lead to a loss of separation with other aeroplanes, possibly resulting in a mid-air collision.

Prompted by these latest findings, and after review of the available information, EASA reassessed the severity and rate of occurrence of false RAs and has decided that mandatory action must be taken to reduce the rate of occurrence, and the risk of loss of separation with other aeroplanes.

Honeywell International Inc. published Service Bulletin (SB) 940–0351–34–0005 [Publication Number D201611000002] to provide instructions for an upgrade of TPA–100B processors P/N 940–0351–001 to P/N 940–0351–005, introducing software version 05/01.

Consequently, Airbus developed certain modifications (mod 159658 and mod 206608) and published SB A32034–1656, SB A320–34–1657, SB A330–34–3342, SB A340–34–4304 and SB A340–34–5118, to provide instructions for in-service introduction of the software update (including change to P/N 940–0351–005) on the affected aeroplanes, or to replace the TCAS processor with a P/N 940–0351–005 unit.

Consequently, EASA issued AD 2017–0091, to require modification or replacement of Honeywell TPA–100B TCAS P/N 940–0351–001 processors, hereafter referred to as 'affected processor' in this [EASA] AD. That [EASA] AD also prohibits installation of an affected processor on post-mod aeroplanes.

After that [EASA] AD was issued, it was found that an error had been introduced, inadvertently restricting the required action to those aeroplanes that had the affected part installed on the Airbus production line, thereby excluding those that had the part installed in-service by Airbus SB. Consequently, EASA revised AD 2017–0091 to amend Note 1 and include references to the relevant Airbus SBs that introduced the affected processor in service.

Since EASA AD 2017–0091R1 was issued, prompted by operator feedback and to avoid confusion, it was decided to exclude aeroplanes that had an affected processor installed by STC, for which EASA AD No.: 2017–0091R2 separate [EASA] AD action is planned. It was also determined that the prohibition to install an affected processor was too strict, particularly for Group 2 aeroplanes.

For the reason described above, this [EASA] AD is revised to reduce the Applicability, introduce some minor editorial changes and to amend paragraph (3).

You may examine the MCAI in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2017–1096.

Comments

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

Supportive Comment

The Air Line Pilots Association, International supported the NPRM.

Request To Refer to Revised Service Information

Airbus requested that the NPRM be updated to reference the current revision level of certain service information. Airbus noted that four of the service bulletins referred to in the NPRM were revised.

We agree with the commenter's request. We have updated the preamble and paragraph (i) of this AD to refer to the revised service information. Because the revised service information does not include any additional actions, we have added paragraph (l) to this AD to provide credit for actions accomplished prior to the effective date of this AD using the applicable Airbus service bulletin identified in paragraphs (l)(1) through (l)(4) of this AD. We have redesignated subsequent paragraphs accordingly.

Conclusion

We reviewed the relevant data, considered the comments received, and determined that air safety and the public interest require adopting this AD with the changes described previously and minor editorial changes. We have determined that these minor changes:

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

We also determined that these changes will not increase the economic burden on any operator or increase the scope of this AD.

Related Service Information Under 1 CFR Part 51

Airbus has issued the following service information, which describes procedures for modifying the software in the TCAS computer processor and procedures for replacing the TCAS computer with a new TCAS computer. These documents are distinct since they apply to different airplane models in different configurations.

- Airbus Service Bulletin A320–34–1656, Revision 01, dated September 6, 2017.
- Airbus Service Bulletin A320–34–1657, Revision 01, dated September 6, 2017.
- Airbus Service Bulletin A330–34–3342, Revision 01, dated November 13, 2017.
- Airbus Service Bulletin A340–34–4304, dated April 19, 2017.
- Airbus Service Bulletin A340–34–5118, Revision 01, dated September 12, 2017.

This service information is reasonably available because the interested parties have access to it through their normal course of business or by the means identified in the **ADDRESSES** section.

Costs of Compliance

We estimate that this AD affects 205 airplanes of U.S. registry.

We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Software modification	2 work-hours × $85 per hour = $170	$0	$170	$34,850
TCAS replacement	2 work-hours × $85 per hour = $170	298	468	95,940

Authority for This Rulemaking

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

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

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

Regulatory Findings

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

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

1. Is not a "significant regulatory action" under Executive Order 12866,

2. Is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979),

3. Will not affect intrastate aviation in Alaska, and

4. Will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2018–06–01 Airbus: Amendment 39–19221; Docket No. FAA–2017–1096; Product Identifier 2017–NM–072–AD.

(a) Effective Date

This AD is effective April 30, 2018.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Airbus airplanes, all manufacturer serial numbers, certificated in any category, as identified in paragraphs (c)(1) through (c)(11) of this AD; except those Model A318, A319, A320 and A321 series airplanes that have been modified by a supplemental type certificate (STC) that installs Honeywell traffic alert and collision avoidance system (TCAS) 7.1 processor, part number (P/N) 940–0351–001.

(1) Model A318–111, –112, –121, and –122 airplanes.

(2) Model A319–111, –112, –113, –114, –115, –131, –132, and –133 airplanes.

(3) Model A320–211, –212, –214, –216, –231, –232, –233, –251N, and –271N airplanes.

(4) Model A321–111, –112, –131, –211, –212, –213, –231, –232, –251N, –253N, and –271N airplanes.

(5) Model A330–223F and –243F airplanes.
(6) Model A330–201, –202, –203, –223, and –243 airplanes.
(7) Model A330–301, –302, –303, –321, –322, –323, –341, –342, and –343 airplanes.
(8) Model A340–211, –212, and –213 airplanes.
(9) Model A340–311, –312, and –313 airplanes.
(10) Model A340–541 airplanes.
(11) Model A340–642 airplanes.

(d) Subject

Air Transport Association (ATA) of America Code 34, Navigation.

(e) Reason

This AD was prompted by reports of false TCAS resolution advisories. We are issuing this AD to prevent false TCAS resolution advisories, which could lead to a loss of separation with other airplanes, possibly resulting in a mid-air collision.

(f) Compliance

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

(g) Definition of Group 1 and Group 2 Airplanes

(1) For the purposes of this AD, Group 1 airplanes are those that have a Honeywell TPA–100B TCAS P/N 940–0351–001 processor that was installed during production, or in-service using the procedures in the applicable service information identified in paragraphs (g)(1)(i) through (g)(1)(xii) of this AD.
(i) Airbus Service Bulletin A320–34–1504.
(ii) Airbus Service Bulletin A320–34–1506.
(iii) Airbus Service Bulletin A320–34–1533.
(iv) Airbus Service Bulletin A320–34–1534.
(v) Airbus Service Bulletin A320–34–1572.
(vi) Airbus Service Bulletin A330–34–3247.
(vii) Airbus Service Bulletin A330–34–3281.
(viii) Airbus Service Bulletin A330–34–3344.
(ix) Airbus Service Bulletin A340–34–4263.
(x) Airbus Service Bulletin A340–34–4254.
(xi) Airbus Service Bulletin A340–34–5076.
(xii) Airbus Service Bulletin A340–34–5087.
(2) For the purposes of this AD, Group 2 airplanes are airplanes that do not have a Honeywell TPA–100B TCAS P/N 940–0351–001 processor installed.

(h) Software Modification or TCAS Processor Replacement

For Group 1 airplanes, as identified in paragraph (g)(1) of this AD: Within 12 months after the effective date of this AD, do a modification of the TCAS processor to upgrade the software, or replace the TCAS processor with a TCAS TPA–100B processor having P/N 940–0351–005, in accordance with the Accomplishment Instructions of the applicable service information identified in paragraph (i) of this AD.

Note 1 to paragraph (h) of this AD: Guidance for modifying an affected TCAS processor and re-identifying the processor as P/N 940–0351–005 can be found in paragraph 3.F. of Honeywell Service Bulletin 940–0351–34–0005, dated January 20, 2017.

(i) Service Information for Accomplishment of Actions Specified in Paragraph (h) of This AD

Use the applicable service information specified in paragraphs (i)(1) through (i)(5) of this AD to accomplish the actions required by paragraph (h) of this AD.
(1) For Model A318 and A319 series airplanes; Model A320–211, A320–212, A320–214, A320–216, A320–231, A320–232, and A320–233 airplanes; and Model A321 series airplanes: Airbus Service Bulletin A320–34–1656, Revision 01, dated September 6, 2017.
(2) For Model A320–251N and Model A320–271N airplanes: Airbus Service Bulletin A320–34–1657, Revision 01, dated September 6, 2017.
(3) For Model A330–200, A330–200 Freighter, and A330–300 series airplanes: Airbus Service Bulletin A330–34–3342, Revision 01, dated November 13, 2017.
(4) For Model A340–200 and A340–300 series airplanes: Airbus Service Bulletin A340–34–4304, dated April 19, 2017.
(5) For Model A340–500 and A340–600 series airplanes: Airbus Service Bulletin A340–34–5118, Revision 01, dated September 12, 2017.

(j) Identification of Airplanes That Do Not Have a Honeywell TPA–100B TCAS P/N 940–0351–001 Processor Installed

An airplane on which Airbus modification 159658 or Airbus modification 206608, as applicable, has been embodied in production and on which it can be positively determined that no TCAS processor has been replaced or modified on that airplane since its date of manufacture is a Group 2 airplane, as identified in paragraph (g)(2) of this AD. Group 2 airplanes are not affected by the requirements of paragraph (h) of this AD. A review of airplane maintenance records is acceptable to make this determination, provided those records can be relied upon for that purpose and that the TCAS processor part number and software standard can be positively identified from that review.

(k) Parts Installation Prohibition

Installation of a Honeywell TCAS TPA–100B processor having P/N 940–0351–001 is prohibited, as required by paragraphs (k)(1) and (k)(2) of this AD.
(1) For Group 1 airplanes, as identified in paragraph (g)(1) of this AD: After modification of an airplane as required by paragraph (h) of this AD.
(2) For Group 2 airplanes, as identified in paragraph (g)(2) of this AD: As of the effective date of this AD.

(l) Credit for Previous Actions

This paragraph provides credit for the actions required by paragraph (h) of this AD, if those actions were performed before the effective date of this AD using the Accomplishment Instructions of the applicable Airbus service bulletin identified in paragraphs (l)(1) through (l)(4) of this AD.
(1) Airbus Service Bulletin A320–34–1656, dated April 19, 2017.
(2) Airbus Service Bulletin A320–34–1657, dated April 19, 2017.
(3) Airbus Service Bulletin A330–34–3342, dated April 19, 2017.
(4) Airbus Service Bulletin A340–34–5118, dated April 19, 2017.

(m) Other FAA AD Provisions

The following provisions also apply to this AD:
(1) *Alternative Methods of Compliance (AMOCs):* The Manager, International Section, Transport Standards Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the International Section, send it to the attention of the person identified in paragraph (n)(2) of this AD. Information may be emailed to: *9-ANM-116-AMOC-REQUESTS@faa.gov*. Before using any approved AMOC, notify your appropriate principal inspector, or lacking a principal inspector, the manager of the local flight standards district office/certificate holding district office.
(2) *Contacting the Manufacturer:* For any requirement in this AD to obtain corrective actions from a manufacturer, the action must be accomplished using a method approved by the Manager, International Section, Transport Standards Branch, FAA; or the European Aviation Safety Agency (EASA); or Airbus's EASA Design Organization Approval (DOA). If approved by the DOA, the approval must include the DOA-authorized signature.
(3) *Required for Compliance (RC):* If any service information contains procedures or tests that are identified as RC, those procedures and tests must be done to comply with this AD; any procedures or tests that are not identified as RC are recommended. Those procedures and tests that are not identified as RC may be deviated from using accepted methods in accordance with the operator's maintenance or inspection program without obtaining approval of an AMOC, provided the procedures and tests identified as RC can be done and the airplane can be put back in an airworthy condition. Any substitutions or changes to procedures or tests identified as RC require approval of an AMOC.

(n) Related Information

(1) Refer to Mandatory Continuing Airworthiness Information (MCAI) EASA Airworthiness Directive 2017–0091R2, dated June 2, 2017, for related information. This MCAI may be found in the AD docket on the internet at *http://www.regulations.gov* by searching for and locating Docket No. FAA–2017–1096.
(2) For more information about this AD, contact Sanjay Ralhan, Aerospace Engineer, International Section, Transport Standards Branch, FAA, 2200 South 216th St., Des Moines, WA 98198; telephone and fax 206–231–3223.

(3) Service information identified in this AD that is not incorporated by reference is available at the addresses specified in paragraphs (o)(3) and (o)(4) of this AD.

(o) Material Incorporated by Reference

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

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

(i) Airbus Service Bulletin A320–34–1656, Revision 01, dated September 6, 2017.

(ii) Airbus Service Bulletin A320–34–1657, Revision 01, dated September 6, 2017.

(iii) Airbus Service Bulletin A330–34–3342, Revision 01, dated November 13, 2017.

(iv) Airbus Service Bulletin A340–34–4304, dated April 19, 2017.

(v) Airbus Service Bulletin A340–34–5118, Revision 01, dated September 12, 2017.

(3) For service information identified in this AD, contact Airbus SAS, Airworthiness Office—EAL, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France; telephone +33 5 61 93 36 96; fax +33 5 61 93 45 80; email *airworthiness.A330-A340@airbus.com;* internet *http://www.airbus.com*.

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

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html*.

Issued in Renton, Washington, on March 2, 2018.

Michael Kaszycki,

Acting Director, System Oversight Division, Aircraft Certification Service.

[FR Doc. 2018–05013 Filed 3–23–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 91

[Docket No. FAA–2018–0243]

"Doors-off" and "Open-door" Flight Prohibition: Emergency Restriction/Prohibition Order

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notification of Emergency Order of Prohibition.

SUMMARY: This notification provides Emergency Order of Prohibition No. FAA–2018–0243, issued March 22, 2018 to all operators and pilots of flights for compensation or hire with the doors open or removed in the United States or using aircraft registered in the United States for doors off flights. The Emergency Order prohibits the use of supplemental passenger restraint systems that cannot be released quickly in an emergency in doors off flight operations. It also prohibits passenger-carrying doors off flight operations unless the passengers are at all times properly secured using FAA-approved restraints.

DATES: The Emergency Order of Prohibition is effective March 22, 2018.

FOR FURTHER INFORMATION CONTACT: Jodi Baker, Acting Deputy Director, Office of Safety Standards, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: 202–267–3747; email: *Jodi.L.Baker@faa.gov*.

SUPPLEMENTARY INFORMATION: The full text of Emergency Order of Prohibition No. FAA–2018–0243, issued March 22, 2018 is as follows:

This Emergency Order of Prohibition is issued by the Federal Aviation Administration (FAA) pursuant to 49 U.S.C. 40113(a) and 46105(c). This Order is effective immediately. This order is issued to all operators and pilots of flights for compensation or hire with the doors open or removed (hereinafter, ''doors off flights'' or ''doors off flight operations'') in the United States or using aircraft registered in the United States for doors off flights. This Order prohibits the use of supplemental passenger restraint systems (as defined below) that cannot be released quickly in an emergency in doors off flight operations. This Order also prohibits passenger-carrying doors off flight operations unless the passengers are at all times properly secured using FAA-approved restraints.

Upon information derived from investigation into a March 11, 2018, helicopter accident on the East River near New York City, New York, the Acting Administrator has found that an emergency exists related to aviation safety and safety in air commerce and requires immediate action. For more detailed information, see ''Background/Basis for Order,'' below.

Scope and Effect of This Order

This order applies to all persons (including, but not limited to, pilots) conducting doors off flights for compensation or hire in the United States or using aircraft registered in the United States to conduct such operations. ''Operate,'' as defined in 14 CFR 1.1, means to ''use, cause to use or authorize to use'' an aircraft, including the piloting of an aircraft, with or without right of legal control.

Supplemental passenger restraint systems, such as the harness system used by the operator of the helicopter involved in the March 11, 2018, accident, can significantly delay or prevent passengers from exiting the aircraft in an emergency. Effective immediately, the use of supplemental passenger restraint systems in doors off flight operations for compensation or hire is prohibited. The term ''supplemental passenger restraint system'' means any passenger restraint that is not installed on the aircraft pursuant to an FAA approval, including (but not limited to) restraints approved through a Type Certificate, Supplemental Type Certificate, or as an approved major alteration using FAA Form 337.

Persons may operate doors off flights for compensation or hire involving supplemental passenger restraint systems if the Acting Administrator has determined that the restraints to be used can be quickly released by a passenger with minimal difficulty and without impeding egress from the aircraft in an emergency. The ability of a passenger to quickly release the restraint with minimal difficulty must be inherent to the supplemental passenger restraint system. A supplemental passenger restraint system must not require the use of a knife to cut the restraint, the use of any other additional tool, or the assistance of any other person. A supplemental passenger restraint also must not require passenger training beyond what would be provided in a pre-flight briefing.

Applications for a determination as to whether a supplemental passenger restraint system can be quickly released by a passenger with minimal difficulty may be submitted to the FAA Aircraft Certification Service, Policy and Innovation Division, Rotorcraft Standards Branch, 10101 Hillwood Parkway, Ft. Worth, Texas 76177, Attention: Jorge Castillo, Manager (email: *Jorge.R.Castillo@faa.gov;* tel: 817–222–5110). The applicant bears the burden of clearly and convincingly demonstrating that the supplemental passenger restraint system can be quickly released by a passenger with minimal difficulty and without impeding egress from the aircraft in an emergency. In reviewing any such application, the FAA shall consider the design, manufacture, installation, and operation of the supplemental passenger restraint system.

Further, effective immediately, passenger-carrying doors off flight operations for compensation or hire are prohibited unless the passengers are at all times properly using FAA-approved restraints, such as at all times occupying an approved seat or berth and properly secured with a safety belt and, if installed, a harness; or at all times secured by an FAA-approved supplemental passenger restraint system.

The prohibitions in this Order shall not be construed as authorizing doors off flight operations without supplemental passenger restraint systems. The operator of a doors off flight remains responsible for ensuring the safety of the aircraft and the passengers on board, and otherwise complying with all statutes, regulations, and safety standards concerning the flight.

Authority and Jurisdiction

The FAA Administrator is required to promote the safe flight of civil aircraft by, among other things, prescribing minimum standards for practices, methods, and procedures the Administrator finds necessary for safety in air commerce. 49 U.S.C. 44701(a)(5). The FAA Administrator has authority to take necessary and appropriate actions to carry out his aviation safety duties and powers under part A (''Air Commerce and Safety'') of subtitle VII of Title 49 of the United States Code, including conducting investigations, issuing orders, and prescribing regulations, standards, and procedures. 49 U.S.C. 40113(a). When the Administrator determines that an emergency exists related to safety in air commerce and requires immediate action, the Administrator may issue immediately effective orders to meet the emergency. 49 U.S.C. 46105(c).

Background/Basis for Order

Based on an initial investigation and the reliable and credible evidence presently available, the Acting Administrator finds that:

On March 11, 2018, civil aircraft N350LH, an Airbus Helicopters AS350B2 helicopter, was operated ''doors off'' on a flight in the vicinity of New York City, New York. All passengers on the flight wore harness systems that allowed the passengers to move securely within the helicopter and sit in the door sill while airborne. The harness systems were provided by the operator to ensure passengers did not fall out of the helicopter while moving around. Along with the supplemental passenger restraint systems, the operator provided knives to be used to cut through the restraints if necessary, and informed the passengers of the purpose of the knives.

During the flight, the aircraft experienced a loss of power, resulting in the aircraft impacting the East River. The aircraft subsequently rolled over, and all of the passengers perished. The supplemental passenger restraint systems worn by the passengers, while intended as a safety measure when the aircraft was in flight, may have prevented the passengers' quick egress from the aircraft.

While the fatalities on March 11, 2018, involved an aircraft impacting the water, passengers could face a similar hazard in other emergency situations, such as an aircraft fire on the ground.

Under 49 U.S.C. 46105(c) the Acting Administrator has determined that an emergency exists related to safety in air commerce. This determination is based on the threat to passenger safety presented by the use of supplemental passenger restraint systems not approved by the FAA, which may prevent a passenger from exiting the aircraft quickly in an emergency. Accordingly, this Order is effective immediately.

Duration

This Order remains in effect until the issuance of an applicable FAA order rescinding or modifying this Order. The Administrator will issue a rescission order when there is a change in an applicable statute or federal regulation that supersedes the requirements of this Order, or the Administrator otherwise determines that the prohibitions prescribed above are no longer necessary to address an emergency in air safety or air commerce.

While this Order remains in effect, the FAA intends to initiate a rulemaking that addresses operations using supplemental passenger restraint systems that have not been approved by the FAA.

Consequences of Failure To Comply With This Order

Any person failing to comply with this Order is subject to a civil penalty for each flight on which they are found to be in violation. *See* 49 U.S.C. 46302(a). Small business concerns and individuals (other than persons serving as an airman) are subject to a civil penalty of up to $13,066 per flight. *See* 49 U.S.C. 46301(a)(5)(A)(ii); 14 CFR 13.301. Other entities are subject to a civil penalty of up to $32,666 per flight. *See* 49 U.S.C. 46301(a)(1)(B); 14 CFR 13.301. A person serving as an airman on a flight operated in violation of this Order is subject to a civil penalty of up to $1,437 per flight or a certificate action, up to and including revocation. *See* 49 U.S.C. 46301(a)(1)(B), 44709(b)(1)(A); 14 CFR 13.301. An air carrier or commercial operator violating this Order is subject to certificate action, up to and including revocation. *See id.* Air tour operators and other persons are subject to the rescission of any FAA-issued waiver or letter of authorization. Any person failing to comply with this Order may be subject to a cease and desist order or a civil action in a United States district court to ensure compliance. *See* 49 U.S.C. 44103(a), 46106.

Right To Review

Pursuant to 49 U.S.C. 46110(a), a person with a substantial interest in this order ''may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States in the circuit in which the person resides or has its principal place of business.'' The petition must be filed within 60 days after the date of this order. 49 U.S.C. 46110(a).

Emergency Contact Official

Direct any questions concerning this Emergency Order of Prohibition, to Jodi Baker, Acting Deputy Director, Office of Safety Standards, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591 (email: *Jodi.L.Baker@faa.gov;* Tel: 202–267–3747).

Issued in Washington, DC on March 22, 2018.

Daniel K. Elwell,

Acting Administrator.

[FR Doc. 2018–06096 Filed 3–22–18; 4:15 pm]

BILLING CODE 4910–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No.: 180110025–8285–02]

RIN 0648–BH51

Fisheries of the Northeastern United States; Northern Gulf of Maine Measures in Framework Adjustment 29 to the Atlantic Sea Scallop Fishery Management Plan

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

ACTION: Final rule.

SUMMARY: NMFS approves and implements those measures included in

Framework Adjustment 29 to the Atlantic Sea Scallop Fishery Management Plan that establish fishing year 2018 and 2019 scallop specifications and other measures for the Northern Gulf of Maine scallop management area. This action is necessary to prevent overfishing and improve both yield-per-recruit and the overall management of the Atlantic sea scallop resource in the Northern Gulf of Maine. The intended effect of this rule is to implement these measures for the 2018 fishing year.

DATES: Effective April 1, 2018.

ADDRESSES: The New England Fishery Management Council developed an environmental assessment (EA) for this action that describes the measures, other considered alternatives, and analyzes the impacts of the measures and alternatives. Copies of Framework Adjustment 29, the EA, and the Initial Regulatory Flexibility Analysis (IRFA), are available upon request from Thomas A. Nies, Executive Director, New England Fishery Management Council, 50 Water Street, Newburyport, MA 01950. The EA/IRFA is also accessible via the internet at: *http://www.nefmc.org/scallops/index.html*.

Copies of the small entity compliance guide are available from Michael Pentony, Regional Administrator, NMFS, Greater Atlantic Regional Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930–2298, or available on the internet at: *http://www.greateratlantic.fisheries.noaa.gov/sustainable/species/scallop/*.

FOR FURTHER INFORMATION CONTACT: Travis Ford, Fishery Policy Analyst, 978–281–9233.

SUPPLEMENTARY INFORMATION:

Background

The New England Fishery Management Council adopted Framework Adjustment 29 to the Atlantic Sea Scallop Fishery Management Plan (FMP) in its entirety on December 7, 2017, and submitted a draft of the framework, including a draft EA, to NMFS on January 25, 2018, for review and approval.

This action implements and approves the portion of Framework 29 that establishes scallop fishing year 2018 and 2019 specifications and other measures for the Northern Gulf of Maine (NGOM) scallop management area. We are expediting the implementation of these measures separately from other measures in Framework 29 to help prevent excessive fishing at the beginning of the scallop fishing year in the NGOM. The explanation for why it was necessary to implement the NGOM measures in a separate action are detailed in the proposed rule and not repeated here. We published a proposed rule for the remaining specifications and other management measures in Framework 29 on March 15, 2018 (83 FR 11474). We intend to publish a final rule for those remaining measures, if approved, shortly after the comment period closes.

This action includes catch, effort, and quota allocation adjustments to the NGOM management program for fishing year 2018 and default specifications for fishing year 2019. NMFS published a proposed rule for approving and implementing the NGOM Measures in Framework 29 on February 20, 2018 (83 FR 7129). The proposed rule included a 15-day public comment period that closed on March 7, 2018. The Council submitted a final EA to NMFS on March 14, 2018, for approval. NMFS has approved all of the NGOM measures recommended by the Council and described below. The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) permits NMFS to approve, partially approve, or disapprove measures proposed by the Council based only on whether the measures are consistent with the fishery management plan, the Magnuson-Stevens Act and its National Standards, and other applicable law. We defer to the Council's policy choices unless there is a clear inconsistency with the law or the FMP. Details concerning the development of these measures were contained in the preamble of the proposed rule and are not repeated here.

This action sets new management measures in the NGOM for the scallop fishery for the 2018 and 2019 fishing years, including prohibiting the limited access fleet from accessing the NGOM while participating in the days-at-sea (DAS) program. In addition, this action divides the annual NGOM total allowable catch (TAC) between the limited access fleet while on research set-aside (RSA) trips and limited access general category (LAGC) fleets for the 2018 and 2019 (default) fishing years as follows:

TABLE 1—NGOM TAC FOR FISHING YEARS 2018 AND 2019

[Default]

Fleet	2018		2019 (default)	
	lb	kg	lb	kg
LAGC	135,000	61,235	102,500	46,493
Limited access	65,000	29,484	32,500	14,742
Total	200,000	90,718	135,000	61,235

Setting the NGOM TAC

This actions sets the NGOM TAC by applying a fishing mortality rate (F) of F = 0.18 using only the projected exploitable biomass on Jeffreys Ledge and Stellwagen Bank for fishing years 2018 and 2019. The overall TAC for the entire NGOM management area is set at 200,000 lbs (90,718 kg) for fishing year 2018, and 135,000 lbs (61,235 kg) for fishing year 2019 (Table 1).

Dividing the NGOM TAC

This action divides the TAC between the LAGC fleet and the limited access fleet while on an RSA trip at a level consistent with the biomass in the area. The first 70,000 lb (31,751 kg) of the NGOM TAC is allocated to the LAGC fleet, and any remaining pounds are split equally between the LAGC and limited access fleets (Table 1). Each fleet must operate independently under its own portion of the TAC. The NGOM management area remains open for each component until their TAC is projected to be harvested, even if the other component has reached its TAC. For example, if the LAGC component harvests its TAC before the limited access fleet harvests all of its allocation, the area would remain open for limited access fishing. This TAC division is intended to be a short-term solution to allow controlled fishing in the NGOM management area until the Council and

NMFS can develop a future action to address NGOM issues more completely.

Managing Limited Access Removals

This action does not change how the LAGC component currently operates in the NGOM. However, the limited access fleet is prohibited from accessing the NGOM while participating in the DAS program. The limited access share of the NGOM TAC is available through RSA compensation fishing only. This action allows NMFS to allocate the limited access portion of the NGOM TAC (65,000 lb (29,484 kg)) to be harvested as RSA compensation quota. This allocation is not in addition to the 1.25 million lb (566,990 kg) RSA quota. When allocating the 65,000 lb (29,484 kg) NGOM RSA quota to specific projects, NMFS gives priority to projects that are relevant to the NGOM. Any limited access or LAGC vessels that NMFS awards NGOM RSA compensation pounds must declare into the area and fish exclusively within the NGOM management area. Any NGOM RSA harvest overages will be deducted from the following year's limited access NGOM TAC.

Making the limited access share of the NGOM TAC available for RSA compensation fishing is a short-term solution to utilize a small limited access portion of the NGOM TAC available, with the expectation that a more long-term and complete allocation and harvest strategy will be developed in a future amendment.

Clarifying Changes From Proposed Rule to Final Rule

We included minor, clarifying changes to the regulatory text in the § 648.10(f) language requiring that vessels participating in the NGOM program must declare into the fishery through their vessel monitoring system. Specifically, we deleted the unnecessary phrase ''fishing in the'' and corrected the reference by replacing the phrase ''Northern Gulf of Maine management area'' with ''NGOM Management Program'', and inserted ''NGOM Management Program,'' before the second reference to ''LAGC scallop fishery''.

Comments and Responses

We received 10 comments on the proposed rule during the public comment period; 7 in support of the action and 3 that were unrelated to the proposed measures. All of the relevant comments were in favor of this action. Comments were submitted by a limited access scallop fisherman, a limited access scallop fisherman who also owns a NGOM permit, two NGOM fishermen, Maine Coast Fishermen's Association (MCFA), Downeast Dayboat, and a group of 22 fishermen.

Comment 1: Downeast Dayboat, MCFA, one NGOM fisherman, and the group of 22 fishermen commented that the Council should develop more permanent and robust management measures in the NGOM.

Response: It is the Council's intent that this action serve as a short-term solution to some of the issues facing the NGOM. The Council has a priority to more permanently address these issues in a future amendment.

Comment 2: Downeast Dayboat, MCFA, and both NGOM fishermen commented that it is necessary to get these measures in place by April 1, 2018.

Response: NMFS agrees that it is essential to get these measures in place by April 1, 2018. As discussed in the proposed rule and the preamble of this rule, we separated out the NGOM measures in Framework 29 to ensure that they will be in place by April 1, 2018.

Comment 3: A limited access scallop fisherman commented that the oceans are warming and that if the scallop resource moves north it would be detrimental to shut out any user group in this area.

Response: This action is intended to be a short-term solution to allow controlled fishing in the NGOM management area until the Council and NMFS can develop a future action to address NGOM issues more completely. The Council currently has a priority to address NGOM management in 2018. Any such allocation decisions that are more comprehensive and permanent would be addressed by the Council as part of this priority in a future amendment.

Comment 4: The owner of both a limited access and a NGOM permit commented that if the NGOM quota is not harvested that the remaining scallops should be used to seed other areas in the NGOM.

Response: In 2017, the Council had a research priority to evaluate the impacts of scallop spat and seeding projects. While scallop seeding projects have been successful in other countries, the Scallop FMP does not officially include a seeding program. However, if the limited access fleet does not harvest all of its portion of the TAC the unharvested scallops would add to the spawning population. Further, the Council intentionally set a conservative TAC for the NGOM to lead to more consistent harvests in the area.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with the FMP, other provisions of the Magnuson-Stevens Act, the Endangered Species Act, and other applicable law.

OMB has determined that this rule is not significant pursuant to E.O. 12866.

This final rule does not contain policies with federalism or ''takings'' implications, as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

This action does not contain any collection-of-information requirements subject the Paperwork Reduction Act (PRA).

The Assistant Administrator for Fisheries has determined that the need to implement the measures of this rule in an expedited manner are necessary to achieve conservation objectives for the scallop fishery and certain fish stocks, and to relieve other restrictions on the scallop fleet. This constitutes good cause, under authority contained in 5 U.S.C. 553(d)(3), to waive the 30-day delay in the date of effectiveness and to make the final NGOM measures in Framework 29 effective on April 1, 2018.

As described in the proposed rule, in the absence of this action, the current default 2018 regulations would apply, and the limited access fleet would be able to fish in the NGOM under the DAS program with no hard TAC to limit scallop removals. The Council determined and NMFS agrees that this result would be inconsistent with the goals of the NGOM management program because it would allow excessive catch of scallops by this fleet.

This final rule sets the limited access portion of the NGOM TAC at 65,000 lb (29,484 kg). At one point during the 2017 fishing year, the limited access fleet was harvesting over 100,000 lb/day (45,359 kg/day) in the NGOM. If this final rule is not in place by April 1, 2018, the beginning of the fishing scallop fishing year, the limited access fleet will likely begin fishing in the NGOM on this date at levels equivalent to or in excess of last year's levels. Fishing at these excessive levels again in the upcoming fishing year would undermine the conservation objectives of the NGOM program because it would result in much higher fishing mortality than is considered acceptable for this portion of the scallop stock. This higher fishing mortality could jeopardize the long-term optimum yield of scallops in the NGOM. Moreover, this action increases the economic benefits to the

LAGC fleet by allowing them to harvest a higher allocated share of the TAC and by basing the trigger for closing this area on what each fleet harvests.

NMFS is not providing for a 30-day delay in the date of effectiveness because the information and data necessary for the Council to develop the framework were not available in time for this action to be forwarded to NMFS and implemented by April 1, 2018, the beginning of the scallop fishing year. NMFS published the proposed rule as quickly as possible after receiving Framework 29 from the Council. Even though we are also publishing the final rule as quickly as possible after the close of the comment period, there is not sufficient time to allow for a 30-day cooling off period before the beginning of the scallop fishing year. Delaying the implementation of this action for 30 days would likely result in excessive fishing in the NGOM leading to the negative consequences described above. Therefore, the Assistant Administrator for Fisheries has waived the 30-day delay in the date of effectiveness requirement of 5 U.S.C. 553(d).

NMFS, pursuant to section 604 of the Regulatory Flexibility Act (RFA), has completed a final regulatory flexibility analysis (FRFA) in support of the entirety of Framework 29. Specific to the NGOM measures of Framework 29 contained in this final rule, the FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, NMFS responses to those comments, a summary of the analyses completed in the Framework 29 EA, and the preamble to this final rule. A summary of the IRFA was published in the proposed rule for this action and is not repeated here. A description of why this action was considered, the objectives of, and the legal basis for this rule is contained in Framework 29 and in the preambles to the proposed rule and this final rule, and is not repeated here. All of the documents that constitute the FRFA are available from NMFS and/or the Council, and a copy of the IRFA, the Regulatory Impact Review (RIR), and the EA are available upon request (see **ADDRESSES**).

A Summary of the Significant Issues Raised by the Public in Response to the IRFA, a Summary of the Agency's Assessment of Such Issues, and a Statement of Any Changes Made in the Final Rule as a Result of Such Comments

There were no specific comments on the IRFA.

Description and Estimate of Number of Small Entities to Which the Rule Would Apply

These regulations affect all vessels with limited access and LAGC scallop permits, but there is no differential effect based on whether the affected entities are small or large. Framework 29 provides extensive information on the number and size of vessels and small businesses that are affected by the regulations, by port and state (see **ADDRESSES**). Fishing year 2016 data were used for this analysis because these data are the most recent complete data set for a fishing year. There were 313 vessels that obtained full-time limited access permits in 2016, including 250 dredge, 52 small-dredge, and 11 scallop trawl permits. In the same year, there were also 34 part-time limited access permits in the sea scallop fishery. No vessels were issued occasional scallop permits. NMFS issued 225 LAGC individual fishing quota (IFQ) permits in 2016, and 125 of these vessels actively fished for scallops that year. The remaining permit holders likely leased out scallop IFQ allocations with their permits in Confirmation of Permit History. In 2016, there were 27 NGOM vessels that actively fished.

For RFA purposes, NMFS defines a small business in shellfish fishery as a firm that is independently owned and operated with receipts of less than $11 million annually (see 50 CFR 200.2). Individually-permitted vessels may hold permits for several fisheries, harvesting species of fish that are regulated by several different fishery management plans, even beyond those impacted by this proposed rule. Furthermore, multiple permitted vessels and/or permits may be owned by entities with various personal and business affiliations. For the purposes of this analysis, ''ownership entities'' are defined as those entities with common ownership as listed on the permit application. Only permits with identical ownership are categorized as an ''ownership entity.'' For example, if five permits have the same seven persons listed as co-owners on their permit applications, those seven persons would form one ''ownership entity,'' that holds those five permits. If two of those seven owners also co-own additional vessels, that ownership arrangement would be considered a separate ''ownership entity'' for the purpose of this analysis.

On June 1 of each year, ownership entities are identified based on a list of all permits for the most recent complete calendar year. The current ownership dataset is based on the calendar year 2016 permits and contains average gross sales associated with those permits for calendar years 2014 through 2016. Matching the potentially impacted 2016 fishing year permits described above (limited access permits and LAGC IFQ permits) to calendar year 2016 ownership data results in 161 distinct ownership entities for the limited access fleet and 115 distinct ownership entities for the LAGC IFQ fleet. Of these, and based on the Small Business Administration guidelines, 154 of the limited access distinct ownership entities and 113 of the LAGC IFQ entities are categorized as small. The remaining seven of the limited access and two of the LAGC IFQ entities are categorized as large entities. There were 27 distinct small business entities with NGOM permits and active NGOM vessels based on 2016 permits.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule

This action contains no new collection-of-information, reporting, or recordkeeping requirements.

Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

During the development of NGOM measures in Framework 29, NMFS and the Council considered ways to reduce the regulatory burden on, and provide flexibility for, the regulated entities in this action. For instance, in fishing years 2016 and 2017, the limited access fleet (larger trip boats) harvested substantially more scallops from the NGOM than they had since the beginning of the NGOM management program. Because the limited access fleet accessed the NGOM through the DAS program, there was no hard limit on its landings from the area. This resulted in total landings from the NGOM by the limited access fleet that far exceeded the TAC for the LAGC fleet (smaller day boats). The Council determined that this was inconsistent with the goals of the NGOM management program. Accordingly, the Council developed this action, in part, to put these measures in place to temporarily divide the catch more equitably between the two fleets and limit the total catch by the limited access fleet from the NGOM to a level consistent with its specified TAC for the NGOM. Alternatives to the measures in this final rule are described in detail in Framework 29, which includes an EA, RIR, and IRFA (available at **ADDRESSES**). The measures implemented by this final rule minimize the long-term economic impacts on small entities to the extent practicable. The only alternatives for the prescribed catch limits that were analyzed were those that met the legal requirements to implement effective conservation measures. Catch limits are fundamentally a scientific calculation based on the Scallop FMP control rules and SSC approval, and therefore are legally limited to the numbers contained in this rule. Moreover, the limited number of alternatives available for this action must be evaluated in the context of an ever-changing fishery management plan, as the Council has considered numerous alternatives to mitigating measures every fishing year in amendments and frameworks since the establishment of the FMP in 1982.

Overall, this rule minimizes adverse long-term impacts by ensuring that management measures and catch limits result in sustainable fishing mortality rates that promote stock rebuilding, and as a result, maximize optimal yield. The measures implemented by this final rule also provide additional flexibility for fishing operations in the short-term.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency will publish one or more guides to assist small entities in complying with the rule, and will designate such publications as ''small entity compliance guides.'' The agency will explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to permit holders that also serves as a small entity compliance guide (the guide) was prepared. Copies of this final rule are available from the Greater Atlantic Regional Fisheries Office, and the guide (*i.e.,* permit holder letter) will be sent to all holders of permits for the scallop fishery. The guide and this final rule will be available upon request.

List of Subjects in 50 CFR Part 648

Fisheries, Fishing, Recordkeeping and reporting requirements.

Dated: March 21, 2018.

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 648 is amended as follows:

PART 648—FISHERIES OF THE NORTHEAST UNITED STATES

■ 1. The authority citation for part 648 continues to read as follows:

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

Subpart A—General Provisions

■ 2. In § 648.10, revise paragraphs (f) introductory text, (f)(2) introductory text, and (f)(4)(i) to read as follows:

§ 648.10 VMS and DAS requirements for vessel owners/operators.

* * * * *

(f) *Atlantic sea scallop vessel VMS notification requirements.* Less than 1 hour prior to leaving port, the owner or authorized representative of a scallop vessel that is required to use VMS as specified in paragraph (b)(1) of this section must notify the Regional Administrator by transmitting the appropriate VMS code that the vessel will be participating in the scallop DAS program, Area Access Program, LAGC scallop fishery, NGOM Management Program, or will be fishing outside of the scallop fishery under the requirements of its other Federal permits, or that the vessel will be steaming to another location prior to commencing its fishing trip by transmitting a ''declared out of fishery'' VMS code. If the owner or authorized representative of a scallop vessel declares out of the fishery for the steaming portion of the trip, the vessel cannot possess, retain, or land scallops, or fish for any other fish. Prior to commencing the fishing trip following a ''declared out of fishery'' trip, the owner or authorized representative must notify the Regional Administrator by transmitting the appropriate VMS code, before first crossing the VMS Demarcation Line, that the vessel will be participating in the scallop DAS program, Area Access Program, NGOM Management Program, or LAGC scallop fishery. VMS codes and instructions are available from the Regional Administrator upon request.

* * * * *

(2) *NGOM scallop fishery.* A NGOM scallop vessel is deemed to be fishing in Federal waters of the NGOM management area and will have its landings applied against the LAGC portion of the NGOM management area TAC, specified in § 648.62(b)(1), unless:

* * * * *

(4) *Catch reports.* (i) The owner or operator of a limited access or LAGC scallop vessel with an IFQ permit that fishes for, possesses, or retains scallops, and is not fishing under a NE Multispecies DAS or sector allocation, must submit reports through the VMS, in accordance with instructions to be provided by the Regional Administrator, for each day fished, including open area trips, access area trips as described in § 648.59(b)(9), Northern Gulf of Maine RSA trips, and trips accompanied by a NMFS-approved observer. The reports must be submitted for each day (beginning at 0000 hr and ending at 2400 hr) and not later than 0900 hr of the following day. Such reports must include the following information:

(A) VTR serial number;

(B) Date fish were caught;

(C) Total pounds of scallop meats kept;

(D) Total pounds of all fish kept.

* * * * *

■ 3. In § 648.14:

■ a. Revise paragraphs (i)(1)(iii)(A)(*1*)(*ii*) and (*iv*), and (i)(1)(viii)(A) and (B);

■ b. Add paragraph (i)(2)(iii)(E); and

■ c. Revise paragraphs (i)(3)(iii)(C) and(D).

The revisions and addition read as follows:

§ 648.14 Prohibitions.

* * * * *

(i) * * *

(1) * * *

(iii) * * *

(A) * * *

(*1*) * * *

(*ii*) The scallops were harvested by a vessel that has been issued and carries on board a limited access scallop permit and is properly declared into the scallop DAS, Area Access program, or the NGOM management area.

* * * * *

(*iv*) The scallops were harvested by a vessel that has been issued and carries on board an NGOM or IFQ scallop permit, and is properly declared into the NGOM scallop management area, and the LAGC portion of the NGOM TAC specified in § 648.62 has not been harvested.

* * * * *

(viii) *Scallop research.* (A) Fail to comply with any of the provisions specified in § 648.56 or the conditions of a letter of authorization issued under § 648.56.

(B) Fish for scallops in, or possess or land scallops from the NGOM, unless allocated NGOM RSA allocation as described in § 648.56(d) and fishing on a scallop research set aside compensation trip.

* * * * *

(2) * * *

(iii) * * *

(E) Fish for, possess, or land scallops from the NGOM, unless on a scallop RSA compensation trip and allocated

NGOM RSA allocation as described in § 648.56(d).

* * * * *

(3) * * *

(iii) * * *

(C) Declare into the NGOM scallop management area after the effective date of a notification published in the **Federal Register** stating that the LAGC portion of the NGOM scallop management area TAC has been harvested as specified in § 648.62, unless the vessel is fishing exclusively in state waters, declared a state-waters only NGOM trip, and is participating in an approved state waters exemption program as specified in § 648.54, or unless the vessel is participating in the scallop RSA program as specified in § 648.56.

(D) Fish for, possess, or land scallops in or from the NGOM scallop management area after the effective date of a notification published in the **Federal Register** that the LAGC portion of the NGOM scallop management area TAC has been harvested, as specified in § 648.62, unless the vessel possesses or lands scallops that were harvested south of 42°20′ N lat., the vessel is transiting the NGOM scallop management area, and the vessel's fishing gear is properly stowed and not available for immediate use in accordance with § 648.2 or unless the vessel is fishing exclusively in state waters, declared a state-waters only NGOM trip, and is participating in an approved state waters exemption program as specified in § 648.54, or unless the vessel is participating in the scallop RSA program as specified in § 648.56.

* * * * *

Subpart D—Management Measures for the Atlantic Sea Scallop Fishery

■ 4. In § 648.56 revise paragraphs (c) and (d) to read as follows:

§ 648.56 Scallop research.

* * * * *

(c) NOAA shall make the final determination as to what proposals are approved and which vessels are authorized to take scallops in excess of possession limits, or take additional trips into Open, Access Areas, or the NGOM management area. NMFS shall provide authorization of such activities to specific vessels by letter of acknowledgement, letter of authorization, or Exempted Fishing Permit issued by the Regional Administrator, which must be kept on board the vessel.

(d) Available RSA allocation shall be 1.25 million lb (567 mt) annually, which shall be deducted from the ABC/ACL specified in § 648.53(a) prior to setting ACLs for the limited access and LAGC fleets, as specified in § 648.53(a)(3) and (4), respectively. Approved RSA projects shall be allocated an amount of scallop pounds that can be harvested in open areas, available access areas, and the NGOM. The specific access areas that are open to RSA harvest and the amount of NGOM allocation to be landed through RSA harvest shall be specified through the framework process as identified in § 648.59(e)(1). In a year in which a framework adjustment is under review by the Council and/or NMFS, NMFS shall make RSA awards prior to approval of the framework, if practicable, based on total scallop pounds needed to fund each research project. Recipients may begin compensation fishing in open areas prior to approval of the framework, or wait until NMFS approval of the framework to begin compensation fishing within approved access areas.

* * * * *

■ 5. In § 648.62:

■ a. Revise paragraphs (a)(2) through (a)(4);

■ b. Add paragraph (a)(5); and

■ c. Revise paragraphs (b) through (d).

The revisions and addition read as follows:

§ 648.62 Northern Gulf of Maine (NGOM) Management Program.

(a) * * *

(2) Scallop landings by vessels issued NGOM permits shall be deducted from the LAGC portion of the NGOM scallop total allowable catch when vessels fished all or part of a trip in the Federal waters portion of the NGOM. If a vessel with a NGOM scallop permit fishes exclusively in state waters within the NGOM, scallop landings from those trips will not be deducted from the Federal NGOM quota.

(3) Scallop landings by all vessels issued LAGC IFQ scallop permits and fishing in the NGOM scallop management area shall be deducted from the LAGC portion of the NGOM scallop total allowable catch specified in the specifications or framework adjustment processes defined in § 648.55. Scallop landings by LAGC IFQ scallop vessels fishing in the NGOM scallop management area shall be deducted from their respective scallop IFQs. Landings by incidental catch scallop vessels shall not be deducted from the NGOM total allowable catch specified in paragraph (b) of this section.

(4) A vessel issued a NGOM or LAGC IFQ scallop permit that fishes in the NGOM may fish for, possess, or retain up to 200 lb (90.7 kg) of shucked or 25 bu (8.81 hL) of in-shell scallops, and may possess up to 50 bu (17.6 hL) of in-shell scallops seaward of the VMS Demarcation Line. A vessel issued an incidental catch general category scallop permit that fishes in the NGOM may fish for, possess, or retain only up to 40 lb of shucked or 5 U.S. bu (1.76 hL) of in-shell scallops, and may possess up to 10 bu (3.52 hL) of in-shell scallops seaward of the VMS Demarcation Line.

(5) Scallop landings by all vessels issued scallop permits and fishing in the NGOM under the scallop RSA program (as specified in § 648.56) shall be deducted from the limited access portion of the NGOM scallop total allowable catch.

(b) *Total allowable catch.* The total allowable catch for the NGOM scallop management area shall be specified through the framework adjustment process. The total allowable catch for the NGOM scallop management area shall be based on the Federal portion of the scallop resource in the NGOM. The total allowable catch shall be determined by historical landings until additional information on the NGOM scallop resource is available, for example through an NGOM resource survey and assessment. The ABC/ACL as defined in § 648.53(a) shall not include the total allowable catch for the NGOM scallop management area, and landings from the NGOM scallop management area shall not be counted against the ABC/ACL defined in § 648.53(a). The total allowable catch shall be divided between the limited access and the LAGC fleets.

(1) *NGOM annual hard TACs.* The LAGC and the limited access portions of the annual hard TAC for the NGOM 2018 and 2019 fishing years are as follows:

Fleet	2018		2019 (default)	
	lb	kg	lb	kg
LAGC	135,000	61,235	102,500	46,493

Fleet	2018		2019 (default)	
	lb	kg	lb	kg
Limited access	65,000	29,484	32,500	14,742
Total	200,000	90,718	135,000	61,235

(2) Unless a vessel has fished for scallops outside of the NGOM scallop management area and is transiting the NGOM scallop management area with all fishing gear stowed and not available for immediate use as defined in § 648.2, no vessel issued an LAGC or limited access scallop permit pursuant to § 648.4(a)(2) may possess, retain, or land scallops in the NGOM scallop management area once the Regional Administrator has provided notification in the **Federal Register** that the vessel's respective portion(s) of the NGOM scallop total allowable catch in accordance with paragraph (b)(1) of this section has been reached, unless the vessel is participating in the scallop RSA program as specified in § 648.56, has been allocated NGOM RSA pounds, and the limited access portion of the NGOM TAC has not been reached. Once the NGOM hard TAC is reached, a vessel issued a NGOM permit may no longer declare a state-only NGOM scallop trip and fish for scallops exclusively in state waters within the NGOM, unless participating in the state waters exemption program as specified in § 648.54. A vessel that has not been issued a Federal scallop permit that fishes exclusively in state waters is not subject to the closure of the NGOM scallop management area.

(3) If either the LAGC or the limited access portion of the annual NGOM TAC is exceeded, the amount of NGOM scallop landings in excess of the portion of the TAC specified in paragraph (b)(1) of this section shall be deducted from the respective portion(s) of the NGOM TAC which has been exceeded for the subsequent fishing year, as soon as practicable, once scallop landings data for the NGOM management area is available.

(c) *VMS requirements.* Except scallop vessels issued a limited access scallop permit pursuant to § 648.4(a)(2)(i) that have declared a NGOM trip under the scallop RSA program, a vessel issued a scallop permit pursuant to § 648.4(a)(2) that intends to fish for scallops in the NGOM scallop management area or fishes for, possesses, or lands scallops in or from the NGOM scallop management area, must declare a NGOM scallop management area trip and report scallop catch through the vessel's VMS unit, as required in § 648.10. If the vessel has a NGOM permit, the vessel must declare either a Federal NGOM trip or a state-waters NGOM trip. If a vessel intends to fish any part of a NGOM trip in Federal NGOM waters, it may not declare into the state water NGOM fishery.

(d) *Gear restrictions.* Except scallop vessels issued a limited access scallop permit pursuant to § 648.4(a)(2)(i) that have properly declared a NGOM trip under the scallop RSA program, the combined dredge width in use by, or in possession on board, LAGC scallop vessels fishing in the NGOM scallop management area may not exceed 10.5 ft (3.2 m), measured at the widest point in the bail of the dredge.

[FR Doc. 2018–06051 Filed 3–23–18; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 83, No. 58
Monday, March 26, 2018

FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 110

[Notice 2018–06]

Internet Communication Disclaimers and Definition of "Public Communication"

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission requests comment on two alternative proposals to amend its regulations concerning disclaimers on public communications on the internet that contain express advocacy, solicit contributions, or are made by political committees. The Commission is undertaking this rulemaking in light of technological advances since the Commission last revised its rules governing internet disclaimers in 2006, and questions from the public about the application of those rules to internet communications. The Commission's goal is to promulgate a rule that in its text and interpretation recognizes the paramount importance of providing the public with the clearest disclosure of the payor or sponsor of these public communications on the internet.

Both proposals are intended to give the American public easy access to information about the persons paying for and candidates authorizing these internet communications, pursuant to the Federal Election Campaign Act. Both proposals would continue to require disclaimers for certain internet communications, and both would allow certain internet communications to provide disclaimers through alternative technology. The proposals differ, however, in their approach. The Commission requests comment on all elements of both proposals. The two proposals need not be considered as fixed alternatives; commenters are encouraged to extract the best elements of each, or suggest improvements or alternatives, to help the Commission fashion the best possible rule. The Commission also requests comment on proposed changes to the definition of "public communication." The Commission has not made any final decisions on any of the issues or proposals presented in this rulemaking.

DATES: Comments must be received on or before May 25, 2018. The Commission will hold a public hearing on this notice on June 27, 2018. Anyone wishing to testify at such a hearing must file timely written comments and must include in the written comments a request to testify.

ADDRESSES: All comments must be in writing. Commenters are encouraged to submit comments electronically via the Commission's website at *http://sers.fec.gov/fosers/rulemaking.htm?pid=74739*. Alternatively, commenters may submit comments in paper form, addressed to the Federal Election Commission, Attn.: Neven F. Stipanovic, Acting Assistant General Counsel, 1050 First St. NE, Washington, DC 20463. Each commenter must provide, at a minimum, his or her first name, last name, city, and state; comments without this information will not be accepted. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the Commission's website and in the Commission's Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social security number, or driver's license number, or any information that is restricted from disclosure, such as trade secrets or commercial or financial information that is privileged or confidential.

FOR FURTHER INFORMATION CONTACT: Mr. Neven F. Stipanovic, Acting Assistant General Counsel, or Ms. Jessica Selinkoff, Attorney, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Commission is proposing to revise its regulations at 11 CFR 100.26 and 110.11 regarding disclaimers on communications placed for a fee on the internet. The Commission may provide illustrative examples on the Commission's website during the comment period.

A. Rulemaking History

1. Definition of "Public Communication"

The Commission published a Notice of Proposed Rulemaking ("Technology NPRM") in the **Federal Register** on November 2, 2016.[1] The Technology NPRM comment period ended on December 2, 2016. The Commission received four comments in response to the Technology NPRM.[2]

One of the proposals in the Technology NPRM was to update the definition of "public communication" at 11 CFR 100.26. Section 100.26 currently defines "public communication" as excluding all internet communications, "other than communications placed for a fee on another person's website." When the Commission promulgated this definition in 2006, it focused on websites because that was the predominant means of paid internet advertising at the time. The Commission analogized paid advertisements on websites to the forms of mass communication enumerated in the definition of "public communication" in the Federal Election Campaign Act, 52 U.S.C. 30101–46 ("the Act"), because "each lends itself to distribution of content through an entity ordinarily owned or controlled by another person." internet Communications, 71 FR 18589, 18594 (Apr. 12, 2006) ("2006 internet E&J"); 52 U.S.C. 30101(22).

The Commission proposed to update the definition by adding communications placed for a fee on another person's "internet-enabled device or application." The purpose of the proposed change was to reflect post-2006 changes in internet technology [3]—

[1] Technological Modernization, 81 FR 76416 (Nov. 2, 2016).

[2] The Commission also received four comments in response an earlier stage of the technology rulemaking. *See* Technological Modernization, 78 FR 25635 (May 2, 2013). To review those proposals and other Commission rulemaking documents, including comments received, visit *http://sers.fec.gov/fosers/rulemaking.htm?pid=84652.*

[3] *See* Amy Schatz, *In Hot Pursuit of the Digital Voter,* Wall St. J., Mar. 23, 2012, *www.wsj.com/articles/SB10001424052702303812904577299820064048072* (showing screenshots of 2012 presidential committee advertisements on Hulu and noting another campaign's purchase of advertisements on Pandora internet radio); Tanzina Vega, *The Next Political Battleground: Your Phone,* CNN (May 29, 2015, 6:44 a.m.), *www.cnn.com/2015/05/29/politics/2016-presidential-campaigns-mobile-technology* (noting that "voters should expect more political ads as they scroll through their phones

such as the development of mobile applications (''apps'') on smartphones and tablets, smart TV devices, interactive gaming dashboards, e-book readers, and wearable network-enabled devices such as smartwatches and headsets—and to make the regulatory text more adaptable to the development of future technologies. The Commission asked several questions about its proposed change, including whether the term ''internet-enabled device or application'' is a sufficiently clear and technically accurate way to refer to the various media through which paid internet communications can be sent and received; whether there is a better way to refer to them; and whether it would help to provide examples of such paid media.

The Commission received only one comment in response to this aspect of the Technology NPRM.[4] The comment generally supported the proposed revision to the definition of ''public communication'' in section 100.26.[5]

The Commission has decided to reintroduce the proposed change to the definition of ''public communication'' in this rulemaking for the limited purpose of determining whether the term ''internet-enabled device or application'' is a sufficiently clear and technically accurate way to refer to the various media through which paid internet communications can be sent and received. The term is closely tied to the internet communication disclaimer requirements.[6]

2. Internet Communication Disclaimers

On October 13, 2011, the Commission published in the **Federal Register** an Advance Notice of Proposed Rulemaking (''ANPRM'') soliciting comment on whether to modify disclaimer requirements at 11 CFR 110.11 for certain internet communications, or to provide exceptions thereto, consistent with the Act.[7] The Commission received eight comments in response. Six of the commenters agreed that the Commission should update the disclaimer rules through a rulemaking, though commenters differed on how the Commission should do so.

On October 18, 2016, the Commission solicited additional comment in light of legal and technological developments during the five years since the ANPRM was published.[8] The Commission received six comments during the reopened comment period, all but one of which supported updating the disclaimer rules. Commenters, however, differed on whether the Commission should allow modified disclaimers for all online advertisements or exempt paid advertisements on social media platforms from the disclaimer requirements.

On October 10, 2017, the Commission again solicited additional comment in light of recent legal, factual, and technological developments.[9] During this reopened comment period, the Commission received submissions from 149,772 commenters (including persons who signed on to others' comments), of which 147,320 indicated support for updating or strengthening the disclaimer rules or other government action; 2,262 indicated opposition to such efforts; and 190 did not indicate a discernable preference.[10]

After considering the comments from all three comment periods and additional deliberation, the Commission now seeks comment on the proposed changes described in this notice. Other than the issues specified in this notice, the Commission does not, in this rulemaking, propose changes to any other rules adopted by the Commission in the internet Communications rulemaking of 2006.

B. Current Statutory and Regulatory Framework Concerning Disclaimers

A ''disclaimer'' is a statement that must appear on certain communications to identify who paid for it and, where applicable, whether the communication was authorized by a candidate. 52 U.S.C. 30120(a); 11 CFR 110.11; *see also* Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds, 67 FR 76962, 76962 (Dec. 13, 2002) (''2002 Disclaimer E&J''). The Supreme Court has recognized that disclaimer requirements may burden political speech, and thus must bear a substantial relation to a sufficiently important governmental interest. *See Citizens United* v. *FEC,* 558 U.S. 310, 366–67 (2010) (''*Citizens United*'') (citing *Buckley* v. *Valeo,* 424 U.S. 1, 64, 66 (1976) (''*Buckley*'')).

The Court has found that the government's interest in mandating such disclaimers justifies the accompanying burden on political speech. For example, in approving the disclaimers at issue in *Citizens United,* the Court explained, ''[d]isclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking. The Court has subjected these requirements to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'' *Id.* (internal quotation marks and alterations removed). The Court also held that disclaimers ''provide the electorate with information and insure that the voters are fully informed about the person or group who is speaking,'' and stated that identifying the sources of advertising enables people ''to evaluate the arguments to which they are being subjected.'' *Id.* at 368 (internal quotations and alterations removed).

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next year—much as they'll be bombarded with ads on television,'' including ads using geolocation to target ''potential voters who may have downloaded the candidate's app''). Indeed, a recent study has shown that 19% of Americans access the internet exclusively or mostly through their smartphones as opposed to desktop or laptop computers. *See* Pew Research Ctr., *U.S. Smartphone Use in 2015,* at 3 (2015), *www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf.*

[4] *See* Campaign Legal Center and Democracy 21, Comment on REG 2013–01 (Technological Modernization) (Dec. 2, 2016), *http://sers.fec.gov/fosers/showpdf.htm?docid=354002.*

[5] The comment also urged the Commission to amend 11 CFR 100.26 ''to make clear that any expenditure beyond a de minimis amount for internet communications is not exempt from the definition of 'public communication.''' *Id.* at 2.

[6] The definition of ''public communication'' is also relevant to the coordination rules, 11 CFR 109.21(c), and financing limitations, *e.g.,* 11 CFR 100.24(b)(3), 300.32(a)(1)–(2), 300.71.

[7] *See* internet Communication Disclaimers, 76 FR 63567 (Oct. 13, 2011).

[8] *See* internet Communication Disclaimers; Reopening of Comment Period and Notice of Hearing, 81 FR 71647 (Oct. 18, 2016). The Commission postponed the hearing announced in that notice because few commenters expressed interest in participating. As noted above, the Commission will hold a hearing on the proposals in this notice on June 27, 2018.

[9] *See* internet Communication Disclaimers; Reopening of Comment Period, 82 FR 46937 (Oct. 10, 2017); *see also* internet Communication Disclaimers; Extension of Comment Period, 82 FR 52863 (Nov. 15, 2017) (explaining Commission's extension of comment period for one business day due to technological difficulties).

[10] Commission staff read and categorized each comment in one of three broad categories: Support, oppose, or neutral. ''Support'' included comments supporting more stringent disclaimer rules; favoring ''transparency''; opposing application of the small items or impracticable exceptions to online advertisements; opposing advertising by foreign nationals; opposing Russian interference in the 2016 election; or supporting the ''Honest Ads Act'' or any of its components. *See* S. 1989, 115th Cong. (2017). ''Oppose'' included comments opposing any rulemaking; opposing more stringent disclaimer rules; supporting application of the small items or impracticable exceptions to online advertising; supporting modified disclaimers in lieu of full disclaimers; opposing any restriction of speech, ''infringement'' of constitutional rights, or ''censorship''; or reminding the Commission to read the Constitution. ''Neutral'' included comments recognizing the value of disclaimers, but noting the difficulty of providing disclaimers online; recommending modified disclaimers in some, but not all, circumstances; appearing to make contradictory statements in support or opposition; presenting unclear statements of preferred action, such as ''do the right thing''; or commenting off topic, such as on net neutrality. Comments addressing specific aspects of the current or proposed rules are discussed below, as appropriate.

With some exceptions, the Act and Commission regulations require disclaimers for public communications: (1) Made by a political committee; (2) that expressly advocate the election or defeat of a clearly identified federal candidate; or (3) that solicit a contribution. 52 U.S.C. 30120(a); 11 CFR 110.11(a). Under existing regulations, the term ''public communication'' does not include internet communications other than ''communications placed for a fee on another person's website.'' 11 CFR 100.26. In addition to these internet public communications, ''electronic mail of more than 500 substantially similar communications when sent by a political committee . . . and all internet websites of political committees available to the general public'' also must have disclaimers. 11 CFR 110.11(a).

The content of the disclaimer that must appear on a given communication depends on who authorized and paid for the communication. If a candidate, an authorized committee of a candidate, or an agent of either pays for and authorizes the communication, then the disclaimer must state that the communication ''has been paid for by the authorized political committee.'' 11 CFR 110.11(b)(l); *see also* 52 U.S.C. 30120(a)(1). If a public communication is paid for by someone else, but is authorized by a candidate, an authorized committee of a candidate, or an agent of either, then the disclaimer must state who paid for the communication and that the communication is authorized by the candidate, an authorized committee of the candidate, or an agent of either. 11 CFR 110.11(b)(2); *see also* 52 U.S.C. 30120(a)(2). If the communication is not authorized by a candidate, an authorized committee of a candidate, or an agent of either, then the disclaimer must ''clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee.'' 11 CFR 110.11(b)(3); *see also* 52 U.S.C. 30120(a)(3).

Every disclaimer ''must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity'' of the communication's sponsor. 11 CFR 110.11(c)(1). While the Act and Commission regulations impose specific requirements for communications that are ''printed'' or that appear on radio or television, they do not specify additional requirements for disclaimers on internet advertisements. *Compare* 11 CFR 110.11(c)(1) (general ''clear and conspicuous'' requirement for all disclaimers), *with* 11 CFR 110.11(c)(2)–(4) (additional requirements for printed, radio, and television disclaimers) *and* 52 U.S.C. 30120(c)–(d) (specifications for printed, radio, and television disclaimers).

Commission regulations set forth limited exceptions to the general disclaimer requirements. For example, disclaimers are not required for communications placed on ''[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed.'' 11 CFR 110.11(f)(1)(i) (''small items exception''). Nor are disclaimers required for ''[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable.'' 11 CFR 110.11(f)(1)(ii) (''impracticable exception'').

C. Application of the Disclaimer Requirements to Internet Communications

1. Development of Current Rule That Paid Internet Advertisements Require Disclaimers

The Commission first addressed disclaimers on internet communications in two 1995 advisory opinions regarding the application of the Act to internet solicitations of campaign contributions. *See* Advisory Opinion 1995–35 (Alexander for President); Advisory Opinion 1995–09 (NewtWatch PAC).[11] The Commission determined that internet solicitations are ''general public political advertising''[12] and, as such, they ''are permissible under the [Act] provided that certain requirements, including the use of appropriate disclaimers, are met.'' Advisory Opinion 1995–35 (Alexander for President) at 2 (characterizing conclusion in Advisory Opinion 1995–09 (NewtWatch PAC)). Later that year, the Commission stated in a rulemaking that ''internet communications and solicitations that constitute general public political advertising require disclaimers,'' adding that ''[t]hese communications and others that are indistinguishable in all material aspects from those addressed in [Advisory Opinion 1995–09 (NewtWatch PAC)] will now be subject to'' the disclaimer requirement. *See* Communications Disclaimer Requirements, 60 FR 52069, 52071 (Oct. 5, 1995).

The Bipartisan Campaign Reform Act of 2002, Public Law 107–155, 116 Stat. 81 (2002) (''BCRA''), added specificity to the disclaimer requirements (including ''stand by your ad'' requirements for certain radio and television communications), expanded the scope of communications covered by the disclaimer requirements, and defined a new term, ''public communication,'' that did not reference the internet. *See* 52 U.S.C. 30101(22), 30120; *see also* 2002 Disclaimer E&J, 67 FR at 76962. The Commission promulgated rules to implement BCRA's changes to the disclaimer provisions of the Act and the new statutory definition of ''public communication.'' *See* 2002 Disclaimer E&J, 67 FR at 76962; Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49111 (July 29, 2002) (''Non-Federal Funds E&J''). The 2002 rules incorporated the term ''public communication'' to describe the general reach of the disclaimer rules and applied the disclaimer requirements to political committees' websites and distribution of more than 500 substantially similar unsolicited emails. Other than these two specific types of internet-based activities by political committees, however, internet communications were excluded from the regulatory definition of ''public communication'' and, therefore, outside the scope of the disclaimer requirements that apply to public communications. *See* 2002 Disclaimer E&J, 67 FR at 76963–64; Non-Federal Funds E&J, 67 FR at 49111.

In 2006, after a court challenge to the regulatory definition of ''public communication,'' the Commission revised its rules to include internet communications ''placed for a fee on another person's website'' in the definition of ''public communication'' and, therefore, within the scope of the disclaimer rule. *See* 2006 internet E&J, 71 FR at 18594; *see also Shays* v. *FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004) (holding, among other things, that Commission could not wholly exclude internet activity from the definition of ''public communication''). The Commission explained that, under the revised definition, ''when someone such as an individual, political committee, labor organization or corporation pays a fee to place a banner, video, or pop-up advertisement on another person's website, the person paying makes a 'public communication.''' 2006 internet E&J, 71 FR at 18593–94. Furthermore, the Commission explained that ''the

[11] Documents related to Commission advisory opinions are available on the Commission's website at *www.fec.gov/data/legal/advisory-opinions/*.

[12] At the time, 11 CFR 110.11 explicitly applied to ''general public political advertising.'' The current rule uses the term ''public communication'' as defined at 11 CFR 100.26, which includes ''general public political advertising.''

placement of advertising on another person's website for a fee includes all potential forms of advertising, such as banner advertisements, streaming video, popup advertisements, and directed search results.'' [13] *Id.; see also id.* at 18608 n.52 (noting that, as used in a different context, ''terms 'website' and 'any internet or electronic publication' are meant to encompass a wide range of existing and developing technology'' including ''social networking software''). Thus, since 2006, Commission regulations have required disclaimer information to be included in certain paid internet advertisements.

2. Application of Disclaimer Rule to ''Small'' Internet Communications

The Commission has been asked on a number of occasions about the application of the disclaimer requirement to internet communications, including small, character- or space-limited internet communications such as banner advertisements; social media text, video, or image advertisements; and directed search results. The queries center on whether the communications are exempt from the disclaimer requirements under the impracticable or small items exceptions at 11 CFR 110.11(f)(1) or whether they may incorporate technological modifications to satisfy the disclaimer requirements.[14]

The Commission has applied the small items exception to the general disclaimer requirements in situations where there are ''technological limitations on both the size and the length of information'' that can be contained based on the small physical size of the item or an external technological constraint. Advisory Opinion 2007–33 (Club for Growth PAC) at 3 (declining to extend small items exception to spoken disclaimer requirement); *see also* Advisory Opinion 1980–42 (Hart for Senate Campaign Committee) (applying the exception to concert tickets); Advisory Opinion 2002–09 (Target Wireless) (applying the exception to character-limited ''short message service,'' or SMS, communications distributed through a non-internet-based wireless telecommunications network); 11 CFR 110.11(f)(1)(i). In the Target Wireless advisory opinion, the Commission considered whether disclaimers were required on paid content distributed via SMS communications through a non-internet-based wireless telecommunications network. At the time the Commission issued that advisory opinion, technology limited SMS content to 160 text-only characters per message; SMS messages could not include images; wireless telephone carriers contractually required consumers to pay a flat fee for a certain number of SMS messages that consumers could receive; and content longer than 160 text characters would be sent over multiple messages, which might not be received consecutively. Advisory Opinion 2002–09 (Target Wireless) at 2. The Commission concluded that the small items exception applied to paid SMS messages, noting ''that the SMS technology places similar limits on the length of a political advertisement as those that exist with bumper stickers.'' *Id.* at 4.

The Commission has not exempted any disclaimers under the small items exception in the 15 years since it issued the Target Wireless advisory opinion. The Commission discussed the small items exception in Advisory Opinion 2007–33 (Club for Growth PAC), which concerned whether an advertiser could ''dispense with'' or ''truncate'' the required disclaimers in 10- and 15-second television advertisements. The Commission concluded that the advertisements did not qualify for the small items exception.

The related impracticable exception at 11 CFR 110.11(f)(1)(ii) exempts from the disclaimer requirement advertisements displayed via skywriting, water towers, and wearing apparel, as well as ''other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable.'' The list of communications in the rule is not exhaustive. The Commission has not, however, applied the impracticable exception to a situation beyond those listed in section 110.11(f)(1)(ii). *See* Advisory Opinion 2007–33 (Club for Growth PAC) (determining that ''physical or technological limitations'' in 10- and 15-second television advertisements do not qualify for impracticable exception); Advisory Opinion 2004–10 (Metro Networks) (determining that ''live read'' traffic report sponsorship messages, delivered by reporters from mobile units and aircraft, did not present ''specific physical and technological limitations'' to qualify for impracticable exception); *see also* Advisory Opinion 2013–13 (Freshman Hold'em JFC *et al.*) at n.4 (concluding that ''emails and web pages . . . are not electronic communications in which the inclusion of disclaimers may be inherently impracticable.'').

Nonetheless, in Advisory Opinion 2004–10 (Metro Networks), the Commission recognized that, although the ''physical and technological limitations'' of a communication medium may ''not make it impracticable to include a disclaimer at all,'' technological or physical limitations may extend to ''one particular aspect of the disclaimer'' requirements. Advisory Opinion 2004–10 (Metro Networks) at 3. In such circumstances, the Commission concluded that a disclaimer was required but permitted modifications or adaptations of the technologically or physically limited aspects of the communication medium. *See id.* at 3–4 (concluding that reporters reading sponsorship message live from aircraft or mobile units could read stand by your ad language, rather than candidate who was not physically present).

The Commission was first asked to apply the small items exception or impracticable exception to text-limited internet advertisements in 2010. Google proposed to sell AdWords search keyword advertisements limited to 95 text characters; the proposed advertisements would not include disclaimers but would link to a landing page (the purchasing political committee's website) on which users would see a disclaimer. *See* Advisory Opinion 2010–19 (Google). The Commission concluded that Google's proposed AdWords program ''under the circumstances described . . . [was] not in violation of the Act or Commission regulations,'' but the advisory opinion did not answer whether Google AdWords ads would qualify for the small items or impracticable exception. *Id.* at 2.

In response to two subsequent advisory opinion requests concerning the possible application of the small items exception or impracticable exception to small internet advertisements, the Commission was unable to issue advisory opinions by the required four affirmative votes. *See* Advisory Opinion Request, Advisory Opinion 2011–09 (Facebook) (Apr. 26,

[13] But ''when the search results are displayed as a result of the normal function of a search engine, and not based on any payment for the display of a result, the search results are not forms of 'general public political advertising,' '' and ''where a search engine returns a website hyperlink in its normal course, and features the same hyperlink separately as the result of a paid sponsorship arrangement, the latter is a 'public communication' while the former is not.'' 2006 internet E&J, 71 FR at 18594 n.28.

[14] *See* Advisory Opinion 2017–12 (Take Back Action Fund); Advisory Opinion 2010–19 (Google); *see also* Advisory Opinion Request, Advisory Opinion 2013–18 (Revolution Messaging) (Sept. 11, 2013); Advisory Opinion Request, Advisory Opinion 2011–09 (Facebook) (Apr. 26, 2011). In addition to the advisory opinion requests concerning internet advertisements, another advisory opinion request asked the Commission to apply the impracticable exception in support of truncating a political committee's name in disclaimers on its mass emails and on its website. *See* Advisory Opinion 2013–13 (Freshman Hold'em JFC *et al.*) at n.4.

2011) (concerning application of exceptions to zero-to-160 text character ads with thumbnail size images); Advisory Opinion Request, Advisory Opinion 2013–18 (Revolution Messaging) (Sept. 11, 2013) (concerning application of exceptions to mobile banner ads).

Finally, the Commission considered an advisory opinion request in 2017 asking whether paid image and video ads on Facebook ''must . . . include all, some, or none of the disclaimer information specified by 52 U.S.C. 30120(a).'' Advisory Opinion Request at 4, Advisory Opinion 2017–12 (Take Back Action Fund) (Oct. 31, 2017). The Commission issued an opinion concluding that the proposed Facebook image and video advertisements ''must include all of the disclaimer information'' specified by the Act, but, in reaching this conclusion, Commissioners relied on two different rationales, neither of which garnered the required four affirmative votes. Advisory Opinion 2017–12 (Take Back Action Fund) at 1.

D. Proposed Revision to the Definition of ''Public Communication'' at 11 CFR 100.26

As discussed above, the Commission proposed in the Technology NPRM to revise the definition of ''public communication'' in 11 CFR 100.26 to include communications placed for a fee on another person's ''internet-enabled device or application,'' in addition to communications placed for a fee on another person's website. Disclaimers are required for any ''public communication'' that contains express advocacy or solicits a contribution, and for all public communications by political committees. The Commission wants to make sure that any change to the definition of ''public communication'' in 11 CFR 100.26 is appropriate as applied in the disclaimer rule, given the complexities of internet advertising and the rapid pace of technological change.

Commenters in this rulemaking have offered insight into, as one described it, the ''myriad of options for advertising via different media and different platforms online.'' [15] Since the Commission's 2006 internet rulemaking, the focus of internet activity has shifted from blogging, websites, and listservs [16] to social media networks (Facebook, Twitter, and LinkedIn), media sharing networks (YouTube, Instagram, and Snapchat), streaming applications (Netflix, Hulu), and mobile devices and applications. Other significant developments include augmented and virtual reality [17] and the ''Internet of Things'': Wearable devices (smart watches, smart glasses), home devices (Amazon Echo), virtual assistants (Siri, Alexa), smart TVs and other smart home appliances.[18] One commenter noted, ''[a]s consumers move toward virtual and augmented reality services, wearable technology, screenless assistants, and other emerging technologies, there is every reason to predict that advertisers will demand the ability to reach voters and customers on those technologies, and, in turn, new advertising configurations that have not yet been imagined will be developed.'' [19]

Accordingly, the Commission is reopening the definition of ''public communication'' in 11 CFR 100.26 for the limited purpose of determining whether revising the definition to include communications placed for a fee on another person's ''internet-enabled device or application,'' in addition to communications placed for a fee on another person's website, would be a clear and technically accurate way to refer to the various media through which paid internet communications can be and will be sent and received. The Commission invites comment on this proposal. Is it clear from the proposed language that both the placement-for-a-fee requirement and the third-party requirement would apply to websites, internet-enabled devices, and internet applications? In this rulemaking, the Commission is not considering any change to the definition of ''public communication'' other than the terminology that should replace ''website'' as used in the definition.

E. Proposed Revision to the Disclaimer Rules at 11 CFR 110.11

Technological developments over the past 15 years have rendered much current internet advertising distinguishable from the non-internet-based SMS advertisements to which the Commission applied the small items exception in Advisory Opinion 2002–09 (Target Wireless) and from the internet advertisements the Commission considered in promulgating the disclaimer regulations in 2002. As Facebook explained in a comment on this rulemaking, ''[w]hen Facebook submitted its request for an advisory opinion in 2011, ads on Facebook were small and had limited space for text. Ad formats available on Facebook have expanded dramatically since that time.'' [20] Indeed, many internet advertisements today include video, audio, and graphic components in addition to the text components considered in the Target Wireless advisory opinion. *See, e.g.,* Advisory Opinion Request, Advisory Opinion 2017–12 (Take Back Action Fund) (Oct. 31, 2017). Moreover, today, commercial internet advertisements are subject to other federal regulatory disclosure regimes.[21] Are the different degrees of First Amendment protection afforded political speech as opposed to commercial speech relevant to any consideration of other agencies' disclosure regimes? [22]

As noted above, the Commission's regulations have required disclaimer information to be included in certain paid internet advertisements since 2006. Spending on digital political advertising grew almost eightfold just between 2012 and 2016, from $159 million to $1.4

[15] Computer & Communications Industry Association, Comment at 9 (Nov. 9, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358503*.

[16] 2006 Internet E&J at 18590–91; *see also* Asian Americans Advancing Justice, *et al.,* Comment at 5 (Nov. 13, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=371144* (''In 2006, blogging was at its height, and it seemed as if everyone would have his or her own blog.'').

[17] *See* Computer & Communications Industry Association, Comment at 9.

[18] *See* Asian Americans Advancing Justice, *et al.,* Comment at 7 (also noting potential for political advertising on ''smart refrigerators'').

[19] Google, Comment at 4–5 (Nov. 9, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358482*.

[20] Facebook noted that some of its ads ''continue to be limited in size, with text limitations or truncations based on format and placement of the ad,'' but that other formats ''allow for additional creative flexibility.'' Facebook, Comment at 3 (Nov. 13, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358468* (citing Facebook, *Facebook Ads Guide, https://www.facebook.com/business/ads-guide* (last visited Mar. 15, 2018)); *see also* Fidji Simo, *An Update on Facebook Ads,* Facebook Newsroom (June 6, 2013), *https://newsroom.fb.com/news/2013/06/an-update-on-facebook-ads/* (announcing reconfiguration of ad products); Google, Comment at 3 (noting that the ''types and varieties of digital advertisements that political advertisers create and place throughout the web has grown exponentially since 2011.'').

[21] *See* CMPLY, Comment at 2 (Nov. 9, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358493* (noting that regulatory disclaimer and disclosure requirements ''have been addressed in similar contexts for marketing, financial and pharmaceutical, without those regulators exempting disclosures in social media channels'').

[22] *See Buckley,* 424 U.S. at 14 (''Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' '') (citation omitted); *Sorrell* v. *IMS Health Inc.,* 564 U.S. 552, 579 (2011) (''[G]overnment's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech' '') (citations omitted); *Citizens United,* 558 U.S. at 329 (''[P]olitical speech . . . is central to the meaning and purpose of the First Amendment.'').

billion.[23] Many commenters expressed the view that the need for internet communication disclaimers has grown along with spending on internet political advertising.[24] As one commenter wrote, ''[T]he increasing prominence of online election expenditures makes the failure to update campaign finance laws to adequately cover the internet more dangerous with every cycle.'' [25] The dramatic growth in political advertising on the internet highlights the need for regulatory clarity in this area. As one commenter noted, ''[w]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears.'' [26] Other commenters noted that the importance and value of political advertising disclaimers do not vary when new forms of communication emerge.[27]

Thus, the Commission is proposing to add regulatory provisions clarifying, for various types of paid internet public communications, the disclaimers required and, in certain circumstances, when a paid internet communication may employ a modified approach to the disclaimer requirements.

As explained below, the Commission offers two proposals. They differ in approach.

Alternative A proposes to apply the full disclaimer requirements that now apply to radio and television communications to public communications distributed over the internet with audio or video components. Alternative A also proposes to apply the type of disclaimer requirements that now apply to printed public communications to text and graphic public communications distributed over the internet. Finally, Alternative A would allow certain small text or graphic public communications distributed over the internet to satisfy the disclaimer requirements through an ''adapted disclaimer.''

Alternative B proposes to treat internet communications differently from communications in traditional media. Alternative B would require disclaimers on internet communications to be clear and conspicuous and to meet the same general content requirement as other disclaimers, without imposing the additional disclaimer requirements that apply to print, radio, and television communications. Alternative B also proposes to allow certain paid internet advertisements to satisfy the disclaimer requirements through an adapted disclaimer, depending on the amount of space or time necessary for a clear and conspicuous disclaimer as a percentage of the overall advertisement. In the event that an advertisement could not provide a disclaimer even through a technological mechanism, Alternative B proposes to create an exception to the disclaimer requirement specifically for paid internet advertisements.

The Commission requests comment on all elements of both proposals. The two proposals need not be considered as fixed alternatives; commenters are encouraged to extract the best elements of each, or suggest improvements or alternatives, to help the Commission fashion the best possible rule.

1. Proposed Disclaimer Requirements for Communications Distributed Over the Internet—Organization

Both Alternative A and Alternative B propose to add new paragraph (c)(5) to 11 CFR 110.11. New paragraph (c)(5) in each proposal would provide specific disclaimer requirements for internet communications. This approach would be consistent with the current structure of the disclaimer rule at 11 CFR 110.11, which categorizes disclaimer requirements by the form of communication on which they appear.

In the first paragraph of Alternative B's proposed section (c)(5), Alternative B proposes to define the term ''internet communications.'' Alternative A does not propose to introduce or define this term. Alternative B's proposed paragraph (c)(5)(i)(A) defines ''internet communications'' as email of more than 500 substantially similar communications when sent by a political committee; internet websites of political committees available to the general public; and ''internet public communications'' as defined in paragraph (c)(5)(i)(B). Alternative B's proposed paragraph (c)(5)(i)(B) defines ''internet public communication,'' in turn, as any communication placed for a fee on another person's website or internet-enabled device or application. Alternative B's proposed definition of ''internet communication'' is intended to capture all communications distributed via the internet that are subject to the disclaimer requirement. *See* 11 CFR 110.11(a)(1)–(3). Alternative B's proposed definition of ''internet public communication'' is intended to capture all online ''public communications,'' as defined in 11 CFR 100.26. Are the proposed definitions sufficiently broad to encompass new technologies? Are they platform-neutral? Should the definition of ''internet public communication'' include a reference to virtual reality, social networking, or internet platforms?

Both Alternative A and Alternative B propose to define additional terms: ''adapted disclaimer,'' ''technological mechanism,'' and ''indicator.'' These terms are discussed below.

2. Disclaimer Requirements for Video and Audio Communications Distributed Over the Internet

As described below, Alternative A proposes to extend the specific requirements for disclaimers on radio and television communications to public communications distributed over the internet with audio or video components. Under Alternative A, such audio and video internet public communications would also be required to satisfy the general requirements that apply to all public communications requiring disclaimers. Alternative B likewise proposes to require that radio and television communications distributed over the internet must satisfy the general requirements that apply to all public communications requiring disclaimers. Alternative B would not extend any additional disclaimer requirements to such communications.

a. Alternative A—Proposed 11 CFR 110.11(c)(5)(ii)

As noted above, the Act and Commission regulations impose specific requirements for disclaimers on radio and television communications. *See* 52 U.S.C. 30120(d); 11 CFR 110.11(c)(3)–(4). These requirements vary, depending on whether a candidate or another person pays for or authorizes the communication.

Radio communications paid for or authorized by a candidate must include

[23] *See* Borrell Associates, *The Final Analysis: Political Advertising in 2016, https://www.borrellassociates.com/industry-papers/free-summaries/borrell-2016-political-advertising-analysis-exec-sum-jan-2017-detail* (subscription required).

[24] *See, e.g.,* Sunlight Foundation, Comment at 1 (Nov. 13, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=360854* (''The FEC and Congress should act to ensure disclosures and disclaimers are neither discretionary nor uneven . . . [D]isclaimers and disclosures don't mean renouncing business or chilling speech, any more than has been the case for TV or radio stations.'').

[25] Brennan Center for Justice, Comment at 3 (Nov. 13, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358487*.

[26] Institute for Free Speech, Comment at 3 (Nov. 9, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358495* (quoting *Brown* v. *Entm't Merchs. Ass'n,* 564 U.S. 786, 790 (2011)).

[27] *See, e.g.,* BMore Indivisible, Comment at 5 (Nov. 9, 2017) *http://sers.fec.gov/fosers/showpdf.htm?docid=358504* (stating that ''[p]roviding disclaimers o[n] internet and app advertising is an extension of the role the FEC has historically performed for traditional media. Online media advertising transparency is increasingly essential as Americans turn to the internet as their primary source of information'').

an audio statement spoken by the candidate, identifying the candidate and stating that the candidate has approved the communication. 11 CFR 110.11(c)(3)(i). Radio communications that are not paid for or authorized by a candidate must include an audio statement identifying the person paying for the communication and that that person ''is responsible for the content of this advertising.'' 11 CFR 110.11(c)(4)(i).

Television, broadcast, cable, or satellite communications paid for or authorized by a candidate must include a statement by the candidate, identifying the candidate and stating that the candidate has approved the communication, either through a full-screen view of the candidate making the statement or by a voice-over accompanied by a ''clearly identifiable photographic or similar image'' of the candidate; these communications must also include a similar statement ''in clearly readable writing'' at the end of the communication. 11 CFR 110.11(c)(3)(ii)–(iii). Television, broadcast, cable, or satellite communications that are not paid for or authorized by a candidate must include the audio statement required by 11 CFR 110.11(c)(4)(i) and conveyed by a ''full-screen view of a representative'' of the person making the statement or in a voice-over by such person; these communications must also include a similar statement ''in clearly readable writing'' at the end of the communication. 11 CFR 110.11(c)(4)(ii)–(iii).[28]

As noted above, internet advertisements may be in the form of audio or video communications, or may incorporate audio or video elements.[29] Alternative A is based on the premise that these advertisements are indistinguishable from offline advertisements that may be distributed on radio or television, broadcast, cable, or satellite in all respects other than the medium of distribution.[30] Moreover, because the audio and video components of internet communications with these elements do not contain ''character'' restrictions, Alternative A proposes to apply parameters to such communications akin to the parameters in which disclaimers must appear on radio and television advertisements rather than the conditions that may constrain ''printed'' materials on which a disclaimer must appear.

Accordingly, in Alternative A, the Commission proposes to provide that public communications distributed over the internet with audio or video components are treated, for purposes of the disclaimer rules, the same as ''radio'' or ''television'' communications. The Commission, in Alternative A, proposes to do so in proposed paragraph (c)(5)(ii), which would incorporate the existing requirements at 11 CFR 110.11(c)(3) and (4) that apply to radio, television, broadcast, cable, and satellite communications, because those provisions have been in operation for 15 years and are, therefore, familiar to persons paying for, authorizing, and distributing communications. Moreover, by applying the specifications for radio and television communications to audio and video communications distributed over the internet, the proposed regulations would ensure that internet audio ads could air on radio and internet video ads could air on television without having to satisfy different disclaimer requirements.

Alternative A's proposed paragraph (c)(5)(ii) would provide that a ''public communication distributed over the internet with audio but without video, graphic, or text components'' must include the statement described in 11 CFR 110.11(c)(3)(i) and (iv) if authorized by a candidate, or the statement described in 11 CFR 110.11(c)(4) if not authorized by a candidate.

Alternative A's proposals concerning audio communications (like Alternative A's proposals for video, text, and graphic internet communications discussed below) incorporate the term ''public communication,'' as it exists or may be amended, to make clear that these provisions neither expand nor contract the scope of the disclaimer rules set forth at 11 CFR 110.11(a). The proposed reference to ''a public communication distributed over the internet with an audio component but without video, graphic, or text components'' (like the reference to the ''internet'' in Alternative A's proposals for video, text, and graphic internet communications discussed below) is intended to encompass advertisements on websites as well as those distributed on other internet-enabled or digital devices or applications; for audio internet advertisements, these would include communications on podcasts, internet radio stations, or app channels.[31] The proposed reference to a ''public communication distributed over the internet'' is not intended to alter the definition of ''public communication,'' as defined in 11 CFR 100.26. Is this clear, or should the Commission include a cross-reference in the regulatory text? Moreover, so as to hew most closely to the ''radio'' provisions that Alternative A incorporates, the proposed amendments regarding ''audio'' internet communications are intended to apply to those communications with *only* an audio component. The Commission proposes to address communications with any ''video, graphic, or text components'' separately, as explained below.

Alternative A's proposed paragraph (c)(5)(ii) would also provide that a ''public communication distributed over the internet with a video component'' must include the statement described in 11 CFR 110.11(c)(3)(ii)–(iv) if authorized by a candidate, or the statement described in 11 CFR 110.11(c)(4) if not authorized by a candidate.

Because this proposal is intended to encompass video public communications on websites, apps, and streaming video services, Alternative A's proposed new paragraph (c)(5)(ii)

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[28] The Commission previously extended the ''stand by your ad'' requirements to communications transmitted through broadcast, cable, or satellite transmission. *See* 2002 Disclaimer E&J, 67 FR at 76963 (referring to ''the Commission's judgment that it would be unsupportable to require a disclaimer for a television communication that was broadcast, while not requiring a disclaimer for the same communication merely because it was carried on cable or satellite'').

[29] *See, e.g., 5 Advertising Trends from the 2016 Presidential Election,* Pandora for Brands (Dec. 8, 2016), *http://pandoraforbrands.com/insight/5-advertising-trends-from-the-2016-presidential-election* (urging readers ''[t]o learn how Pandora can help amplify your next political campaign''); Amy Schatz, *In Hot Pursuit of the Digital Voter,* Wall St. J., Mar. 23, 2012, *www.wsj.com/articles/SB100014 24052702303812904577299820064048072* (showing screenshots of 2012 presidential committee advertisements on Hulu and noting another campaign's purchase of advertisements on Pandora internet radio); *see also* Advisory Opinion Request at 4, Advisory Opinion 2017–12 (Take Back Action Fund) (Oct. 31, 2017).

[30] *See, e.g.,* Electronic Privacy Information Center, Comment at 3 (Nov. 3, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358477* (urging extension of broadcast communication disclaimer requirements to ''analogous'' communication online); Rep. John Sarbanes *et al.,* Comment at 2 (Nov. 9, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358505* (noting belief of 18 Members of Congress that ''it is past time for the Commission to take action to harmonize disclaimer requirements for paid internet communications, regardless of size, on internet platforms with advertisements served on other media, such as broadcast television or radio''); *accord* 2006 Internet E&J, 71 FR at 18609 (''The Commission has consistently viewed online, internet-based dissemination of news stories, commentaries, and editorials to be indistinguishable from offline television and radio broadcasts, newspapers, magazines and periodical publications for the purposes of applying the media exemption under the Act''); *but see* Software and Information Industry Association, Comment at 3 (Nov. 13, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358508* (''Digital advertising is inherently more diverse than a simple transition of similar content from print or broadcast television.'').

[31] *See* Software and Information Industry Association, Comment at 3 (''in-app advertising has become one of the fastest-growing mobile ad mediums'').

would apply to a video that a political committee pays to run as a ''pre-roll'' video on the YouTube app or appear in a promoted *YouTube.com* search result, but would not apply to the same video posted for free on *YouTube.com* (since a communication not placed for a fee would not be a ''public communication'').[32] Unlike traditional television, broadcast, cable, or satellite ads, however, video advertisements placed online may include non-video components such as separate text, or graphic fields. The proposed rule regarding internet video ads thus would differ from the existing television, broadcast, cable, and satellite provisions in that the proposed rule would apply even if the communication also included non-video components.

This aspect of Alternative A would not explicitly address small audio or video internet ads. The Commission proposes to take this approach to hew Alternative A's proposed rules on audio and video ads as closely as possible to the existing disclaimer provisions for advertisements transmitted by radio, television, broadcast, cable, and satellite, which do not, in paragraphs (c)(3) or (4), account for ''small'' advertisements. Should new technology develop that would render the provision of a disclaimer on a particular type of audio or video internet communication impracticable, the Commission anticipates that, as with current TV and radio ads, such circumstances could be addressed in an advisory opinion seeking to exempt such a communication from the disclaimer requirements.[33]

The Commission seeks comment as to whether these proposals accurately describe audio and video communications over the internet, regardless of the electronic or digital platforms on which they may be distributed. For example, does the Commission need to clarify or expand the term ''internet''? Similarly, does the Commission need to clarify the term ''video'' to address whether an advertisement with a GIF is a communication ''with a video component'' or one with a ''graphic'' component? Similarly, should the Commission expressly include or exclude from the term ''video'' static (*i.e.,* non-moving) paid digital advertisements in dynamic (*i.e.,* moving) environments such as ''billboard'' ads inside interactive gaming systems, or virtual-reality and augmented-reality platforms?[34]

The Commission also welcomes comment on any aspect of these proposals, including the approach towards the exceptions and, more generally, the advisability of treating audio and video internet communications in the manner that radio, television, broadcast, cable, and satellite communications are treated.

b. Alternative B—Proposed Paragraph (c)(5)(ii)

The proposals in Alternative B are premised on the internet as a ''unique medium of . . . communication[]''[35] that poses ''unique challenges with respect to advertising disclosures.''[36] Although advertisements on the internet may often look or sound like television or radio advertisements, several commenters focused on the differences between internet advertising and advertising on more traditional forms of media. As one stated, ''[d]igital advertising is inherently more diverse than a simple transition of similar content from print or broadcast television. It comes in many different formats presented across a wide range of technology platforms with screen size ranging from large to very small.''[37] Another commenter noted that, ''[i]n addition to character-limited ads that just feature text, there are banner ads with images and text, video ads with text, and audio ads that also feature a corresponding interactive image or video on an app.''[38] A third commented on the ''nearly infinite range . . . of possible combinations of hardware, software, add-ons, screen sizes and resolutions, individualized settings, and other factors . . . can affect the display of a political communication'' on the internet.[39] ''Content that is optimized for viewing on phones, tablets, and other mobile devices is distinct from content that appears on a desktop or laptop computer.''[40] The ''ways people physically interact with content also vary by medium (*e.g.,* a user can 'rollover' content on a desktop screen to see more information, but may not use a mouse or view rollovers on a mobile device).''[41] In addition, internet advertisements can vary significantly in duration. Internet ads can last for as little as ''fifteen seconds . . . or even shorter,'' and entire ad campaigns can last for as little as ''a few days or just a few hours for events like flash sales.''[42] Moreover, ''[p]aid advertising on the internet is constantly evolving in nature.''[43]

Given the rapid pace of technological change and an inability to forecast the future, the revisions to the disclaimer rules proposed in Alternative B are intended to recognize the differences between the internet and traditional forms of media like newspapers, radio, and television.[44] Thus, Alternative B's proposed paragraph (c)(5)(ii) would require disclaimers on internet communications to meet the general content requirements in 11 CFR 110.11(b) and the general ''clear and conspicuous'' requirement of 11 CFR 110.11(c)(1), but not the additional ''stand by your ad'' requirements for radio and television communications.[45]

[32] *See* Google, Comment at 3 (describing Google ad products on YouTube).

[33] *See* 11 CFR 112.1 (describing advisory opinion requests); *see also* Advisory Opinion 2007–33 (Club for Growth PAC) (considering and rejecting request to apply small items exception to disclaimers in 10- and 15-second television advertisements).

[34] *See, e.g.,* Steve Gorman, *Obama Buys First Video Game Campaign Ads,* Reuters, Oct. 17, 2008, *https://www.reuters.com/article/us-usa-politics-videogames/obama-buys-first-video-game-campaign-ads-idUSTRE49EAGL20081017* (showing example of static court-side ad in dynamic basketball gaming environment).

[35] Public Citizen and Free Speech for People, Comment at 3 (Nov. 1, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358485* (expressing the view that ''disclaimers on all forms of on-line paid campaign advertising are practical and pose little inconvenience'' to sponsors or recipients); *see also id.* at 1 (referring to ''the unique medium of internet communications'' in urging Commission to proceed with rulemaking).

[36] Software & Information Industry Association, Comment at 3.

[37] *Id.*

[38] Computer & Communications Industry Association, Comment at 9.

[39] Coolidge-Reagan Foundation, Comment at 5 (Nov. 8, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358499.*

[40] Facebook, Comment at 2.

[41] *Id.*

[42] Computer & Communications Industry Association, Comment at 11.

[43] Public Citizen and Free Speech for People, Comment at 3; *see also* American Federation of Labor and Congress of Industrial Organizations, *et al.,* Comment at 2 (Dec. 19, 2016), *http://sers.fec.gov/fosers/showpdf.htm?docid=354341* (''Since the technology of the internet is rapidly changing, and will likely continue to do so indefinitely, the Commission's rules in this area must be sufficiently flexible and principle-focused so they do not become obsolete in short order.'').

[44] *See* Center for Competitive Politics, Comment at 3 (Dec. 19, 2016), *http://sers.fec.gov/fosers/showpdf.htm?docid=354344; see also* Campaign Solutions, Comment at 1 (Nov. 9, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=365826* (''As new and disruptive technologies change the way we interact with technology and consume media, we are sometimes unable to anticipate the format of political advertising.''); Computer & Communications Industry Association, Comment at 13 (''Campaigns are constantly trying new methods to appeal to new voters, and political campaign communication and advertising methods change with every election cycle. As technology develops, new forms of advertising could become available.'').

[45] *See* Electronic Frontier Foundation, Comment at 2 (Nov. 9, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358498; see also* Google, Comment at 4 (''unlike broadcast advertising, which involves an advertiser providing a static advertisement to the broadcaster that is the same ad every time it airs, digital ads can be dynamic''); Coolidge-Reagan Foundation, Comment at 4 (''Any internet-related regulations should afford speakers

Continued

The Act requires all disclaimers to provide payment and authorization information, regardless of the form that the communication may take, but imposes additional ''stand by your ad'' requirements *only* on television and radio communications.[46] Does the Commission have the legal authority to extend those requirements to internet communications?[47] If so, should the Commission exercise that authority? Or, as a practical matter, do the differences between internet advertising and radio and television advertising make the ''stand by your ad'' requirements a poor fit for audio and video public communications on the internet? Some commenters in this rulemaking indicated that the internet is a continuously evolving advertising medium with a wide range of platforms, formats, displays, duration, and interactivity. Are the ''stand by your ad'' requirements for television and radio communications overly inflexible by comparison?[48] For example, television advertisements must have both spoken and written disclaimers. One commenter estimated that the spoken disclaimer can take five or more seconds to deliver,[49] and the Act requires the written disclaimer to appear ''in a clearly readable manner . . . for a period of *at least 4 seconds.*''[50] Is it reasonable to impose these requirements on paid internet advertisements?[51] Should audio or video internet ads that are very short be required to provide full ''stand by your ad'' disclaimer information, as the Commission has decided in the television advertising context?[52] Does requiring a candidate or other individual representing the payor to claim responsibility for a communication by image or voice-over (as is currently required for radio and television communications) impose an additional burden on the person making the communication? Is this the type of obligation that courts have approved in television and radio advertising? What additional information, if any, does this requirement convey to a reader, viewer, or listener about the source of the communication?

3. Disclaimer Requirements for Text and Graphic Communications Distributed Over the Internet

As described below, Alternative A proposes to extend to text and graphic public communications distributed over the internet that lack any video component the specific requirements for disclaimers on printed public communications. Under Alternative A, such text and graphic public communications would also be required to satisfy the general requirements that apply to all public communications requiring disclaimers. Alternative B proposes to require all public communications distributed over the internet, including text and graphic public communications, to satisfy the general requirements that apply to all public communications requiring disclaimers, and does not propose to extend any additional disclaimer requirements to such communications.

a. Alternative A

i. Proposed 11 CFR 110.11(c)(5)(i)

Internet advertisements may be in the form of text, image, and other graphic elements with audio but without video components; such advertisements come ''in all shapes and sizes.''[53]

Alternative A proposes to adapt the existing requirements at 11 CFR 110.11(c)(2) that apply to printed communications because they have been in operation for 15 years and are, therefore, familiar to persons paying for, authorizing, and distributing communications.

Alternative A's proposed new paragraph (c)(5)(i) would provide that a ''public communication distributed over the internet with text or graphic components but without any video component'' must contain a disclaimer that is of ''sufficient type size to be clearly readable by the recipient of the communication,'' a requirement adapted from 11 CFR 110.11(c)(2)(i). Alternative A's proposed paragraph (c)(5)(i) would further specify this ''text size'' requirement by providing that a ''disclaimer that appears in letters at least as large as the majority of the other text in the communication satisfies the size requirement.'' Finally, Alternative A's proposed paragraph (c)(5)(i) would require that a disclaimer be displayed ''with a reasonable degree of color contrast between the background and the text of the disclaimer,'' a requirement the proposal indicates would be satisfied if the disclaimer ''is displayed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest text used in the communication.'' These proposals are adapted from 11 CFR 110.11(c)(2)(iii).

ii. Text or Graphic Internet Communications With Video or Audio Components

The proposal in Alternative A regarding a public communication distributed over the internet ''with text or graphic components but without any video component'' is intended to work in conjunction with Alternative A's video proposal discussed above; under the operation of both of these parts of Alternative A, an internet communication that contains both text or graphic elements and a video component would be subject only to the specific disclaimer rules applicable to television, broadcast, cable, and satellite communications that are incorporated into Alternative A's proposed paragraph (c)(5)(ii). The Commission seeks

maximum flexibility in satisfying any applicable disclaimer requirements, rather than being tied to specific forms of communication that may become superseded or outmoded.''). *But see supra* n.30 and comments cited therein.

[46] *Compare* 52 U.S.C. 30120(d) (imposing ''stand by your ad'' requirements on radio and television communications only) *with* 30104 (requiring Commission to make disclosure reports publicly available on internet), 30112 (requiring Commission to maintain central site on internet).

[47] The recently introduced Honest Ads Act would amend the Act by requiring, among other things, disclaimers on internet communications to comply with the same ''stand by your ad'' requirements as radio and television communications. *See* S. 1989, 115th Cong. § 7(b) (2017).

[48] *See, e.g.,* 52 U.S.C. 30120(d)(1)(B) (requiring television advertisement authorized by candidate to provide disclaimer through ''unobscured, full-screen view of the candidate making the statement, or the candidate in voice-over, accompanied by a clearly identifiable photographic or similar image of the candidate,'' and ''in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds''), 30120(d)(2) (requiring television advertisement not authorized by candidate to provide disclaimer ''conveyed by an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over, and shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds'').

[49] *See* Computer & Communications Industry Association, Comment at 11.

[50] 52 U.S.C. 30120(d)(1)(B)(ii), (d)(2) (emphasis added); *see also* 11 CFR 110.11(c)(3)(iii)(B), (c)(4)(iii)(B).

[51] *See* Computer & Communications Industry Association, Comment at 11 (stating that audio advertisements on internet ''could be fifteen seconds in length or even shorter'' and urging Commission to ''avoid rigidly extending broadcast radio spoken-word disclaimer requirements for radio to online platforms'').

[52] *See* Advisory Opinion 2007–33 (Club for Growth PAC) (requiring full stand-by-your-ad disclaimers in 10- and 15-second television advertisements).

[53] Google, Comment at 5 (describing ad products on the Google Display Network); *see also* Advisory Opinion Request 2017–12 (Take Back Action Fund) at 4.

comment on this proposal. In particular, the Commission seeks comment regarding how users interact with internet advertisements that contain both text or graphic and video elements. Is it common for users to view only the printed or video components of an internet advertisement that contains both? Should the Commission require that such communications include at least an adapted disclaimer, *see below,* on the face of the text or graphic element? Do such adapted disclaimers provide adequate transparency? How important is it for adapted disclaimers to provide information sufficient to identify the communication's payor on the communication's face? Would a hyperlink in a communication be a reliable way to identify the payor or could hyperlinks prove to be transient? Could an indicator be used to defeat disclosure by linking to, for example, goo.gl/nRk1H1 at publication and then, once a complaint is filed with the Commission, to an actual political committee's website? Should the Commission consider other approaches, such as allowing political committees to identify themselves in adapted disclaimers with their FEC Committee ID numbers? Should or could the Commission require the hyperlinks on the adapted disclaimers of political committees to connect to the committees' fec.gov pages? [54] Should the Commission adopt rules that require a disclaimer to be included on either the text and graphic portion or the video portion of an internet advertisement, or on both portions, depending on the proportion of the advertisement that contains each type of content? Alternatively, should the rules allow an advertiser the choice between the ''television'' or ''text and graphic'' communication disclaimer rules for an internet communication that contains both video and text or graphic components?

Similarly, under the operation of the ''text or graphic'' and audio proposals in Alternative A, an internet communication that contains both text and graphic elements and an audio, but not a video, component, would be subject to the specific disclaimer rules applicable only to text or graphic communications. Alternative A does not propose to include such communications in the proposed ''audio'' rules because such advertisements appear more like text or graphic communications than ''radio'' ones. The Commission seeks comment on this proposal. In particular, and as with the proposal above, the Commission seeks comment regarding how users interact with internet advertisements that contain both text or graphic and audio elements. Is it common for users only to view the printed components or listen to the audio components of an internet advertisement that contains both? Should the Commission instead consider such advertisements under the ''audio'' proposals discussed above? Should the Commission require that such communications include both ''radio'' and text or graphic disclaimers? Should the Commission adopt rules that require disclaimer to be included in either the ''text or graphic'' or audio portion of an internet advertisement, or on both portions, depending on the proportion of the advertisement that contains each type of content? Alternatively, should the rules allow an advertiser the choice between the ''radio'' or ''text or graphic'' communication disclaimer rules for an internet communication that contains both audio and text or graphic components?

iii. Text and Graphic Internet Communication Disclaimer Text Size Safe Harbor

Alternative A proposes to establish a ''safe harbor'' provision identifying disclaimer text size—''letters at least as large as the majority of the other text in the communication''—that clearly satisfies the rule. This would track the current approach for ''printed'' materials. *See* 2002 Disclaimer E&J, 67 FR 76965 (describing current 12-point type safe harbor for printed communication disclaimers); *cf.* Advisory Opinion 1995–09 (NewtWatch PAC) at 2 (approving disclaimer on political committee's website that was ''printed in the same size type as much of the body of the communication''). The Commission recognizes that some text or graphic internet communications may not have a ''majority'' text size. The possible diversity of text sizes in internet text and graphic communications is, in this respect, similar to text size diversity in printed communications currently addressed in 11 CFR 110.11(c)(2)(i). As the Commission explained when adopting the current safe harbor in lieu of a strict size requirement, ''the vast differences in the potential size and manner of display of larger printed communications would render fixed type-size examples ineffective and inappropriate.'' 2002 Disclaimer E&J, 67 FR 76965. Thus, for internet communications with text or graphic components that are not included in the proposed text-size safe harbor, the intent behind Alternative A is that questions of whether a disclaimer is of sufficient type size to be clearly readable would be ''determined on a case-by-case basis, taking into account the vantage point from which the communication is intended to be seen or read as well as the actual size of the disclaimer text,'' as they are under the current rule for printed materials. *Id.* Would the use of metrics minimize the need for case-by-case determinations?

b. Alternative B—Proposed 11 CFR 110.11(c)(5)(ii)

Alternative B proposes to treat graphic, text, audio, and video communications on the internet equally for disclaimer purposes. Under proposed paragraph (c)(5)(ii) in Alternative B, disclaimers for all such communications would have to meet the general content requirement of 11 CFR 110.11(b) and be ''clear and conspicuous'' under 11 CFR 110.11(c)(1), including disclaimers for graphic and text communications on the internet. Thus, the disclaimers would have to be ''presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication,'' 11 CFR 110.11(c)(1). Under Alternative B, disclaimers could not be difficult to read or hear, and their placement could not be easily overlooked. *Id.* Is Alternative B's proposal to treat internet communications differently from print, radio, and TV communications for disclaimer purposes a reasonable approach to address current internet advertisements and future developments in internet communications?

Alternative B does not propose to create any safe harbors. The intent behind Alternative B is to establish objective criteria that would cover all situations and minimize the need for case-by-case determinations. Would safe harbors nonetheless be helpful in interpreting and applying the proposed rule? Or do safe harbors tend to become the *de facto* legal standard applied in advisory opinions and enforcement actions?

4. Adapted Disclaimers for Public Communications Distributed Over the Internet

Alternatives A and B both propose that some public communications distributed over the internet may satisfy

[54] For example: *https://www.fec.gov/data/committee/C00580100/?tab=about-committee,* where ''C00580100'' is the organization's Committee ID.

the disclaimer requirement by an ''adapted disclaimer,'' which includes an abbreviated disclaimer on the face of the communication in conjunction with a technological mechanism that leads to a full disclaimer, rather than by providing a full disclaimer on the face of the communication itself. Some aspects of both proposals are similar, and some are different, in ways highlighted below.

The discussion in this section explains the Commission's alternative proposals for when a public communication distributed over the internet may utilize an adapted disclaimer. Alternative A allows the use of an adapted disclaimer when a full disclaimer cannot fit on the face of a text or graphic internet communication due to technological constraints. Alternative B allows the use of an adapted disclaimer when a full disclaimer would occupy more than a certain percentage of any internet public communication's available time or space. Under Alternative B, the first tier of an adapted disclaimer would require the identification of the payor plus an indicator on the face of the communication. Alternative B's second tier adapted disclaimer would require only an indicator on the face of the communication.

a. Alternative A—Proposed 11 CFR 110.11(c)(5)(i)(A): When a Communication May Use Technological Adaptations

While current text and graphic internet advertisements are akin in many respects to analog printed advertisements, material differences between them remain. Most significant among these differences are the availability of ''micro'' sized text and graphic internet advertisements and the interactive capabilities of advertisements over the internet.[55] To ensure the disclaimer rules remain applicable to new forms of internet advertising that may arise, while also reducing the need for serial revisions to Commission regulations in light of such developments, Alternative A proposes adopting a provision specifically addressing those text and graphic internet advertisements that cannot, due to external character or space constraints, practically include a full disclaimer on the face of the communication. *See* Advisory Opinion 2004–10 (Metro Networks) at 3 (concluding that modifications or adaptations to disclaimers may be permissible in light of technologically or physically limited aspects of a communication).

Accordingly, under Alternative A's proposed paragraph (c)(5)(i)(A), a ''public communication distributed over the internet with text or graphic components but without any video component'' that, ''due to external character or space constraints,'' cannot fit a required disclaimer must include an ''adapted disclaimer.'' This provision would explain the circumstances under which a communication may use technological adaptations, describe how the adaptations must be presented, and provide examples of the adaptations.

Under Alternative A, the determination of whether a public communication distributed over the internet with text or graphic components but without any video component cannot fit a full disclaimer is intended to be an objective one. That is, the character or space constraints intrinsic to the technological medium are intended to be the relevant consideration, not the communication sponsor's subjective assessment of the ''difficulty'' or ''burden'' of including a full disclaimer. As the Supreme Court has held in the context of broadcast advertisements, the government's informational interest is sufficient to justify disclaimer requirements even when a speaker claims that the inclusion of a disclaimer ''decreases both the quantity and effectiveness of the group's speech.'' *Citizens United,* 558 U.S. at 368. Alternative A is built upon the proposition that the informational interest relied upon by the Supreme Court with respect to broadcast communications is equally implicated in the context of text and graphic public communications distributed over the internet.

Alternative A's reference to ''external character or space constraints'' is intended to codify the approach to those terms as the Commission has discussed them in the context of the small items and impracticable exceptions discussed above. *See, e.g.,* Advisory Opinion 2007–33 (Club for Growth PAC) at 3 (contrasting lack of ''physical or technological limitations'' constraining 10- and 15-second television advertisements with ''overall limit'' and ''internal limit'' on size or length of SMS ads); Advisory Opinion 2004–10 (Metro Networks) at 3 (discussing ''physical and technological limitations'' of ad read live from helicopter). This approach to determining when a communication cannot fit a required disclaimer—rather than by the particular size of the communication as measured by pixels, number of characters, or other measurement—is intended to minimize the need for serial revisions to Commission regulations as internet technology may evolve. Should existing or newly developed internet advertising opportunities raise questions as to whether a particular communication may fit a disclaimer, the intent behind Alternative A is that such questions may be addressed in an advisory opinion context.[56] Would this approach provide sufficient clarity about the application of the disclaimer requirement, and the disclaimer exceptions, to particular communications? Should Alternative A, if adopted, preclude the use of the small items and impracticable exceptions for internet public communications?

Does the ''external character or space constraints'' approach provide sufficiently clear guidance in light of existing technology or technological developments that may occur? Is it clear what ''cannot fit'' means in the proposed rule? Should the Commission adopt a safe harbor indicating that ads with particular pixel size, character limit, or other technological characteristic may use adapted disclaimers? Or do safe harbors tend to become the *de facto* legal standard in advisory opinions and enforcement actions? If the Commission were to adopt either a bright-line rule or a safe harbor based on pixel size, character limit, or other technological characteristic, what should those technological limits be? Does the ''external character or space constraints'' wording make clear that business decisions to sell small ads that are not constrained by actual technological limitations do not justify use of an adapted disclaimer? Are there circumstances under which requiring a full disclaimer to appear on the face of an internet ad would cause the speaker to curtail his or her message, or purchase a larger ad, or run the ad on a different platform? Are there circumstances under which such a requirement would discourage the speaker from running the ad at all? Is there anything about advertising on the internet that would warrant a different conclusion than courts have reached in upholding the Act's disclaimer requirements on political advertising in other media?

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[55] *See* Public Citizen and Free Speech for People, Comment at 3 (noting that paid online communications by ''bots'' ''can be very short and seamlessly integrated into social conversations. Absent disclaimers, such messages are not likely to be perceived as paid messages''); *see also* Spot-On, Comment at 8 (Nov. 9, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358480* (noting that ''all [online] ads link to some sort of web page or presence'').

[56] *See* 11 CFR 112.1.

b. Alternative B—Proposed 11 CFR 110.11(c)(5)(ii)–(iv): When a Communication May Use Technological Adaptations

In applying the disclaimer rules to internet public communications, Alternative B proposes to allow any form of paid internet advertisement—including audio and video ads—to utilize an adapted disclaimer under certain conditions.[57] Alternative B proposes to establish a bright-line rule to help speakers determine for themselves when they may utilize an adapted disclaimer.[58] The ''bright line'' is determined by the amount of time or space necessary to provide a full disclaimer in an internet public communication as a percentage of the overall communication.[59] Proposed paragraph (c)(5)(iii) in Alternative B suggests ''ten percent of the time or space in an internet communication'' as the appropriate amount. If the amount of time or space necessary for a clear and conspicuous disclaimer exceeds ten percent, then the speaker may, under Alternative B, provide an adapted disclaimer. Is ten percent a reasonable figure, or is it too high or too low?[60] Should the Commission adopt a different benchmark for allowing political speakers to use available technology to provide disclaimers for their internet public communications? Is Alternative B's proposed approach sufficiently clear to enable speakers to administer it for themselves rather than seek advisory opinions before engaging in political advertising online?

To provide clarity in determining whether a speaker may utilize an adapted disclaimer, proposed paragraph (c)(5)(ii) in Alternative B also proposes objective standards for use in measuring time and space. For internet public communications consisting of text, graphics, or images, Alternative B proposes to use characters or pixels. For internet public communications consisting of audio and video, Alternative B proposes to use seconds. These proposals are based on the Commission's experience with such communications in the advisory opinion context.[61] The Commission has limited expertise in the technical aspects of internet advertising, however. Are the proposed metrics of characters, pixels, and seconds a reasonable way to measure space and time in paid internet advertisements? If they are, then are they sufficiently flexible to remain relevant as technology changes, or are they likely to become obsolete? Should the rule, instead, specify a percentage of space or time without identifying the units of measurement? Would that provide sufficient clarity for speakers to be able to determine for themselves when they can utilize an adapted disclaimer? The Commission also seeks comment on how it should measure the time and space that a disclaimer occupies on an internet advertisement containing both text or graphic and audio or video elements. Should the Commission's disclaimer regulations explicitly address such advertisements? If so, how? Additionally, how should the Commission measure pixels, characters, and seconds in an advertisement that may expand or change, such as those with scrolling, frame, carousel, or similar features? Should the Commission incorporate in the rule specifications for these internet advertisement features?

5. How Adaptations Must Be Presented on the Face of the Advertisement

The discussion in this section explains the Commission's alternative proposals for what information must be included on the face of an advertisement that utilizes an adapted disclaimer. Both Alternatives A and B propose that an internet public communication that provides an adapted disclaimer must provide some information on the face of the advertisement, and both alternatives require such information to be clear and conspicuous and to provide notice that further disclaimer information is available through the technological mechanism. Alternative A proposes one method of presenting an adapted disclaimer, and Alternative B proposes two methods, in a tiered approach.

Alternative A's approach would require, on the face of the advertisement, the payor's name plus an ''indicator'' that would give notice that further information is available. Alternative B proposes a two-tiered approach. Under its first tier, Alternative B would require, on the face of the advertisement, identification of the payor plus an ''indicator.'' Tier one of Alternative B differs from Alternative A in only one material aspect: Alternative B would allow, in lieu of a payor's full name, for a payor to be identified by a clearly recognized identifier such as an abbreviation or acronym. Under its second tier, Alternative B would require, on the face of the advertisement, only an ''indicator''; neither the payor's name nor an identifier would be required under tier two of Alternative B. Alternatives A and B use similar definitions of ''adapted disclaimer'' and ''indicator.''

a. Alternative A—One Tier: Name Plus Indicator

Alternative A's proposed rule would explain that an ''adapted disclaimer'' means ''an abbreviated disclaimer on the face of a communication in conjunction with an indicator through which a reader can locate the full disclaimer required'' under 11 CFR

[57] Neither Alternative proposes to allow political committees to provide disclaimers through a technological mechanism for their email of more than 500 substantially similar communications or their internet websites available to the general public.

[58] *See, e.g.,* Facebook, Comment at 3 (encouraging ''a regulatory approach that provides advertisers flexibility to meet their disclaimer obligations in innovative ways that take full advantage of the technological advances in communication the internet makes possible''); Campaign Legal Center and Democracy 21, Comment at 2 (Nov. 14, 2011), *http://sers.fec.gov/fosers/showpdf.htm?docid=98749* (''Innovation, not exemption, is the answer.''); American Federation of Labor and Congress of Industrial Organizations *et al.,* Comment at 2 (''[R]ules in this area must be . . . flexible and principle-focused . . . . The challenge is to achieve both public informational goals and provide sufficient clarity to speakers about the rules so there is both informed compliance and predictable enforcement''); Computer & Communications Industry Association, Comment at 14 (''CCIA cautions against regulatory action that does not allow for flexible solutions''); Software & Information Industry Association, Comment at 4 (urging ''a flexible and diverse set of transparency practices that evolve and innovate as digital content offerings and advertising profiles continue to evolve'').

[59] Commission regulations also apply a time-space approach to attributing expenditures for publications and broadcast communications to more than one candidate. *See* 11 CFR 106.1(a).

[60] Some commenters suggested different levels at which providing a disclaimer becomes unduly burdensome. *See* Cause of Action, Comment at 4–5 (Nov. 14, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=98750* (explaining that California's disclaimer requirement, ''while minimal, still takes around 15% of a Google advertisement,'' which ''carr[ies] a high cost of character space, even to the point of overshadowing the communication itself''); Center for Competitive Politics, Comment at 4 (urging the Commission to ''excuse disclaimers in any internet advertising product where the number of characters needed for a disclaimer would exceed 4% of the characters available in the advertising product, exclusive of those reserved for the ad's title'') (internal quotations omitted); Institute for Free Speech, Comment at 4 (same); *see also* American Federation of Labor and Congress of Industrial Organizations, *et al.,* Comment at 2 (''In no case should the disclaimer rules compel a diminution of the speaker's message itself in order to accommodate the disclaimer; and, that principle should determine whether or not an internet advertisement . . . may omit the full, statutorily required language, and instead link to a disclaimer as the routine solution.''). Certain aspects of Federal Communications Commission rules employ a bright line for certain political advertisement sponsorship statements. *See, e.g.,* 47 CFR 73.1212 (requiring sponsors of political advertising broadcast via television to be identified with letters that are equal to or greater than 4% of the vertical picture height).

[61] *See* Advisory Opinion 2017–12 (Take Back Action Fund); Advisory Opinion Request 2013–18 (Revolution Messaging), Advisory Opinion Request 2011–09 (Facebook); Advisory Opinion 2010–19 (Google).

110.11(c)(5)(i). The proposal would further clarify that the adapted disclaimer ''must indicate the person or persons who paid for the communication in letters of sufficient size to be clearly readable by a recipient of the communication.''

Alternative A is proposing that adapted disclaimers include a payor's name on the face of the communication for several reasons. First, the inclusion of such information would signal to a recipient that the communication is, indeed, a paid advertisement. This is especially important on the internet where paid content can be targeted to a particular user and appear indistinguishable from the unpaid content that user views, unlike traditional media like radio or television, where paid content is transmitted to all users in the same manner and is usually offset in some way from editorial content.[62] Second, the inclusion of the payor's name would allow persons viewing the communication on any device, even if the recipient does not view the full disclaimer, to know ''the person or group who is speaking'' and could, therefore, assist voters in identifying the source of advertising so they are better ''able to evaluate the arguments to which they are being subjected.'' *Citizens United,* 558 U.S. at 368 (internal quotations and alterations removed). Alternative A is based on the premise that a technological mechanism to reach a full disclaimer provided by shortened URL and without the payor's name would not provide, on the face of the communication, the same informational value.[63] Third, some commenters suggested that the Commission and the public not rely on social media platforms' voluntary efforts[64] to identify paid communications (such as by a tag that a communication is ''paid,'' ''sponsored,'' or ''promoted'').[65] As a preliminary matter, the Commission lacks any enforcement mechanism to ensure compliance with such voluntary efforts, which, by definition, may be modified or abandoned at any time. In addition, tags that identify *whether* an advertisement is ''paid,'' ''sponsored,'' or ''promoted,'' do not necessarily identify *who* paid, sponsored, or promoted the advertisement,[66] and even that limited information may disappear when a paid communication is shared with other social media users.

To further help voters evaluate the message, Alternative A proposes to require that information about the payor be of a size to ''be clearly readable.'' As with the size requirements for text and graphic internet communications described above, Alternative A intends that questions of whether a disclaimer is of sufficient type size to be clearly readable would be ''determined on a case-by-case basis, taking into account the vantage point from which the communication is intended to be seen or read as well as the actual size of the disclaimer text,'' as they are under the current rule. 2002 Disclaimer E&J, 67 FR 76965. Would a case-by-case ''clearly readable'' standard provide sufficient guidance to advertisers regarding the necessary size of an adapted disclaimer?

As a component of adapted disclaimers, Alternative A proposes to require the use of an ''indicator,'' which it defines in proposed paragraph (c)(5)(i)(B) as ''any visible or audible element of an internet communication that is presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice that further disclaimer information is available by a technological mechanism. An indicator is not clear and conspicuous if it is difficult to see, read, or hear, or if the placement is easily overlooked.'' Alternative A adds in proposed paragraph (c)(5)(i)(B): ''[a]n indicator may take any form including, but not limited to, words, images, sounds, symbols, and icons.'' What are the advantages and disadvantages of this approach? What would be the advantages and disadvantages of the Commission's designing and promulgating a single indicator to be used across all media and platforms?

b. Alternative B—Two Tiers: Indicator Plus Payor Identification or Indicator-Only

Alternative B's proposed paragraph (c)(5)(ii) would explain that an ''adapted disclaimer'' means ''an abbreviated disclaimer on the face of the communication in conjunction with a technological mechanism by which a reader can locate the disclaimer satisfying the general requirements'' of 11 CFR 110.11(b) and (c)(1).

Alternative B proposes a two-tiered approach to the information that must be presented on the face of an internet public communication utilizing an adapted disclaimer. Under Alternative B's first tier, in proposed paragraph (c)(5)(iii), an adapted disclaimer consists of an abbreviated disclaimer that includes an ''indicator'' and identifies the payor by full name or by ''a clearly recognized abbreviation, acronym, or other unique identifier by which the payor is commonly known,'' in lieu of the full name. Under Alternative B's second tier, in proposed paragraph (c)(5)(iv) described below, an adapted disclaimer consists of an abbreviated disclaimer that need include only an ''indicator.'' Under both tiers—indicator-plus-payor identification and indicator-only—the internet public communication would have to provide a full disclaimer through a technological mechanism, described below.[67]

Under the first tier, described in proposed paragraph (c)(5)(iii), an advertisement could identify the payor by the payor's full name or by a clearly

[62] *See, e.g.,* Center for Digital Democracy, Comment at 2 (Nov. 9, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358502* (noting that ''native advertising'' online ''purposefully blurs the distinctions between editorial content and advertising''); Twitter, Comment at 2 (Nov. 9, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358496* (noting that, absent paid ''Promoted'' tag, Promoted Tweets ''look and act just like regular Tweets''); Electronic Privacy Information Center, Comment at 4 (''Online platforms use algorithms to target ads with a level of granularity that has not been possible before'').

[63] *See* Electronic Privacy Information Center, Comment at 3 (explaining that ''URL shortening tools such as goo.gl and bit.ly can take lengthy hyperlinks and reduce them to just a few characters. This would allow an ad with character limitations to provide a URL that linked to a full disclaimer.'').

[64] *See, e.g.,* BMore Indivisible, Comment at 5 (stating that ''Given the history of technology and social media companies—and their nearly total reliance on advertising for corporate profits — the American people and the FEC cannot rely on them to regulate themselves when it comes to disclosing the source of political advertisements. Legislative action is uncertain and may be incomplete. The FEC must act to fully regulate internet political advertising disclaimers''); Center for American Progress, Comment at 2–3 (Nov. 9, 2017) *http://sers.fec.gov/fosers/showpdf.htm?docid=358489* (stating that ''To some extent, these companies have already taken steps toward proving more transparency for online political ads. While we commend those efforts, they are no substitute for action by the FEC. Such efforts vary from one company to another, with no consistent mechanism for enforcement and no meaningful guidance for new entrants. Clear and consistent rules should be in place for all technology companies, to ensure adequate transparency both now and in the future'').

[65] *See, e.g.,* Twitter, Comment at 2 (describing ''promoted'' tweet label); Rob Goldman, *Update on Our Advertising Transparency and Authenticity Efforts,* Facebook Newsroom (Oct. 27, 2017), *https://newsroom.fb.com/news/2017/10/update-on-our-advertising-transparency-andauthenticity-efforts/* (indicating that, starting in summer 2018, Facebook ''advertisers will have to include a disclosure in their election-related ads, which reads: 'Paid for by.' '').

[66] *See* Electronic Frontier Foundation, Comment at 4 (noting current ability to ''publish anonymous election related advertisements on Facebook via an advertising account linked to a pseudonymous Facebook page'').

[67] Given that Alternative B would allow payors to use a technological mechanism to provide disclaimers for any form of paid public communication on the internet, including audio and video communcations, it proposes to require the payor's name to be ''clear and conspicuous'' rather than ''clearly readable,'' as under Alternative A.

recognized abbreviation, acronym, or other unique identifier by which the payor is commonly known. Thus, for example, if the Democratic Senatorial Campaign Committee were to pay for a Facebook advertisement, the advertisement could state that it was paid for by the DSCC, @DSCC, or *DSCC.org*, while providing the committee's full name in a disclaimer through a technological mechanism, as described below. This flexibility is intended to address internet public communications that might not otherwise conveniently or practicably accommodate the payor's name, such as character-limited ads, or where the payor's name is unusually lengthy, or where the payor wishes to use the ad to promote its social media brand.[68]

This proposal is modeled after a longstanding provision in the Commission's regulations that allows a separate segregated fund to include in its name a ''clearly recognized abbreviation or acronym by which [its] connected organization is commonly known.'' 11 CFR 102.14(c). The Commission seeks comment on whether the proposal provides sufficient clarity for a payor to determine whether there is a ''clearly recognized'' abbreviation, acronym, or other unique identifier by which the payor is ''commonly known.'' Should the Commission prescribe standards for use in making that determination? Is there a risk of confusion if two groups are commonly known by the same acronym, or does ready access to a full disclaimer (no more than one technological step away) help to alleviate any potential for confusion? Does the potential for confusion increase if the person viewing or listening to a political advertisement is unfamiliar with the person or group sponsoring the ad? If so, does ready access to the full disclaimer through a technological mechanism help to alleviate any such risk?

Under the second tier, described in proposed paragraph (c)(5)(iv), Alternative B would allow a speaker to include only an ''indicator'' on the face of an internet public communication, if the space or time necessary for a clear and conspicuous tier-one adapted disclaimer under proposed paragraph (c)(5)(iii) would exceed a certain percentage of the overall communication, and provide the full disclaimer through a technological mechanism. Under Alternative B, the term ''indicator'' has the same meaning under both the first and second tiers, as described further below. Again, Alternative B's second tier proposes to use ten percent as the determining figure and to measure ''time or space'' in terms of characters, pixels, and seconds. Is ten percent a reasonable figure, or is it too high or too low? Are characters, pixels, and seconds reasonable metrics? How should characters, pixels, or seconds be determined when an internet public communication combines text, graphic, and video elements, such as an ad with text fields surrounding a video or a GIF?

Alternative B's proposed paragraph (c)(5)(ii)(B) clarifies the ''abbreviated disclaimer'' information aspect of the ''adapted disclaimer'' definition in proposed paragraph (c)(5)(ii). It would require the abbreviated disclaimer on the face of a communication to be presented in a clear and conspicuous manner. An abbreviated disclaimer would not be clear and conspicuous if it is difficult to see, read, or hear, or if the placement is easily overlooked.

Proposed paragraph (c)(5)(i)(D) provides that an ''indicator'' is any visible or audible element of an internet public communication that gives notice to persons reading, observing, or listening to the communication that they may read, observe, or listen to a disclaimer satisfying the general requirements of 11 CFR 110.11(b) and (c)(1) through a technological mechanism.[69] Under Alternative B, an indicator may take any form, including words (such as ''paid for by'' or ''sponsored by''), a website URL, or an image, sound, symbol, or icon. For example, under Alternative B a severely character-limited public internet communication could include an indicator stating ''Paid for by,'' ''Paid by,'' ''Sponsored by,'' ''Ad by,'' or providing the URL to the payor's website, if a reader could move his or her cursor over the words or link to a landing page and see the full disclaimer.[70] Would this proposal promote disclosure and transparency by addressing extremely space- or time-constrained paid internet ads? Does an indicator alone provide sufficient guidance that the full disclaimer is available through a technological mechanism? Would this proposal help to ensure that voters have easy access to the full statutorily prescribed disclaimer for more online communications, while providing greater flexibility to political advertisers on the internet? Or would an indicator that takes the form of a hyperlink, for example, be prone to manipulation? Should the Commission require an indicator to take a specific form or to include specific language?

In their comments on the ANPRM, Google and Twitter said that they intend to require each political advertisement on their platforms to bear a special designation that will allow viewers to obtain additional information about the sponsor of the ad.[71] Should the Commission allow sponsors of extremely space- or time-limited paid internet advertisements to use platform-provided designations as their indicators, if such disclaimers meet all of the requirements for providing a disclaimer through a technological mechanism? Or do the limitations inherent in platform-provided designations, discussed above, argue against doing so? In any event, under Alternative B, the responsibility for ensuring that the disclaimer provided through a technological mechanism complies with the disclaimer requirement would remain with the person paying for the communication, and would not fall on the internet platform hosting it.

6. Adaptations Utilizing One-Step Technological Mechanism

Alternatives A and B both propose that a technological mechanism used to provide access to a full disclaimer must do so within one step.

[68] *See, e.g.,* Advisory Opinion Request, Advisory Opinion 2010–19 (Google) (Aug. 5, 2010) (asking to include URL to payor's website in lieu of disclaimer in severely character-limited internet ads, with disclaimer on landing page); Advisory Opinion Request, Advisory Opinion 2013–13 (Freshman Hold'Em JFC *et al.*) (Aug. 21, 2013) (asking to use shortened form of name and URL in disclaimer, where joint fundraising committee-payor's name included names of 18 participating committees); Advisory Opinion Request, Advisory Opinion 2017–05 (Great America PAC, *et al.*) (June 2, 2017) (asking to use payor's Twitter handle in disclaimers).

[69] The proposed reference to the person ''observing'' an internet communication derives from the existing requirement that ''[a] disclaimer . . . must be presented in a clear and conspicuous manner, to give the reader, *observer,* or listener adequate notice of the identify of the person or political committee that paid for and . . . authorized the communication.'' 11 CFR 110.11(c)(1) (emphasis added). As used in Alternative B, it is intended to be synonymous with ''viewer.''

[70] This provision is similar to the existing regulatory allowance for disclaimers on printed communications, which generally provides that ''[t]he disclaimer need not appear on the front or cover page of the communication as long as it appears within the communication.'' 11 CFR 110.11(c)(2)(iv).

[71] Google, Comment at 1, 6–7, 11–12 (explaining ''Why This Ad'' icon for election-related advertisements on Search, YouTube, and Display); Twitter, Comment at 4 (explaining ''political ad indicator'' for ''electioneering ads'' on Twitter); *see also* Facebook, Comment at 3 (''[A]llowing ads to include an icon or other obvious indicator that more information about an ad is available via quick navigation (like a single click) would give clear guidance on how to include disclaimers in new technologies as they are developed.'').

a. Alternative A—Associated With ''Indicator'' in Advertisement

Because the provision of an ad payor's name is necessary but not always sufficient to meet the Act's disclaimer requirement,[72] Alternative A requires a mechanism to provide the additional required information. Alternative A's proposed paragraph (c)(5)(i)(A) would specify that the technological mechanism used to provide the full disclaimer must be ''associated with'' the indicator and allow a recipient of the communication to locate the full disclaimer ''by navigating no more than one step away from the adapted disclaimer.'' This means that the additional technological step should be apparent in the context of the communication and the disclaimer, once reached, should be ''clear and conspicuous'' and otherwise satisfy the full requirements of 11 CFR 110.11(c). Moreover, this proposed requirement is intended to notify a recipient of the communication that further information about or from the payor is available and that the recipient may find that information with minimal investment of additional effort.[73] Thus, for example, a hyperlink underlying the ''paid for'' language would be ''associated with'' the full disclaimer at the landing page located one step away from the communication and to which the link leads. One commenter suggested that ''the Commission should allow people and entities subject to disclaimer requirements to satisfy them through any reasonable technological means'' rather than through a particular technology.[74] Should the Commission explicitly include a requirement that a technological mechanism be ''reasonable'' or can the reasonableness requirement for such mechanisms be assumed?

[72] *See, e.g.,* 52 U.S.C. 30120(a) (requiring payment and authorization statements and, if not authorized by a candidate, a payor's street address, telephone number, or ''World Wide Web'' address); Hearing Before the Subcomm. on Privileges and Elections of the S. Comm. on Rules and Admin., 94th Cong. 141 (1976) (testimony of Antonin Scalia, Asst. Att'y Gen'l) (testifying, in response to question about proposal to amend Act to require payor name and authorization statement, that ''[t]he principle seems to me a good one'' that ''seems to me like a sensible provision'' to minimize risk that ''candidate's campaign can be run by somebody other than the candidate'').

[73] *See, e.g.,* MCCI, Comment at 2 (Nov. 12, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=360063* (asking, rhetorically, ''Who doesn't know how to click a link in an ad?'' in arguing for short word like ''ad'' or ''paid'' with hyperlink by which readers ''will ultimately be able to track material back to its source'').

[74] Coolidge-Reagan Foundation, Comment at 4.

b. Alternative B—Associated With Adapted Disclaimer

Alternative B's proposed paragraph (c)(5)(i)(C) defines the term ''technological mechanism'' as any use of technology that enables the person reading, observing, or listening to an internet public communication to read, observe, or listen to a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) without navigating more than one step away from the internet public communication, and is associated with an adapted disclaimer as provided in proposed 11 CFR 110.11(c)(5)(ii). Thus, by definition, the technological mechanism must be ''associated with'' the abbreviated disclaimer on the face of the internet communication itself, and must not require the person reading, observing, or listening to an internet communication to navigate more than one step away to read, observe, or listen to the disclaimer. The additional technological step under Alternative B should be apparent in the context of the communication, and the disclaimer provided through alternative technical means must be ''clear and conspicuous'' under 11 CFR 110.11(c)(1). Should a technological mechanism be deemed to be ''associated with'' the abbreviated disclaimer on the face of an internet public communication if the person reading, observing, or listening to the communication can read, observe, or listen to a disclaimer by clicking anywhere on the communication? If a person can access the full disclaimer by clicking anywhere on a communication, should the abbreviated disclaimer even be required on the face of the communication? Are there circumstances where an adapted disclaimer would be preferable to a full disclaimer, even if the full disclaimer would take up ten percent or less of the time or space in the internet public communication?

7. Examples of Technological Mechanisms in Adapted Disclaimers

Alternatives A and B provide similar lists of possible technological mechanisms.

a. Alternative A—Illustrative List of Mechanisms

Alternative A provides a list of examples of ''technological mechanisms for the provision of the full disclaimer'' including, but not limited to, ''hover-over mechanisms, pop-up screens, scrolling text, rotating panels, or hyperlinks to a landing page with the full disclaimer.'' This illustrative list incorporates examples of one-step technological mechanisms the Commission has seen utilized by advisory opinion requestors and other federal and state agency disclosure regulations.[75] The list is intended to provide guidance while retaining flexibility for advertisers to utilize other existing technological mechanisms or new mechanisms that may arise in the future.

Should the Commission allow advertisers to include different parts of a full disclaimer in different frames or components of text or graphic internet advertisements (such as a disclaimer split between two character-limited text fields, one above an image and one below)? Several commenters noted the importance of ensuring that disclaimers are visible across devices or platforms and expressed concern that some technological mechanisms may not be functional across all devices or platforms.[76] Should the Commission incorporate into the rule a requirement that any technological mechanism used must be accessible by all recipients of that communication, including those

[75] *See, e.g.,* Advisory Opinion 2010–19 (Google) (addressing proposal to provide disclaimer by hyperlink to landing page containing full disclaimer); Fed. Trade Comm'n, .com Disclosures: How to Make Effective Disclosures in Digital Advertising 10 (2013), *https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf* (permitting disclosure to ''be provided by using a hyperlink''); *id.* at 12 (allowing ''mouse-over'' display if effective on mobile devices); *id.* at 13–14 (allowing disclosures by pop ups and interstitial pages); *id.* at 16 (allowing scrolling text or rotating panels in space-constrained banner ad to present required disclosures); Cal. Code Regs. tit. 2, sec. 18450.4(b)(3)(G)(1) (permitting ''link to a web page with disclosure information''); *id.* at (b)(3)(G)(1) (allowing disclaimer ''displayed via rollover display''); Md. Code. Regs. 33.13.07(D)(2)(b)(i) (permitting ''viewer to click'' and be ''taken to a landing or home page'' with disclaimer); *see also* First Gen. Counsel's Report at 5 n.19, MUR 6911 (Frankel) (noting respondent committee's claim that ''its Twitter profile contains a link to the campaign's website that contains a disclaimer''); Interactive Advertising Bureau, Comment at 3 (Nov. 10, 2017), *http://sers.fec.gov/fosers/showpdf.htm?docid=358484* (advocating a rule allowing for flexibility in disclaimer provision, such as by click through links); CMPLY, Comment at 2–3 and 9–11 (describing several ''short-form'' disclosure solutions within character-limited social media platforms).

[76] *See, e.g.,* Asian Americans Advancing Justice, *et al.,* Comment at 9–11 (presenting statistics showing that persons of color are more likely to consume information on internet than television and are more likely to do so via mobile devices than display (desktop) platforms); CMPLY, Comment at 2 (noting that '' 'roll over' or 'hover' disclosures . . . have significant limitations in social media platforms and . . . do not function within the user interfaces of mobile devices, where the majority of social media engagement takes place and where we have seen the largest increases in internet and broadband usage'').

accessing the communication on mobile devices?

b. Alternative B—Illustrative List of Mechanisms

Alternative B's proposed paragraph (c)(5)(i)(C) provides the same examples of technological mechanisms as Alternative A, with two exceptions. First, because Alternative B does not limit the use of technological mechanisms to internet communications with text or graphic components and anticipates that technology will develop to enable speakers to provide future disclaimers in ways that might not be available today, it includes ''voice-over'' as an example. Second, Alternative B proposes to refer to ''mouse-over'' and ''roll-over'' as examples, in addition to ''hover-over.'' Are these additional references useful, or are they already subsumed under ''hover-over''? Should the list of examples be further expanded or refined?

8. Proposed Exceptions to Disclaimer Rules for Internet Public Communications

a. Alternative A

No Proposal.

b. Alternative B

Alternative B proposes to codify a preference for including full disclaimers in paid internet advertisements, with alternative approaches available utilizing technological mechanisms. Although Alternative B is intended to make it easier for internet communications to meet the disclaimer requirement, some internet public communications might not be able to comply with the disclaimer requirement, either now or as technology and advertising practices change. Thus, Alternative B proposes to exempt from the disclaimer requirement any internet public communication that can provide neither a disclaimer in the communication itself nor an adapted disclaimer as provided in proposed paragraph (c)(5).

The proposed exception in Alternative B is intended to replace the small items and impracticable exceptions for internet public communication, so that the small items and impracticable exceptions would no longer apply to such communications. The small items and impracticable exceptions both predate the digital age, and the Commission has faced challenges in applying them to internet communications. Despite several requests, the Commission has issued only one advisory opinion in which a majority of Commissioners agreed that a disclaimer exception applied to digital communications. *See* Advisory Opinion 2002–09 (Target Wireless). Statements by individual Commissioners indicate a difference of opinion regarding the application of the exceptions to internet communications.[77]

Alternative B's proposed paragraph (f)(1)(iv) exempts from the disclaimer requirement any paid internet advertisement that cannot provide a disclaimer in the communication itself nor an adapted disclaimer under proposed paragraph (c)(5). Is the exception as currently proposed sufficiently clear? The proposed exception provides as an example static banner ads on small internet-enabled mobile devices that cannot link to a landing page controlled by the person paying for the communication.[78] Do such ads exist? Should Alternative B's proposed exception apply to advertisements that technically can link to a website with a full disclaimer but do not do so? Does the Commission have statutory authority to adopt exceptions to the disclaimer requirements?

If the Commission adopts either the single-tier adapted disclaimer approach of Alternative A or the two-tier approach of Alternative B, would there be a need to exempt any internet public communications from the disclaimer requirement? Or would the adaptations adequately address any technological limitations? Would adopting any new exception to the disclaimer requirement for internet public communications lead to manipulation and abuse of the exception? If so, what can the Commission do to minimize the risk of manipulation and abuse, and enhance disclosure? Conversely, if the Commission decides not to adopt a new exception for internet public communications, what effect would that decision have on political discourse on the internet? Could such a decision, coupled with uncertainty over the application of the existing exceptions to internet public communications, potentially chill political speech on the internet?

F. Conclusion

The Commission welcomes comment on any aspect of Alternatives A and B. Additionally, the Commission seeks comment addressing how differences between online platforms, providers, and presentations may affect the application of any of the proposed disclaimer rules for text, graphic, video, and audio internet advertisements in Alternative A, or for internet public communications generally in Alternative B. Among other topics, the Commission seeks comment on whether the ability to zoom or otherwise expand the size of some digital communications affects any of these proposals. Similarly, the Commission seeks comment on the interaction between the proposed definition of ''public communication'' and the proposed disclaimer rules in Alternatives A and B. The Commission is particularly interested in comment detailing the challenges and opportunities persons have experienced in complying with (and receiving disclosure from) similar state and federal disclaimer or disclosure regimes. Given the development and proliferation of the internet as a mode of political communication, and the expectation that continued technological advances will further enhance the quantity of information available to voters online, the Commission welcomes comment on whether the proposed rules allow for flexibility to address future technological developments while honoring the important function of providing disclaimers to voters.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached proposed rules, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed rules would clarify and update existing regulatory language, codify certain existing Commission precedent regarding internet communications, and provide political committees and other entities with more flexibility in meeting the Act's disclaimer requirements. The proposed rules would not impose new

[77] *See* Advisory Opinion 2017–12 (Take Back Action Fund), Concurring Statement of Commissioner Ellen L. Weintraub (Dec. 21, 2017), Concurring Statement of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen (Dec. 14, 2017); Advisory Opinion Request 2013–18 (Revolution Messaging), Statement for the Record by Vice Chair Ann M. Ravel, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub (Feb. 27, 2014); Advisory Opinion 2010–19 (Google), Concurring Statement of Chairman Matthew S. Petersen (Dec. 30, 2010), Statement for the Record by Commissioner Caroline C. Hunter (Dec. 17, 2016), and Concurring Statement of Vice Chair Cynthia L. Bauerly, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub (Dec. 16, 2010).

[78] The Commission considered static banner ads on small internet-enabled mobile devices in Advisory Opinion Request 2013–18 (Revolution Messaging). In that advisory opinion request, the requestor asked the Commission to recognize small (320 × 50 pixels) static banner ads on smartphones as exempt from the disclaimer requirement under the ''small items'' exception. The Commission did not approve a response by the required four affirmative votes.

recordkeeping, reporting, or financial obligations on political committees or commercial vendors. The Commission therefore certifies that the proposed rules, if adopted, would not have a significant economic impact on a substantial number of small entities.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 110

Campaign funds, Political committees and parties.

For the reasons set out in the preamble, the Federal Election Commission proposes to amend 11 CFR parts 100 and 110, as follows:

PART 100—SCOPE AND DEFINITIONS (52 U.S.C. 30101)

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

Authority: 52 U.S.C. 30101, 30104, 30111(a)(8), and 30114(c).

§ 100.26 [Amended]

■ 2. Amend § 100.26 by removing ''website'' and adding in its place ''website or internet-enabled device or application''.

PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

■ 3. The authority citation for part 110 continues to read as follows:

Authority: 52 U.S.C. 30101(8), 30101(9), 30102(c)(2), 30104(i)(3), 30111(a)(8), 30116, 30118, 30120, 30121, 30122, 30123, 30124, and 36 U.S.C. 510.

Alternative A

■ 4. In § 110.11, add paragraph (c)(5) to read as follows:

§ 110.11 Communications; advertising; disclaimers (52 U.S.C. 30120).

* * * * *

(c) * * *

(5) *Specific requirements for internet communications.* In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a disclaimer required by paragraph (a) of this section that appears on a public communication distributed over the internet must comply with the following:

(i) A public communication distributed over the internet with text or graphic components but without any video component must contain a disclaimer that is of sufficient type size to be clearly readable by the recipient of the communication. A disclaimer that appears in letters at least as large as the majority of the other text in the communication satisfies the size requirement of this paragraph. A disclaimer under this paragraph must be displayed with a reasonable degree of color contrast between the background and the text of the disclaimer. A disclaimer satisfies the color contrast requirement of this paragraph if it is displayed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest text used in the communication.

(A) A public communication distributed over the internet with text or graphic components but without any video component that, due to external character or space constraints, cannot fit a required disclaimer must include an adapted disclaimer. For purposes of this paragraph, an *adapted disclaimer* means an abbreviated disclaimer on the face of a communication in conjunction with an indicator through which a reader can locate the full disclaimer required by paragraph (c)(5)(i). The adapted disclaimer must indicate the person or persons who paid for the communication in letters of sufficient size to be clearly readable by a recipient of the communication. The technological mechanism in an adapted disclaimer must be associated with the indicator and must allow a recipient of the communication to locate the full disclaimer by navigating no more than one step away from the adapted disclaimer. Technological mechanisms for the provision of the full disclaimer include, but are not limited to, hover-over mechanisms, pop-up screens, scrolling text, rotating panels, or hyperlinks to a landing page with the full disclaimer.

(B) As used in paragraph (c)(5), an *indicator* is any visible or audible element of an internet communication that is presented in a clear and conspicuous manner to give the reader, observer, or listener adequate notice that further disclaimer information is available by a technological mechanism. An indicator is not clear and conspicuous if it is difficult to see, read, or hear, or if the placement is easily overlooked. An indicator may take any form including, but not limited to, words, images, sounds, symbols, and icons.

(ii) A public communication distributed over the internet with an audio component but without video, graphic, or text components must include the statement described in paragraphs (c)(3)(i) and (iv) of this section if authorized by a candidate, or the statement described in paragraph (c)(4) of this section if not authorized by a candidate. A public communication distributed over the internet with a video component must include the statement described in paragraphs (c)(3)(ii)–(iv) of this section if authorized by a candidate, or the statement described in paragraph (c)(4) of this section if not authorized by a candidate.

* * * * *

Alternative B

■ 5. Amend § 110.11 as follows:

■ a. Add paragraph (c)(5).

■ b. Add paragraph (f)(1)(iv).

The additions read as follows:

§ 110.11 Communications; advertising; disclaimers (52 U.S.C. 30120).

* * * * *

(c) * * *

(5) *Specific requirements for internet communications.* (i) For purposes of this section:

(A) The term *internet communication* means electronic mail of more than 500 substantially similar communications when sent by a political committee; all internet websites of political committees available to the general public; and any internet public communication as defined in paragraph (c)(5)(i)(B) of this section;

(B) The term *internet public communication* means any communication placed for a fee on another person's website or internet-enabled device or application;

(C) The term *technological mechanism* refers to any use of technology that enables the person reading, observing, or listening to an internet public communication to read, observe, or listen to a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section without navigating more than one step away from the internet public communication, and is associated with an adapted disclaimer as provided in paragraph (c)(5)(ii) of this section. A technological mechanism may take any form including, but not limited to, hover-over; mouse-over; voice-over; roll-over; pop-up screen; scrolling text; rotating panels; and click-through or hyperlink to a landing page; and

(D) The term *indicator* refers to any visible or audible element of an internet public communication that gives notice to persons reading, observing, or listening to the internet public communication that they may read, observe, or listen to a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section through a technological mechanism. An indicator may take any form including, but not limited to, words such as ''Paid for by,'' ''Paid by,'' ''Sponsored by,'' or ''Ad by''; website URL; image; sound; symbol; and icon.

(ii) Every internet communication for which a disclaimer is required by paragraph (a) of this section must satisfy the general requirements of paragraphs (b) and (c)(1) of this section, except an internet public communication may include an adapted disclaimer under the circumstances described in paragraphs (c)(5)(iii)–(c)(5)(iv) of this section. For purposes of this paragraph, an *adapted disclaimer* means an abbreviated disclaimer on the face of the communication in conjunction with a technological mechanism by which a reader can locate the disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section. Any internet public communication that includes an adapted disclaimer must comply with the following:

(A) The internet public communication must provide a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section through a technological mechanism as described in paragraph (c)(5)(i)(C) of this section.

(B) The internet public communication must present the abbreviated disclaimer on the face of the communication in a clear and conspicuous manner. An abbreviated disclaimer is not clear and conspicuous if it is difficult to read, hear, or observe, or if the placement is easily overlooked.

(C) For an internet public communication consisting of text, graphics, or images, time or space must be measured in [characters or pixels].

(D) For an internet public communication consisting of audio or video, time or space must be measured in [seconds].

(iii) If the time or space required for a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section would exceed [ten] percent of the time or space in an internet public communication, then the abbreviated disclaimer on the face of the communication must include an indicator and identify the person who paid for the internet public communication by the person's full name or by a clearly recognized abbreviation, acronym, or other unique identifier by which the person is commonly known.

(iv) If the time or space required for an abbreviated disclaimer under paragraph (c)(5)(iii) of this section would exceed [ten] percent of the time or space in the internet public communication, then the abbreviated disclaimer on the face of the communication must include an indicator.

* * * * *

(f) Exceptions.

(1) * * *

(iv) Any internet public communication that cannot provide a disclaimer on the face of the internet public communication itself nor an adapted disclaimer as provided in paragraph (c)(5) of this section, such as a static banner ad on a small internet-enabled device that cannot link to a landing page of the person paying for the internet public communication. The provisions of paragraph (f)(1)(i)–(iii) of this section do not apply to internet public communications.

* * * * *

On behalf of the Commission,

Dated: March 20, 2018.

Caroline C. Hunter,

Chair, Federal Election Commission.

[FR Doc. 2018–06010 Filed 3–23–18; 8:45 am]

BILLING CODE 6715–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

[Docket No. CFPB–2018–0012]

Request for Information Regarding the Bureau's Inherited Regulations and Inherited Rulemaking Authorities

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Request for information.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is seeking comments and information from interested parties to assist the Bureau in considering whether, consistent with its statutory authority to prescribe rules pursuant to the Federal consumer financial laws, the Bureau should amend the regulations or exercise the rulemaking authorities that it inherited from certain other Federal agencies.

DATES: Comments must be received by June 25, 2018.

ADDRESSES: You may submit responsive information and other comments, identified by Docket No. CFPB–2018–0012, by any of the following methods:

- *Electronic:* Go to *http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Email: FederalRegisterComments@cfpb.gov*. Include Docket No. CFPB–2018–0012 in the subject line of the message.
- *Mail:* Comment Intake, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.
- *Hand Delivery/Courier:* Comment Intake, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

Instructions: The Bureau encourages the early submission of comments. All submissions must include the document title and docket number. Please note the number of the topic on which you are commenting at the top of each response (you do not need to address all topics). Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to *http://www.regulations.gov*. In addition, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. eastern time. You can make an appointment to inspect the documents by telephoning 202–435–7275.

All submissions in response to this request for information, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Thomas L. Devlin and Kristin McPartland, Senior Counsels, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact *CFPB_Accessibility@cfpb.gov*.

SUPPLEMENTARY INFORMATION: Congress established the Bureau in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and therein set forth the Bureau's purpose, objectives, and functions.[1] Pursuant to that Act, on July 21, 2011, the ''consumer financial protection functions'' previously vested in certain other Federal agencies transferred to the

[1] Public Law 111–203, 124 Stat. 2081 (2010) (codified at 15 U.S.C. 1693a *et seq.*). Section 1021 of the Dodd-Frank Act states that the Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive. Section 1021 also authorized the Bureau to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services, five specific objectives are met.

Bureau.[2] The term ''consumer financial protection function'' is defined to include ''all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines.'' [3] The Dodd-Frank Act in turn defines Federal consumer financial law broadly to include ''the provisions of [title X of the Dodd-Frank Act], the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H, and any rule or order prescribed by the Bureau under [title X], an enumerated consumer law, or pursuant to the authorities transferred under subtitles F and H.'' [4]

Accordingly, Congress generally transferred to the Bureau rulemaking authority for Federal consumer financial laws previously vested in certain other Federal agencies, and the Bureau thereafter assumed responsibility over the various regulations that these agencies had issued under this rulemaking authority (the ''Inherited Regulations'').[5] The Dodd-Frank Act also provided new rulemaking authorities to the Bureau under the Federal consumer financial laws. Since the Bureau's creation, it has prescribed a number of rules under Federal consumer financial law in rulemakings mandated by Congress, as well as in discretionary rulemakings. These Bureau-issued rules and the new authorities created under the Dodd-Frank Act are referred to collectively in this RFI as the ''Adopted Regulations.'' The Adopted Regulations have often amended the Inherited Regulations.

The Bureau's Rulemaking Authority. The Dodd-Frank Act states that the Bureau is authorized to ''exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law.'' [6] The Dodd-Frank Act further authorizes the Director of the Bureau to prescribe rules as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, which include enumerated consumer laws as well as provisions of the Dodd-Frank Act, and to prevent evasions thereof.[7]

Existing Bureau Work to Examine Inherited Regulations. The Dodd-Frank Act states that the Bureau is authorized to exercise its authorities under Federal consumer financial law for, among other objectives, ''ensuring that, with respect to consumer financial products and services . . . outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens.'' [8] In 2011 and 2012, the Bureau sought and received stakeholders' suggestions to streamline the Inherited Regulations.[9] The Bureau identified and executed several burden reduction projects from that undertaking.[10] More recently, the Bureau has established an initiative to review periodically individual Inherited Regulations or portions of such regulations. The Bureau is beginning the first such review by focusing on subparts B and G of Regulation Z, which implement the Truth in Lending Act with respect to open-end credit generally and credit cards in particular.[11]

Overview of This Request for Information

The Bureau is using this request for information (RFI) to seek public input regarding the substance of the Inherited Regulations, including whether the Bureau should issue additional rules. The Bureau encourages comments from all interested members of the public. The Bureau anticipates that the responding public may include (among others) entities and their service providers subject to Bureau rules, trade associations that represent these entities, individual consumers, consumer advocates, regulators, and researchers or members of academia.

The Bureau previously issued an RFI regarding its rulemaking processes, and plans to issue an RFI about the Bureau's regulatory implementation and guidance functions. The Bureau also previously issued an RFI regarding the Adopted Regulations. Accordingly, the purpose of this RFI is to seek feedback on the content of the Inherited Regulations, not the Bureau's rulemaking processes, implementation initiatives that occur after the issuance of a final rule, or the Adopted Regulations.[12] Also please note that the Bureau is not requesting comment on any pending rulemaking for which the Bureau has issued a Notice of Proposed Rulemaking or otherwise solicited public comment.

The Inherited Regulations. The Inherited Regulations comprise the statutory authority and regulations that were transferred to the Bureau by title X of the Dodd-Frank Act. They include the regulations that the Bureau restated in Title 12, Chapter X of the Code of Federal Regulations. For clarity, the term ''Inherited Regulations'' also includes all rulemaking authority inherited by the Bureau, regardless of the extent to which the Bureau's predecessors exercised that authority.

Suggested Topics for Commenters

To allow the Bureau to more effectively evaluate suggestions, the Bureau requests that, where possible, comments include:

- Specific suggestions regarding any potential updates or modifications to the Inherited Regulations, consistent with the laws providing the Bureau with rulemaking authority and the Bureau's regulatory and statutory purposes and objectives, and including, in as much detail as possible, the nature of the requested change, and supporting data or other information on impacts and costs of the Inherited Regulations and on the suggested changes thereto; and
- Specific identification of any aspects of the Inherited Regulations that should not be modified, consistent with the laws providing the Bureau with rulemaking authority and the Bureau's regulatory and statutory purposes and objectives, and including, in as much detail as possible, supporting data or other information on impacts and costs, or information related to consumer and public benefit resulting from these rules.

The following list represents a preliminary attempt by the Bureau to identify considerations relevant in determining where modifications of the Inherited Regulations or further exercise of the Bureau's rulemaking authorities may be appropriate. This non-exhaustive list is meant to assist in the formulation of comments and is not intended to restrict the issues that may be addressed. The Bureau requests that,

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[2] 12 U.S.C. 5581.

[3] 12 U.S.C. 5581(a)(1).

[4] 12 U.S.C. 5481(14).

[5] The Bureau generally restated these regulations first through a series of interim final rules published in the **Federal Register** and subsequently through a final rule. 81 FR 25323 (Apr. 28, 2016). Bureau rules are generally set forth in title 12, Chapter X of the Code of Federal Regulations.

[6] 12 U.S.C. 5512(a).

[7] 12 U.S.C. 5512(b)(1).

[8] 12 U.S.C. 5511(b)(3).

[9] 76 FR 75825 (Dec. 5, 2011).

[10] *See* 79 FR 64057 (Oct. 28, 2014); 78 FR 25818 (May 3, 2013); 78 FR 18221 (Mar. 26, 2013). In some cases Congress took action related to the same topics identified as part of the Bureau's streamlining initiative. *See, e.g.,* 81 FR 44801 (July 11, 2016); 78 FR 18221 (Mar. 26, 2013).

[11] *See* 83 FR 1968, 1970 (Jan. 12, 2018); RIN 3170–AA73.

[12] The Adopted Regulations include rulemakings issued by the Bureau since its creation, including rules that were adopted pursuant to specific instructions from Congress. They also include new rulemaking authorities given to the Bureau by the Dodd-Frank Act that did not previously exist under the Federal consumer financial laws.

in addressing these questions or others, commenters identify with specificity the Bureau rules at issue, providing legal citations to specific regulations or statutes where appropriate and available. The Bureau invites commenters to identify the products or services that would be affected by any recommendations made by those commenters. Please feel free to comment on some or all of the questions below and on some or all of the Inherited Regulations, but please be sure to indicate on which area you are commenting. The Bureau encourages commenters to make their best efforts to limit their comments to the Inherited Regulations; however, the Bureau will consider all comments received under the Inherited Regulations and Adopted Regulations RFIs together.

From all of the suggestions, commenters are requested to offer their highest priorities, along with their explanation of how or why they have prioritized suggestions. Commenters are asked to single out their top priority. Suggestions should focus on revisions that the Bureau could implement consistent with its authorities and without Congressional action.

The Bureau is seeking feedback on all aspects of the Inherited Regulations, including but not limited to:

1. Aspects of the Inherited Regulations that:

a. Should be tailored to particular types of institutions or to institutions of a particular size;

b. Create unintended consequences;

c. Overlap or conflict with other laws or regulations in a way that makes it difficult or particularly burdensome for institutions to comply;

d. Are incompatible or misaligned with new technologies, including by limiting providers' ability to deliver, electronically, mandatory disclosures or other information that may be relevant to consumers; or

e. Could be modified to provide consumers greater protection from the incidence and effects of identity theft.

2. Changes the Bureau could make to the Inherited Regulations, consistent with its statutory authority, to more effectively meet the statutory purposes and objectives set forth in the Federal consumer financial laws, as well as the Bureau's predecessor agencies' specific goals for the particular Inherited Regulation in the first instance.

3. Changes the Bureau could make to the Inherited Regulations, consistent with its statutory authority, that would advance the following statutory purposes and objectives as set forth in section 1021 of the Dodd-Frank Act:

a. The statutory purposes set forth in section 1021(a) are:

i. All consumers have access to markets for consumer financial products and services; and

ii. Markets for consumer financial products and services are fair, transparent, and competitive.

b. The statutory objectives set forth in section 1021(b) are:

i. Consumers are provided with timely and understandable information to make responsible decisions about financial transactions;

ii. Consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination;

iii. Outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens;

iv. Federal consumer financial law is enforced consistently in order to promote fair competition; and

v. Markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation.

4. Pilots, field tests, demonstrations, or other activities that the Bureau could launch to better quantify benefits and costs of potential revisions to the Inherited Regulations, or make compliance with the Inherited Regulations more efficient and effective.

5. Areas where the Bureau has inherited rulemaking authority, but has not exercised it, where rulemaking would be beneficial and align with the purposes and objectives of the applicable Federal consumer financial laws.

Authority: 12 U.S.C. 5511(c).

Dated: March 14, 2018.

Mick Mulvaney,

Acting Director, Bureau of Consumer Financial Protection.

[FR Doc. 2018–06027 Filed 3–23–18; 8:45 am]

BILLING CODE 4810–AM–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–0219; Airspace Docket No. 17–AGL–23]

Proposed Amendment of Air Traffic Service (ATS) Routes in the Vicinity of Mattoon and Charleston, IL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify two VHF Omnidirectional Range (VOR) Federal airways (V–72 and V–429) in the vicinity of Mattoon and Charleston, IL. The FAA is proposing this action due to the planned decommissioning of the Mattoon, IL (MTO), VOR/Distance Measuring Equipment (VOR/DME) navigation aid (NAVAID) which provides navigation guidance for portions of the affected ATS routes. The Mattoon VOR is being decommissioned in support of the FAA's VOR Minimum Operational Network (MON) program.

DATES: Comments must be received on or before May 10, 2018.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1(800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2018–0219 and Airspace Docket No. 17–AGL–23 at the beginning of your comments. You may also submit comments through the internet at *http://www.regulations.gov*.

FAA Order 7400.11B, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11B at NARA, call (202) 741–6030, or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html*.

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

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace Policy Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would support the route structure in the Mattoon and Charleston, IL, area as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2018–0219 and Airspace Docket No. 17–AGL–23) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: "Comments to FAA Docket No. FAA–2018–0219 and Airspace Docket No. 17–AGL–23." The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Central Service Center, Federal Aviation Administration, 10101 Hillwood Blvd., Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11B, Airspace Designations and Reporting Points, dated August 3, 2017, and effective September 15, 2017. FAA Order 7400.11B is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11B lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

The FAA is planning to decommission the Mattoon, IL (MTO), VOR/DME in November 2018. The Mattoon VOR was one of the candidate VORs identified for discontinuance by the FAA's VOR MON program and listed in the Final policy statement notice, "Provision of Navigation Services for the Next Generation Air Transportation System (NextGen) Transition to Performance-Based Navigation (PBN) (Plan for Establishing a VOR Minimum Operational Network)," published in the **Federal Register** of July 26, 2016 (81 FR 48694), Docket No. FAA–2011–1082.

With the planned decommissioning of the Mattoon, IL, VOR/DME, the remaining ground-based NAVAID coverage in the area is insufficient to enable the continuity of the affected airways. As such, proposed modifications to VOR Federal airways V–72 and V–429 would result in a gap in the enroute ATS route structure in the Mattoon and Charleston, IL, area. To overcome the gap in the enroute structure, instrument flight rules (IFR) traffic could use adjacent VOR Federal airways (including V–5, V–7, V69, V–171, V–191, V–192, V–262, and V–586) to circumnavigate the affected area, file point to point through the affected area using fixes that will remain in place, or receive air traffic control (ATC) radar vectors through the area. Additionally, the Mattoon DME facility is planned to be retained and charted as a DME facility with the "MTO" three-letter identifier. Visual flight rules (VFR) pilots who elect to navigate via the airways through the affected area could also take advantage of the adjacent VOR Federal airways or ATC services previously listed.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to modify the descriptions of VOR Federal airways V–72 and V–429. The planned decommissioning of the Mattoon, IL, VOR has made these actions necessary. The proposed VOR Federal airway changes are described below.

V–72: V–72 currently extends between the Razorback, AR, VOR/Tactical Air Navigation (VORTAC) and the Bloomington, IL, VOR/DME. The FAA proposes to remove the airway segment between the Bible Grove, IL, VORTAC and the Bloomington, IL, VOR/DME. The unaffected portions of the existing airway would remain as charted.

V–429: V–429 currently extends between the Cape Girardeau, MO, VOR/DME and the Joliet, IL, VORTAC. The FAA proposes to remove the airway segment between the Bible Grove, IL, VORTAC and the Champaign, IL, VORTAC. The unaffected portions of the existing airway would remain as charted.

All radials in the route descriptions below are unchanged and stated in True degrees.

VOR Federal airways are published in paragraph 6010(a) of FAA Order 7400.11B dated August 3, 2017, and effective September 15, 2017, which is incorporated by reference in 14 CFR 71.1. The VOR Federal airways listed in this document would be subsequently published in the Order.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11B, Airspace Designations and Reporting Points, dated August 3, 2017 and effective September 15, 2017, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–72 [Amended]

From Razorback, AR; Dogwood, MO; INT Dogwood 058° and Maples, MO, 236° radials; Maples; Farmington, MO; Centralia, IL; to Bible Grove, IL.

* * * * *

V–429 [Amended]

From Cape Girardeau, MO; Marion, IL; INT Marion 011° and Bible Grove, IL, 207° radials; to Bible Grove. From Champaign, IL; Roberts, IL; to Joliet, IL.

Issued in Washington, DC, on March 19, 2018.

Rodger A. Dean Jr.,

Manager, Airspace Policy Group.

[FR Doc. 2018–05974 Filed 3–23–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–0222; Airspace Docket No. 18–AGL–2]

Proposed Modification of Air Traffic Service (ATS) Route in the Vicinity of Newberry, MI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify VHF Omnidirectional Range (VOR) Federal airway, V–316, in the vicinity of Newberry, MI. The FAA is proposing this action due to the planned decommissioning of the Newberry, MI (ERY), VOR/Distance Measuring Equipment (VOR/DME) navigation aid (NAVAID) which provides navigation guidance for portions of the affected ATS route. The Newberry VOR/DME is a non-federal navigation aid (NAVAID) owned by the State of Michigan that is planned to be decommissioned in September 2018.

DATES: Comments must be received on or before May 10, 2018.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1 (800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2018–0222 and Airspace Docket No. 18–AGL–2 at the beginning of your comments. You may also submit comments through the internet at *http://www.regulations.gov*.

FAA Order 7400.11B, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11B at NARA, call (202) 741–6030, or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html*.

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

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace Policy Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend the route structure in the Newberry, MI, area as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2018–0222 and Airspace Docket No. 18–AGL–2) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2018–0222 and Airspace Docket No. 18–AGL–2.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Central Service Center, Federal Aviation Administration, 10101 Hillwood Blvd., Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11B, Airspace Designations and Reporting Points, dated August 3, 2017, and effective September 15, 2017. FAA Order 7400.11B is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11B lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

The Newberry VOR/DME is a non-federal navaid, owned and maintained by the State of Michigan, and is located on the Luce County Airport in Newberry, MI. The Federal Aviation Administration received a request to decommission the Newberry VOR/DME NAVAID from the Michigan Department of Transportation, Office of Aeronautics, stating the State of Michigan intended to permanently remove the NAVAID from service in September 2018, due to financial constraints. The request included concurrence by the Airport Manager of the Luce County Airport. As a result, the FAA is planning to decommission the Newberry, MI, VOR/DME NAVAID facility effective on September 13, 2018.

With the planned decommissioning of the Newberry, MI, VOR/DME, the remaining ground-based NAVAID coverage in the area is insufficient to enable the continuity of VOR Federal airway, V–316. As such, the proposed modification to V–316 would result in a gap in the airway and the enroute ATS route structure in the Newberry, MI, area between the Sawyer, MI, VOR/DME and Sault Ste Marie, MI, VOR/DME. To overcome the gap in the airway and enroute structure, instrument flight rules (IFR) traffic could circumnavigate the entire area using V–133 and V–193 via the Traverse City VOR/DME, file point to point through the affected area using fixes that will remain in place, or receive air traffic control (ATC) radar vectors through the affected area. Visual flight rules (VFR) pilots who elect to navigate via the airways through the affected area could also take advantage of the adjacent airways to circumnavigate, the fixes that will remain, or the ATC services previously listed.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to modify the description of VOR Federal airway V–316. The planned decommissioning of the Newberry, MI, VOR/DME has made this action necessary. The proposed VOR Federal airway change is described below.

V–316: V–316 currently extends between the Ironwood, MI, VOR/Tactical Air Navigation (VORTAC) and the Sudbury, ON, Canada, VOR/DME. The FAA proposes to remove the airway segment between the Sawyer, MI, VOR/DME and the Sault Ste Marie, MI, VOR/DME. The unaffected portions of the existing airway would remain as charted.

All radials in the route descriptions below are unchanged and stated in True degrees.

VOR Federal airways are published in paragraph 6010(a) of FAA Order 7400.11B dated August 3, 2017, and effective September 15, 2017, which is incorporated by reference in 14 CFR 71.1. The VOR Federal airways listed in this document would be subsequently published in the Order.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11B, Airspace Designations and Reporting Points, dated August 3, 2017 and effective September 15, 2017, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–316

From Ironwood, MI; to Sawyer, MI. From Sault Ste Marie, MI; thence via Sault Ste Marie 091° radial to Elliot Lake, ON, Canada, NDB; thence to Sudbury, ON, Canada, via the 259° radial to Sudbury. The airspace within Canada is excluded.

* * * * *

Issued in Washington, DC, on March 19, 2018.

Rodger A. Dean Jr.,

Manager, Airspace Policy Group.

[FR Doc. 2018–06003 Filed 3–23–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2018–0220; Airspace Docket No. 17–AGL–24]

Proposed Amendment and Revocation of Air Traffic Service (ATS) Routes in the Vicinity of Manistique, MI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify one VHF Omnidirectional Range (VOR) Federal airway (V–78) and remove one VOR Federal airway (V–224) in the vicinity of Manistique, MI. The FAA is proposing this action due to the planned decommissioning of the Schoolcraft County, MI (ISQ), VOR/Distance Measuring Equipment (VOR/DME) navigation aid (NAVAID) which provides navigation guidance for portions of the affected ATS routes. The Schoolcraft County VOR is being decommissioned in support of the FAA's VOR Minimum Operational Network (MON) program.

DATES: Comments must be received on or before May 10, 2018.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: 1(800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2018–0220 and Airspace Docket No. 17–AGL–24 at the beginning of your comments. You may also submit comments through the internet at *http://www.regulations.gov*.

FAA Order 7400.11B, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *http://www.faa.gov/air_traffic/publications/*. For further information, you can contact the Airspace Policy Group, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783. The Order is also available for inspection at the National Archives and Records Administration (NARA). For information on the availability of FAA Order 7400.11B at NARA, call (202) 741–6030, or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html*.

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

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Airspace Policy Group, Office of Airspace Services, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

SUPPLEMENTARY INFORMATION:

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would support the route structure in the Manistique, MI, area as necessary to preserve the safe and efficient flow of air traffic within the National Airspace System.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2018–0220 and Airspace Docket No. 17–AGL–24) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *http://www.regulations.gov*.

Commenters wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to FAA Docket No. FAA–2018–0220 and Airspace Docket No. 17–AGL–24.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded through the internet at *http://www.regulations.gov*. Recently published rulemaking documents can also be accessed through the FAA's web page at *http://www.faa.gov/air_traffic/publications/airspace_amendments/*.

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Operations Support Group, Central Service Center, Federal Aviation Administration, 10101 Hillwood Blvd., Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11B, Airspace Designations and Reporting Points, dated August 3, 2017, and effective September 15, 2017. FAA Order 7400.11B is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11B lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

The FAA is planning to decommission the Schoolcraft County, MI (ISQ), VOR/DME in January 2019. The Schoolcraft County VOR was one of the candidate VORs identified for discontinuance by the FAA's VOR MON program and listed in the Final policy statement notice, ''Provision of

Navigation Services for the Next Generation Air Transportation System (NextGen) Transition to Performance-Based Navigation (PBN) (Plan for Establishing a VOR Minimum Operational Network),'' published in the **Federal Register** of July 26, 2016 (81 FR 48694), Docket No. FAA–2011–1082.

With the planned decommissioning of the Schoolcraft County, MI, VOR/DME, the remaining ground-based NAVAID coverage in the area is insufficient to enable the continuity of the affected airways. As such, proposed modifications to VOR Federal airway V–78 and removal of V–224 would result in a gap in the enroute ATS route structure in the Manistique, MI, area. To overcome the gap in the enroute structure, instrument flight rules (IFR) traffic could file point to point through the affected area using fixes that will remain in place, or receive air traffic control (ATC) radar vectors through the area. Additionally, the Schoolcraft County DME facility is planned to be retained and charted as a DME facility with the ''ISQ'' three-letter identifier. Visual flight rules (VFR) pilots who elect to navigate via the airways through the affected area could also take advantage of the ATC services previously listed.

The Proposal

The FAA is proposing an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to modify the description of VOR Federal airway V–78 and remove VOR Federal airway V–224. The planned decommissioning of the Schoolcraft County, MI, VOR has made these actions necessary. The proposed VOR Federal airway changes are described below.

V–78: V–78 currently extends between the Huron, SD, VOR/Tactical Air Navigation (VORTAC) and the Saginaw, MI, VOR/DME. The FAA proposes to remove the airway segment between the Escanaba, MI, VOR/DME and the Pellston, MI, VORTAC. The unaffected portions of the existing airway would remain as charted.

V–224: V–224 currently extends between the Sawyer, MI, VOR/DME and the Schoolcraft County, MI, VOR/DME. The FAA proposes to remove the airway in its entirety.

All radials in the route descriptions below are unchanged and stated in True degrees.

VOR Federal airways are published in paragraph 6010(a) of FAA Order 7400.11B dated August 3, 2017, and effective September 15, 2017, which is incorporated by reference in 14 CFR 71.1. The VOR Federal airways listed in this document would be subsequently published in the Order.

Regulatory Notices and Analyses

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore: (1) Is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under Department of Transportation (DOT) Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

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

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.11B, Airspace Designations and Reporting Points, dated August 3, 2017 and effective September 15, 2017, is amended as follows:

Paragraph 6010(a) Domestic VOR Federal Airways.

* * * * *

V–78 [Amended]

From Huron, SD; Watertown, SD; Darwin, MN; Gopher, MN; INT Gopher 091° and Eau Claire, WI, 290° radials; Eau Claire; Rhinelander, WI; Iron Mountain, MI; to Escanaba, MI. From Pellston, MI; Alpena, MI; INT Alpena 232° and Saginaw, MI, 353° radials; to Saginaw.

* * * * *

V–224 [Removed]

Issued in Washington, DC, on March 19, 2018.

Rodger A. Dean Jr.,

Manager, Airspace Policy Group.

[FR Doc. 2018–05973 Filed 3–23–18; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 154, 260, & 284

[Docket No. RM18–11–000]

Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Energy Regulatory Commission is proposing a process that will allow it to determine which jurisdictional natural gas pipelines may be collecting unjust and unreasonable rates in light of the recent reduction in the corporate income tax rate in the Tax Cuts and Jobs Act and changes to the Commission's income tax allowance policies following the *United Airlines, Inc.* v. *FERC* decision.

DATES: Comments are due April 25, 2018.

ADDRESSES: Comments, identified by docket number, may be filed electronically at *http://www.ferc.gov* in acceptable native applications and print-to-PDF, but not in scanned or picture format. For those unable to file electronically, comments may be filed by mail or hand-delivery to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426. The Comment Procedures Section of this document contains more detailed filing procedures.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

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I. Introduction

1. On December 22, 2017, the President signed into law the Tax Cuts and Jobs Act.[1] The Tax Cuts and Jobs Act, among other things, lowers the federal corporate income tax rate from 35 percent to 21 percent, effective January 1, 2018. This means that, beginning January 1, 2018, companies subject to the Commission's jurisdiction will compute income taxes owed to the Internal Revenue Service (IRS) based on a 21 percent tax rate. The tax rate reduction will result in less corporate income tax expense going forward.[2]

2. Concurrently with the issuance of this Notice of Proposed Rulemaking, the Commission is issuing a Revised Policy Statement on Treatment of Income Taxes (Revised Policy Statement)[3] and an Order on Remand[4] in response to the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *United Airlines.*[5] The Revised Policy Statement explains that a double recovery results from granting a Master Limited Partnership (MLP) an income tax allowance and a discounted cash flow (DCF) return on equity (ROE), and accordingly establishes a policy that MLPs are not permitted to recover an income tax allowance in their cost of service. The Revised Policy Statement also explains that other partnership and pass-through entities not organized as an MLP must, if claiming an income tax allowance, address the D.C. Circuit's double-recovery concern.[6]

3. In response to the Tax Cuts and Jobs Act and the Revised Policy Statement following the *United Airlines* decision, the Commission proposes to require interstate natural gas pipelines to file an informational filing with the Commission pursuant to sections 10 and 14 of the Natural Gas Act (NGA) (One-time Report on Rate Effect of the Tax Cuts and Jobs Act).[7] The One-time Report is designed to collect financial information to evaluate the impact of the Tax Cuts and Jobs Act and the Revised Policy Statement on interstate natural gas pipelines' revenue requirement. In addition to the One-time Report, the Commission proposes to provide four options for each interstate natural gas pipeline to voluntarily make a filing to address the changes to the pipeline's recovery of tax costs, or explain why no action is needed: (1) File a limited NGA section 4 filing to reduce the pipeline's rates to reflect the decrease in the federal corporate income tax rate pursuant to the Tax Cuts and Jobs Act and the elimination of the income tax allowance for MLPs consistent with the Revised Policy Statement, (2) make a commitment to file a general NGA section 4 rate case in the near future, (3) file a statement explaining why an adjustment to its rates is not needed, or (4) take no action other than filing the One-time Report. If an interstate natural gas pipeline does not choose either of the first two options, the Commission will consider, based on the information in the One-time Report and comments by interested parties, whether to issue an order to show cause under NGA section 5 requiring the pipeline either to reduce its rates to reflect the income tax reduction or explain why it should not be required to do so.

4. The Commission proposes to establish a staggered schedule for interstate natural gas pipelines to file the One-time Report and choose one of the four options described above. The Commission anticipates that the deadlines for these filings will be in the late summer and early fall of this year. The Commission encourages each pipeline to meet with its customers as soon as possible to discuss whether and how its rates should be modified in light of the Tax Cuts and Jobs Act and the

[1] An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, Public Law 115–97, 131 Stat. 2054 (2017) (Tax Cuts and Jobs Act).

[2] *See id.* 11011, 131 Stat. at 2063.

[3] *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs,* 162 FERC ¶ 61,227 (2018) (Revised Policy Statement).

[4] *SFPP, L.P.,* Opinion No. 511–C, 162 FERC ¶ 61,228 (2018) (Remand Order).

[5] *United Airlines, Inc.* v. *FERC,* 827 F.3d 122 (D.C. Cir. 2016).

[6] Revised Policy Statement, 162 FERC ¶ 61,227.

[7] The One-time Report on Rate Effect of the Tax Cuts and Jobs Act is referred to interchangeably as ''One-time Report'' or ''FERC Form No. 501–G'' in this Notice of Proposed Rulemaking.

Revised Policy Statement, and whether settlement is possible. Interstate natural gas pipelines that file general NGA section 4 rate cases or pre-packaged uncontested rate settlements before the deadline for their One-time Report will be exempted from making the One-time Report.[8]

5. The Commission proposes to provide separate procedures for intrastate natural gas pipelines performing interstate service pursuant to section 311 of the Natural Gas Policy Act of 1978 (NGPA) and Hinshaw pipelines performing interstate transportation pursuant to a limited jurisdiction certificate under § 284.224 of the Commission's regulations. The Commission proposes to require these pipelines to file a new rate election under § 284.123(b) of the Commission's regulations if their rates for intrastate service are reduced to reflect the Tax Cuts and Jobs Act.

II. Background

A. Tax Cuts and Jobs Act

6. On December 22, 2017, the President signed the Tax Cuts and Jobs Act. The Tax Cuts and Jobs Act, among other things, lowers the federal corporate income tax rate from 35 percent to 21 percent, effective January 1, 2018. This means that, beginning January 1, 2018, companies subject to the Commission's jurisdiction will compute income taxes owed to the IRS based on a 21 percent tax rate. The tax rate reduction will result in less corporate income tax expense going forward.

7. The tax rate reduction will also result in a reduction in accumulated deferred income taxes (ADIT) on the books of rate-regulated companies. The amount of the reduction to ADIT that was collected from customers but is no longer payable to the IRS is excess ADIT and should be flowed back to ratepayers under general ratemaking principles. The Tax Cuts and Jobs Act does not prevent such flow back, although it does include rules on how quickly companies may reduce their excess ADIT. Specifically, the Tax Cuts and Jobs Act indicates that rate-regulated companies generally should use the average rate assumption method when flowing excess ADIT back to customers.[9] Rate-regulated companies must follow this requirement to be considered in compliance with normalization. This means that any flow back of ADIT faster than the requirement imposed by the Tax Cuts and Jobs Act (*e.g.,* a one-time large credit to ratepayers or a flow-back method that is over a relatively short period of time) would constitute a normalization violation and may result in unfavorable tax consequences.[10]

8. The Tax Cuts and Jobs Act also establishes a 20 percent deduction, with several exceptions, of ''qualified business income'' from certain pass-through businesses (such as a partnership or S corporation) for a taxpayer other than a corporation.[11] The deduction reduces taxable income, not adjusted gross income.

B. United Airlines

9. In *United Airlines,* the D.C. Circuit held that the Commission failed to demonstrate that allowing SFPP, L.P. (SFPP), an MLP, to recover both an income tax allowance and the DCF methodology rate of return does not result in a double recovery of investors' tax costs. Accordingly, the D.C. Circuit remanded the underlying rate proceeding to the Commission for further consideration. While the D.C. Circuit's decision directly addressed the rate case filed by SFPP, the *United Airlines* double-recovery analysis referred to partnerships generally. Recognizing the potentially industry-wide ramifications, the Commission issued a Notice of Inquiry in Docket No. PL17–1–000, soliciting comments on how to resolve any double recovery resulting from the rate of return policies and the policy permitting an income tax allowance for partnership entities.[12]

10. Concurrently with the issuance of this Notice of Proposed Rulemaking, the Commission is issuing both (a) an Order on Remand in the SFPP rate case [13] and (b) a Revised Policy Statement in Docket No. PL17–1.[14] The Revised Policy Statement explains that a double recovery results from granting an MLP an income tax allowance and a DCF ROE. Accordingly, the Commission will no longer permit MLPs to recover an income tax allowance in their cost of service. The Revised Policy Statement also explains that while all partnerships seeking to recover an income tax allowance in a cost-of-service rate case will need to address the *United Airlines* double-recovery concern, the Commission will address the application of *United Airlines* to these non-MLP partnership forms as those issues arise in subsequent proceedings.

C. Overview of Natural Gas Rates

1. The Natural Gas Act

11. As required by § 284.10 of the Commission's regulations,[15] interstate natural gas pipelines generally have stated rates for their services, which are approved in a rate proceeding under NGA sections 4 or 5 and remain in effect until changed in a subsequent section 4 or 5 proceeding. The stated rates recover all components of the pipeline's cost of service, including the pipeline's federal income taxes, in a single, overall rate.[16] When pipelines file under NGA section 4 to change their rates, the Commission requires the pipeline to provide detailed support for all the components of its cost of service, including federal income taxes.[17]

12. The Commission generally does not permit pipelines to change any single component of their cost of service outside of a general NGA section 4 rate case.[18] A primary reason for this policy is that, while one component of the cost of service may have increased, others may have declined. In a general NGA section 4 rate case, all components of the cost of service may be considered and any decreases in an individual component can be offset against increases in other cost components.[19] For the same reasons, the Commission reviews all of a pipeline's costs and revenues when it investigates whether a pipeline's existing rates are unjust and unreasonable under NGA section 5.[20]

[8] In addition, interstate pipelines whose rates are being investigated under NGA section 5 need not file the One-time Report.

[9] *See* Tax Cuts and Jobs Act 13001, 131 Stat. at 2096.

[10] *Id.* 13001(b)(6)(A), 131 Stat. at 2100 (''If . . . the taxpayer does not use a normalization method of accounting for the corporate rate reductions provided in the amendments made by this section . . . the taxpayer's tax for the taxable year shall be increased by the amount by which it reduces its excess tax reserve more rapidly than permitted under a normalization method of accounting.'').

[11] *See id.* 11011, 131 Stat. at 2063.

[12] *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs,* Notice of Inquiry, 157 FERC ¶ 61,210 (2016).

[13] Remand Order, 162 FERC ¶ 61,228.

[14] Revised Policy Statement, 162 FERC ¶ 61,227.

[15] 18 CFR 284.10 (2017).

[16] Most pipeline tariffs include tracking mechanisms for the recovery of fuel and lost and unaccounted for gas, but generally pipelines do not separately track any other cost.

[17] 18 CFR 154.312 and 154.313 (2017). The pipeline must show the computation of its allowance for federal income taxes in Schedule H–3.

[18] *See, e.g., Trunkline Gas Co.,* 142 FERC ¶ 61,133, at P 24 n.28 (2013).

[19] *ANR Pipeline Co.,* 110 FERC ¶ 61,069, at P 18 (2005).

[20] *Natural Gas Pipeline Co. of America LLC,* 158 FERC ¶ 61,044 (2017); *Wyoming Interstate Co., L.L.C.,* 158 FERC ¶ 61,040 (2017); *Tuscarora Gas Transmission Co.,* 154 FERC ¶ 61,030 (2016); *Iroquois Gas Transmission System, L.P.,* 154 FERC ¶ 61,028 (2016); *Empire Pipeline, Inc.,* 154 FERC ¶ 61,029 (2016); *Columbia Gulf Transmission, LLC,* 54 FERC ¶ 61,027 (2016); *Wyoming Interstate Co., L.L.C.,* 141 FERC ¶ 61,117 (2012); *Viking Gas Transmission Co.,* 141 FERC ¶ 61,118 (2012); *Bear Creek Storage Co., L.L.C.,* 137 FERC ¶ 61,134 (2011); *MIGC LLC,* 137 FERC ¶ 61,135 (2011); *ANR Storage Co.,* 137 FERC ¶ 61,136 (2011); *Ozark Gas*

13. NGA sections 4 and 5 proceedings are routinely resolved through a settlement agreement between the pipeline and its customers. Most of the agreements are ''black box'' settlements that do not provide detailed cost-of-service information. In addition, in lieu of submitting a general NGA section 4 rate case, a pipeline may submit a pre-packaged settlement to the Commission. When pipelines file pre-packaged settlements, they generally do not include any cost and revenue data in the filing. The Commission will approve an uncontested settlement offer upon finding that ''the settlement appears to be fair and reasonable and in the public interest.'' [21] Many settlements include moratorium provisions that limit the ability of the pipeline to file to revise its rates, or for the shippers to file a section 5 complaint, for a particular time period. In addition, many settlements include ''come-back provisions,'' which require a pipeline to file a NGA section 4 filing no later than a particular date.

14. The Commission has granted most interstate natural gas pipelines authority to negotiate rates with individual customers.[22] Such rates are not bound by the maximum and minimum recourse rates in the pipeline's tariff.[23] In order to be granted negotiated rate authority, a pipeline must have a cost-based recourse rate on file with the Commission, so a customer always has the option of entering into a contract at the cost-based recourse rate rather than a negotiated rate if it chooses. The pipeline must file each negotiated rate agreement with the Commission. In addition, pipelines are also permitted to selectively discount their rates and the Commission approves the maximum recourse rate. While negotiated rates may be above the maximum recourse rate, discount rates must remain below the maximum rate. The maximum recourse rate is the ceiling rate for all long-term capacity releases, including capacity releases to replacement shippers by firm customers with negotiated rates.

15. Changes to a pipeline's recourse rates occurring under NGA sections 4 and 5 do not affect a customer's negotiated rate, because that rate is negotiated as an alternative to the customer taking service under the recourse rate. However, a shipper receiving a discounted rate may experience a reduction as a result of the outcome of a rate proceeding if the recourse rate is reduced below the discounted rate. The prevalence of negotiated and discount rates varies among pipelines, depending upon the competitive situation.

16. The Commission also grants interstate natural gas pipelines market-based rate authority when the pipeline can show it lacks market power for the specific services or when the applicant or the Commission can mitigate the market power with specific conditions.[24] A pipeline that has been granted market-based rate authority will have an approved tariff on file with the Commission but will not have a Commission approved rate. Rather, all rates for services are negotiated by the pipeline and its customers. Currently, 29 interstate natural gas pipelines have market-based rate authority for storage and interruptible hub services (such as wheeling and park and loan services), and one pipeline (Rendezvous Pipeline Company, LLC) has market-based rate authority for transportation services.

2. The Natural Gas Policy Act of 1978

17. NGPA section 311 authorizes the Commission to allow intrastate pipelines to transport natural gas ''on behalf of'' interstate pipelines or local distribution companies served by interstate pipelines.[25] NGPA section 311(a)(2)(B) provides that the rates for interstate transportation provided by intrastate pipelines shall be ''fair and equitable and may not exceed an amount which is reasonably comparable to the rates and charges which interstate pipelines would be permitted to charge for providing similar transportation service.'' [26] In addition, NGPA section 311(c) provides that any authorization by the Commission for an intrastate pipeline to provide interstate service ''shall be under such terms and conditions as the Commission may prescribe.'' [27] Section 284.224 of the Commission's regulations provides for the issuance of blanket certificates under section 7 of the NGA to Hinshaw pipelines [28] to provide open access transportation service ''to the same extent that and in the same manner'' as intrastate pipelines are authorized to perform such service.[29] The Commission regulates the rates for interstate service provided by Hinshaw pipelines under NGA sections 4 and 5.

18. Section 284.123 of the Commission's regulations provides procedures for section 311 and Hinshaw pipelines to establish fair and equitable rates for their interstate services.[30] Section 284.123(b) allows intrastate pipelines an election of two different methodologies upon which to base their rates for interstate services.[31] First, § 284.123(b)(1) permits an intrastate pipeline to elect to base its rates on the methodology or rate(s) approved by a state regulatory agency included in an effective firm rate for city-gate service. Second, § 284.123(b)(2) provides that the pipeline may petition for approval of rates and charges using its own data to show its proposed rates are fair and equitable. The Commission has established a policy of reviewing the rates of section 311 and Hinshaw pipelines every five years.[32] Section 311 pipelines not using state-approved rates must file a new rate case every five years, and Hinshaw pipelines must file a cost and revenue study every five years. Intrastate pipelines using state-approved rates that have not changed since the previous five-year filing are only required to make a filing certifying that those rates continue to meet the requirements of § 284.123(b)(1) on the same basis on which they were approved. Conversely, if the state-approved rate used for the election is changed at any time, the section 311 or Hinshaw pipeline must file a new rate election pursuant to § 284.123(b) for its interstate rates no later than 30 days after the changed rate becomes effective.

19. An intrastate pipeline may file to request authorization to charge market-

Transmission, L.L.C., 133 FERC ¶ 61,158 (2010); *Kinder Morgan Interstate Gas Transmission LLC,* 133 FERC ¶ 61,157 (2010); *Northern Natural Gas Co.,* 129 FERC ¶ 61,159 (2009); *Great Lakes Gas Transmission Ltd. P'ship,* 129 FERC ¶ 61,160 (2009); *Natural Gas Pipeline Co. of America LLC,* 129 FERC ¶ 61,158 (2009).

[21] 18 CFR 385.602(g)(3).

[22] *See Natural Gas Pipeline Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy,* 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification,* 114 FERC ¶ 61,042, *dismissing reh'g and denying clarification,* 114 FERC ¶ 61,304 (2006).

[23] *Northern Natural Gas Co.,* 105 FERC ¶ 61,299, at PP 15–16 (2003).

[24] *Alternatives to Traditional Cost of Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines,* 74 FERC ¶ 61,076 (1996) (Negotiated Rate Policy Statement); *see also Rate Regulation of Certain Natural Gas Storage Facilities,* Order No. 678, FERC Stats. & Regs. ¶ 31,220 (2006), *reh'g denied,* Order No. 678–A, 117 FERC ¶ 61,190 (2006).

[25] 15 U.S.C. 3371 (2012).

[26] 15 U.S.C. 3371(a)(2)(B) (2012).

[27] 15 U.S.C. 3371(c)(2012).

[28] Section 1(c) of the NGA, 15 U.S.C. 717(c), exempts from the Commission's NGA jurisdiction those pipelines which transport gas in interstate commerce if: (1) They receive natural gas at or within the boundary of a state, (2) all the gas is consumed within that state, and (3) the pipeline is regulated by a state Commission. This is known as the Hinshaw exemption.

[29] *See* 18 CFR 284.224 (2017).

[30] 18 CFR 284.123 (2017).

[31] 18 CFR 284.123(b) (2017).

[32] *Contract Reporting Requirements of Intrastate Natural Gas Companies,* Order No. 735, FERC Stats. & Regs. ¶ 31,310, at P 92, *order on reh'g,* Order No. 735–A, FERC Stats. & Regs. ¶ 31,318 (2010); *see also Hattiesburg Industrial Gas Sales, L.L.C.,* 134 FERC ¶ 61,236 (2011) (imposing a five-year rate review requirement on Hattiesburg Industrial Gas Sales, L.L.C.).

based rates under subpart M of part 284 of the Commission's regulations. The same requirements for showing a lack of market power apply to intrastate pipelines as for interstate pipelines. The Commission has granted market-based rate authority for storage and hub services to 19 of the 112 intrastate pipelines with subpart C of part 284 tariffs.

D. Requests for Commission Action

20. Several entities [33] have sent letters to the Commission requesting that the Commission act to ensure that the economic benefits related to the reduction in the federal corporate income tax rate are passed through to customers. These entities request, among other things, that the Commission institute investigations into the justness and reasonableness of all applicable rates recovered by public utilities and/or pipelines subject to the Commission's jurisdiction with respect to the revenue requirement for federal corporate income taxes and explore ways to implement voluntary rate reductions or refunds. In response to several of these letters, the Interstate Natural Gas Association of America sent a letter to Chairman McIntyre arguing that suggestions for a generic order compelling pipelines to adjust an individual component of their respective recourse rates will, in many cases, not yield a just and reasonable result because of the Commission's policy preference for complete rate reviews, the limits the *Mobile-Sierra* doctrine places on the Commission's ability to reopen rates resulting from freely negotiated agreements, the existence of negotiated ''black-box'' settlements that do not specify a particular tax allowance, and the Internal Revenue Code's normalization rules that a pipeline would violate if excess ADIT was returned to ratepayers more rapidly than allowed by the required amortization methods.[34]

21. In addition, on January 31, 2018 in Docket No. RP18–415–000, several trade associations and companies representing a coalition of the natural gas industry that are dependent upon services provided by interstate natural gas pipeline and storage companies (Petitioners) [35] filed a petition requesting that the Commission take immediate action under sections 5(a), 10(a), and 14(a) and (c) of the NGA to initiate show cause proceedings against all interstate natural gas pipeline and storage companies (unless barred by a settlement moratorium) and require each company to submit a cost and revenue study to demonstrate that their existing jurisdictional rates continue to be just and reasonable following the passage of the Tax Cuts and Jobs Act. Several parties filed comments in support of the petition. Petitioners argue that the following companies should be excluded from the show cause proceedings: (1) Section 311 pipelines (which Petitioners argue are otherwise required to file updated rate justifications on an ongoing basis), and (2) natural gas pipeline and storage companies that are obligated to file a NGA section 4 rate case in 2018.[36]

22. Petitioners argue that the Commission should require an immediate rate reduction, based upon the Commission's calculations, if a filed cost and revenue study demonstrates that the revenues from services offered on the interstate natural gas pipeline or storage company's system exceed the costs following the adjustments to account for changes to the tax laws implemented under the Tax Cuts and Jobs Act. Petitioners contend that, if a pipeline or storage company believes that it has a Commission-approved settlement that would exempt it from such a rate analysis (*e.g.,* NGA section 5 rate moratorium), the Commission should require such company to provide evidence to that effect. Petitioners argue that if the Commission determines that a settlement prohibits a rate change during the term of the settlement, then the show cause order would be applicable to the company at the termination of any applicable NGA section 5 rate moratorium provisions of the settlement. Petitioners also argue that if a pipeline or storage company believes that any of its contracts are exempt from Commission-ordered rate adjustments (*e.g.,* discounted or negotiated rate contracts), the Commission should require such company to identify those contracts and provide evidence to that effect, and permit shipper counterparties the opportunity to contest such a claim.[37]

23. Several parties filed answers in opposition to the petition.[38] These parties argue that the petition asks the Commission to circumvent the statutory requirements of section 5 of the NGA by unlawfully shifting the burden of proof regarding the justness and reasonableness of pipeline rates and denying pipelines their right to an evidentiary hearing.[39] They contend that NGA section 5 and Commission precedent does not generally allow for piecemeal review of a single component of a filed rate considering that a fundamental tenet of ratemaking is that the end result, not any individual component, is what determines whether rates are just and reasonable.[40] They also argue that, given the unique and different circumstances across all pipeline rates including the presence of discounted and negotiated rates, ''black box'' settlements, and moratoria and rate case come-back provisions, a one-size-fits-all approach to modify rates for every pipeline is not appropriate.[41]

III. Discussion

24. The Tax Cuts and Jobs Act, together with the Revised Policy Statement, reduce certain costs eligible for recovery in the rates of every natural gas pipeline subject to the Commission's jurisdiction. The Tax Cuts and Jobs Act reduces the federal income tax rate of all pipelines organized as corporations. The Revised Policy Statement establishes a policy that all pipelines organized as MLPs should eliminate any income tax

[33] These entities include State Advocates (States, state agencies, and state consumer advocates), Organization of PJM States, Inc., Organization of MISO States, American Public Gas Association, Process Gas Consumers Group, Natural Gas Supply Association, Natural Gas Indicated Shippers, Liquids Shippers Group, Oklahoma Attorney General, Gordon Gooch (*pro se* consumer), Advanced Energy Buyers Group, National Association of State Energy Officials, The R-Street Institute, Office of the Ohio Consumers' Counsel, and the Governor of Delaware.

[34] Letter to Chairman McIntyre by the Interstate Natural Gas Association of America in response to letters by the American Public Gas Association, FERC eLibrary Accession No. 20180130–4005 (filed Jan. 30, 2018).

[35] Petitioners include the following trade associations: American Forest and Paper Association, American Public Gas Association, Independent Petroleum Association of America, Natural Gas Supply Association, and Process Gas Consumers Group. Petitioners also include the following companies: Aera Energy LLC, Anadarko Energy Services Company, Chevron U.S.A. Inc., ConocoPhillips Company, Hess Corporation, Petrohawk Energy Corporation, WPX Energy Marketing, LLC, and XTO Energy Inc.

[36] Petitioners, Filing, Docket No. RP18–415–000, at 3–4 (filed Jan. 31, 2018).

[37] *Id.* at 5–6, 12–19.

[38] Parties in opposition to the petition include: Interstate Natural Gas Association of America, TransCanada Corporation, Boardwalk Pipeline Partners, LP, and Kinder Morgan Entities.

[39] Interstate Natural Gas Association of America, Answer, Docket No. RP18–415–000, at 4–6 (filed Feb. 12, 2018); TransCanada Corporation, Answer, Docket No. RP18–415–000, at 4–9 (filed Feb. 12, 2018).

[40] Interstate Natural Gas Association of America, Answer, Docket No. RP18–415–000, at 9–10 (filed Feb. 12, 2018); TransCanada Corporation, Answer, Docket No. RP18–415–000, at 9–10 (filed Feb. 12, 2018); Kinder Morgan Entities, Answer, Docket No. RP18–415–000, at 7–11 (filed Feb. 12, 2018).

[41] Interstate Natural Gas Association of America, Answer, Docket No. RP18–415–000, at 11–18 (filed Feb. 12, 2018); TransCanada Corporation, Answer, Docket No. RP18–415–000, at 2–3, 11–12 (filed Feb. 12, 2018); Boardwalk Pipeline Partners, LP,

Answer, Docket No. RP18–415–000, at 1–8 (filed Feb. 12, 2018); Kinder Morgan Entities, Answer, Docket No. RP18–415–000, at 3–7 (filed Feb. 12, 2018).

allowance from their rates.[42] The Commission believes that interstate natural gas pipelines and intrastate natural gas pipelines providing interstate service should flow through the benefits of the corporate income tax reduction and elimination of MLP income tax allowances to consumers to the extent that their rates would otherwise over-recover their costs of service. Therefore, the Commission is initiating this rulemaking proceeding to consider the most efficient and expeditious method of accomplishing this goal consistent with the requirements of the NGA and the NGPA. Specifically, the Commission proposes to revise its regulations to (1) require interstate natural gas pipelines to file a One-time Report concerning the effects of these tax changes, (2) permit interstate natural gas pipelines to voluntarily submit a limited NGA section 4 filing to reflect the decrease in the federal corporate income tax rate pursuant to the Tax Cuts and Jobs Act and the elimination of the income tax allowance for MLPs consistent with the Revised Policy Statement,[43] and (3) require NGPA section 311 and Hinshaw pipelines to modify their rates for interstate service if they modify their rates for intrastate service to reflect the tax changes. These proposals are intended to encourage natural gas pipelines to voluntarily reduce their rates to the extent the tax changes result in their over-recovering their cost of service, while also providing the Commission and stakeholders information necessary to take targeted actions under NGA section 5 where necessary to achieve just and reasonable rates.

25. The Commission addresses interstate natural gas pipelines under the NGA and NGPA section 311 and Hinshaw pipelines separately below.

A. Interstate Natural Gas Pipelines With Cost-Based Rates

26. The Commission proposes to require interstate natural gas pipelines to file, pursuant to sections 10 and 14(a) of the NGA, a One-time Report on Rate Effect of the Tax Cuts and Jobs Act, to be known as FERC Form No. 501–G,[44] that includes an abbreviated cost and revenue study estimating (1) the percentage reduction in the pipeline's cost of service resulting from the Tax Cuts and Jobs Act and the Revised Policy Statement, and (2) the pipeline's current ROEs before and after the reduction in corporate income taxes and the elimination of income tax allowances for MLPs. As described in more detail below, the FERC Form No. 501–G is designed to collect financial information to evaluate the impact of the Tax Cuts and Jobs Act and the Revised Policy Statement on the pipeline's cost of service, and to inform stakeholders and the Commission regarding the continued justness and reasonableness of the pipeline's rates after the income tax reduction and elimination of MLP income tax allowances. Interstate natural gas pipelines that file general NGA section 4 rate cases or pre-packaged uncontested rate settlements before the deadline for their One-time Report will be exempted from making the One-time Report.[45]

27. In addition to the mandatory One-time Report, the Commission also proposes several options for interstate natural gas pipelines to voluntarily make a filing to address the effect of the Tax Cuts and Jobs Act and the Revised Policy Statement. The Commission proposes to allow an interstate natural gas pipeline to make a limited NGA section 4 filing to reduce its rates by the percentage reduction in its cost of service resulting from the Tax Cuts and Jobs Act and the Revised Policy Statement, as calculated in the FERC Form No. 501–G. This would allow the pipeline to quickly pass on to ratepayers the benefit of the reduction in the corporate income tax rate or the elimination of the MLP income tax allowance, without the need for a full examination of all its costs and revenues. Alternatively, as described below, an interstate pipeline may commit to file either a prepackaged uncontested settlement or, if that is not possible, a general NGA section 4 rate case if the pipeline believes that using the limited NGA section 4 option will not result in a just and reasonable rate. If the pipeline commits to do this by December 31, 2018, the Commission will not initiate an NGA section 5 investigation of its rates prior to that date.

28. The Commission also recognizes that there may be reasons why some pipelines need not change their rates at this time and therefore proposes an interstate pipeline may choose to file a statement explaining why an adjustment to its rates is not needed. For example, a pipeline may argue that it is currently under-recovering its overall cost of service, such that the reduction in its tax costs or elimination of an MLP income tax allowance will not lead to excessive recovery. If that is true, no reduction in the pipeline's existing stated rates would be justified under NGA section 5.[46] The proposed FERC Form No. 501–G will provide information as to whether an interstate pipeline may be under recovering its cost of service. Other pipelines may have settlements providing for moratoria on rate changes until some future date or requiring them to file new NGA section 4 rate cases in the near future.

29. Lastly, a pipeline may file its FERC Form No. 501–G without taking any other action. The Commission will assign each pipeline's filing of the FERC Form No. 501–G an RP docket number and notice the filing providing for interventions and protests. Based on the information in that form, together with any statement filed with the form and comments by intervenors, the Commission will consider whether to initiate an investigation under NGA section 5 of those pipelines that have not filed a limited NGA section 4 rate reduction filing or committed to file a general NGA section 4 rate case.

30. The Commission proposes to require only interstate natural gas pipelines that have cost-based rates for

[42] Revised Policy Statement, 162 FERC ¶ 61,227.

[43] In addition, consistent with the Revised Policy Statement, partnerships or other pass-through entities that have not adopted the MLP business form must address the double-recovery concern raised by *United Airlines.* To the extent any of these partnerships or pass-through entities argue that they should continue to recover an income tax allowance, then the entity's revised tax rate should reflect any relevant tax reductions resulting from the Tax Cuts and Jobs Act. The Commission will review this information in light of its post-*United Airlines* policy changes, including any subsequent orders affecting the income tax policy for other non-MLP partnership or pass-through business forms. *See* Revised Policy Statement, 162 FERC ¶ 61,227 at P 3 (''While all partnerships seeking to recover an income tax allowance will need to address the double-recovery concern, the Commission will address the application of *United Airlines* to non-MLP partnership or other pass-through business forms as those issues arise in subsequent proceedings.'').

[44] Proposed FERC Form No. 501–G will not be published in the **Federal Register** or the Code of Federal Regulations, but is available in the Commission's eLibrary website under Docket No. RM18–11–000.

[45] In addition, interstate pipelines whose rates are being investigated under NGA section 5 need not file the One-time Report.

[46] When an interstate pipeline proposes to increase its rates pursuant to NGA section 4, the Commission may issue an order reducing one component of the proposed increased cost of service, so as to reduce the proposed rate increase, before resolving other issues. *FPC* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 149–156 (1962). However, in order to reduce a pipeline's existing stated rates below their current level under NGA section 5, the Commission must consider all the pipeline's costs and revenues related to that rate. *See FPC* v. *Natural Gas Pipeline Co.,* 315 U.S. 574 (1942) (finding that, when acting under NGA section 5, the Commission may adjust the pipeline's ''*general revenue level* to the demands of a fair return'' before adjusting specific rate schedules to eliminate discriminations and unfairness from its details) (emphasis added).

service under any rate schedule filed pursuant to part 154 of the Commission's regulations to comply with this proposed rule. Therefore, pipelines with market-based rates would not be subject to this proposed rule.

31. The Commission does not propose to take any action regarding the effect of the Tax Cuts and Jobs Act on ADIT in this Notice of Proposed Rulemaking. In a concurrent Notice of Inquiry,[47] the Commission is seeking comment regarding this issue.

1. One-Time Report on Rate Effect of the Tax Cuts and Jobs Act

32. The Commission proposes to exercise its authority under NGA sections 10(a) and 14(a)[48] to require all interstate natural gas pipelines that file a 2017 FERC Form Nos. 2 or 2A to submit an abbreviated cost and revenue study in a format similar to the cost and revenue studies the Commission has attached to its orders initiating NGA section 5 rate investigations in recent years.[49] Using the data in the pipelines' 2017 FERC Form Nos. 2 and 2A, these studies will estimate (1) the percentage reduction in the pipeline's cost of service resulting from the Tax Cuts and Jobs Act and the Revised Policy Statement, and (2) the pipeline's current ROEs before and after the reduction in corporate income taxes and the elimination of income tax allowances for MLPs.[50] FERC Form No. 501–G is an Excel spreadsheet with formulas that, when the respondents populate the form, will calculate an indicated percentage rate reduction reflecting only the corporate income tax rate reduction provided by the Tax Cuts and Jobs Act and the elimination of the MLP tax allowance by the Revised Policy Statement. The form will also calculate the pipeline's estimated actual return on equity both before and after the tax change and implementation of the Revised Policy Statement. The Commission and the parties may use this information in considering whether to initiate NGA section 5 rate investigations of pipelines which do not opt to file a limited section 4 to reduce their rates or commit to make a general section 4 filing by December 31, 2018, and the order in which to initiate any such investigations so as to make the most efficient use of the Commission's and interested parties' resources to provide consumer benefits.

33. Most of the required data is to be taken directly from the respondent's 2017 FERC Form Nos. 2 or Form 2–A[51] without modification. The cost and revenue study incorporates all the major cost components of a jurisdictional cost of service, including: Administrative and General, Operation and Maintenance, other taxes, depreciation expense, and the return related components of ROE, interest expenses and income taxes.

34. A cost and revenue study requires an indicative ROE. In the proposed form, the Commission uses, consistent with Commission practice, the last litigated ROE applicable to situations involving existing plant.[52] The last litigated ROE was in *El Paso Natural Gas Company,* wherein the Commission adopted an ROE of 10.55 percent.[53]

35. In approving the capital structure to be used for ratemaking purposes, the Commission uses an operating company's actual capital structure if the operating company (1) issues its own debt without guarantees, (2) has its own bond rating, and (3) has a capital structure within the range of capital structures approved by the Commission.[54] If the operating company meets these requirements, then the Commission will find that the operating company has demonstrated a separation of financial risks between the operating and parent company. Where these requirements are not met, the Commission will use the consolidated capital structure of the parent company or a proxy capital structure in order to set the overall rate of return for the operating utility company.[55] The proposed form requests the respondent's FERC Form Nos. 2 or 2–A equity related balance sheet items. However, if that data does not satisfy the three-part test of Opinion No. 414, *et al.,* the form provides alternative data entries to reflect parent or hypothetical capital structures consistent with Opinion No. 414, *et al.* If the respondent uses the consolidated capital structure of the parent company, it should provide the capital structure as shown on the parent company's U.S. Securities and Exchange Commission's Form 10–K for 2017.

36. Income tax expenses for pass-through entities are not captured by FERC Form Nos. 2 and 2–A. Income tax expenses for such entities are based upon the individual unit holder's income tax levels. The form requires pass-through entities to provide the weighting and marginal tax rates for each unit holder class ending calendar year 2017. Prospectively for pass-through entities, FERC Form No. 501–G assumes a federal and state income tax expense of zero. As the Commission states in the Revised Policy Statement, all partnerships seeking to recover an income tax allowance will need to address the double-recovery concern.[56] If a partnership not organized as an MLP believes that a federal or state income tax expense is permissible notwithstanding *United Airlines,* proposed § 154.404(a)(3) provides that it may submit that statement with supporting documentation to justify why it should continue to receive an income tax allowance and to reduce its maximum rates to reflect the decrease in the federal income tax rates[57] applicable to partners pursuant to the Tax Cuts and Jobs Act. The Commission will review this information in light of its post-*United Airlines* policy changes, including any subsequent orders affecting the income tax policy for other non-MLP partnership or pass-through business forms.

37. Page 1, Line 33, of FERC Form No. 501–G contains the percentage reduction of each pipeline's cost of service attributable solely to the revised income tax allowance. This percentage reflects the amount a pipeline may choose to use to reduce its reservation rates and any one-part rates which include a fixed cost recovery should it

[47] *Inquiry Regarding the Effect of the Tax Cuts and Jobs Act on Commission-Jurisdictional Rates,* 162 FERC ¶ 61,223 (2018).

[48] *See Tuscarora Gas Transmission Co.,* 154 FERC ¶ 61,273, at PP 4–14 (2016), requiring a pipeline to submit a more detailed cost and revenue study than that which the Commission is proposing here.

[49] See orders cited in footnote 20. Interstate natural gas pipelines whose rates are being examined in a general NGA section 4 rate case or an NGA section 5 investigation need not file the One-time Report. In addition, pipelines that file a pre-packaged uncontested rate settlement before the deadline for their One-time Report will be exempted from making the One-time Report.

[50] An MLP is a publicly traded partnership under the Internal Revenue Code that receives at least 90 percent of its income from certain qualifying sources, including gas and oil transportation. *See* 26 U.S.C. 7704; *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs,* Notice of Inquiry, 157 FERC ¶ 61,210 at PP 4–7.

[51] FERC Form 2s (*Annual report for Major natural gas companies*) and 2–As (*Annual report for Nonmajor natural gas companies*) for calendar year 2017 are due April 18, 2018. 18 CFR 260.1(b)(2) & 260.2(b)(2).

[52] *See, e.g., High Point Gas Transmission, LLC,* 139 FERC ¶ 61,237, at P 154 (2012); *Alliance Pipeline L.P.,* 140 FERC ¶ 61,212, at P 20 (2012); *Northern Natural Gas Co.,* 119 FERC ¶ 61,035, at P 37 (2007).

[53] *El Paso Natural Gas Co.,* Opinion No. 528, 145 FERC ¶ 61,040, at P 642 (2013), *reh'g denied,* Opinion No. 528–A, 154 FERC ¶ 61,120 (2016).

[54] *Transcontinental Gas Pipe Line Corp.,* Opinion No. 414–A, 84 FERC ¶ 61,084, at 61,413–61,415, *reh'g denied,* Opinion No. 414–B, 85 FERC ¶ 61,323 (1998), *petition for review denied sub nom. N.C. Utils. Comm'n* v. *FERC,* D.C. Cir. Case No. 99–1037 (Feb. 7, 2000) (per curiam).

[55] *Id.*

[56] *See* Revised Policy Statement, 162 FERC ¶ 61,227 at P 3.

[57] If a pass-through entity that is not an MLP claims an income tax allowance, it must reflect the corporate rate reduction and any other relevant tax reductions in the Tax Cuts and Jobs Act.

choose to file a limited NGA section 4 filing as described below.

38. The next part of the report estimates the actual rate of return on equity earned by the pipeline for its non-gas revenues during calendar year 2017. Page 3 of the report requires the pipeline to report its revenues from which the cost of service items, as detailed on Page 1, are subtracted. The report depicts the pipeline's estimated actual return on equity both before and after the tax change and implementation of the Revised Policy Statement. The information will be used to guide the Commission, other stakeholders, and potentially the pipelines in determining additional steps.

39. Pipelines may believe that certain 2017 FERC Form Nos. 2 or 2A cost or revenue data require adjustments to properly reflect their situation. Respondents should not make adjustments to the data transferred from FERC Form Nos. 2 or 2–A and 10–K and reported on the FERC Form No. 501–G. Instead, respondents may make adjustments to individual line items in additional work sheets. If a respondent proposes any adjustments, it must fully explain and support the adjustment in a separate document. All adjustments should be shown in a manner similar to that required for adjustments to base period numbers provided in statements and schedules required by §§ 154.312 and 154.313 of the Commission's regulations.[58]

40. When respondents file their FERC Form No. 501–G, the form should be in spreadsheet format with all the formulas unchanged from those provided in the posted form. The Commission proposes to post the FERC Form No. 501–G on its website. In addition, the Commission has prepared an *Implementation Guide for One-time Report on Rate Effect of the Tax Cuts and Jobs Act* (*Implementation Guide*) that provides additional guidance to parties as to the expected data entries. The *Implementation Guide* also contains the proposed staggered compliance dates and the list of companies for each of the four compliance periods. Drafts of the FERC Form No. 501–G and *Implementation Guide* are attached to this NOPR for review and comment as separate files. The attachments to the NOPR will be available in the Commission's eLibrary under Docket No. RM18–11–000 but not published in the **Federal Register** or Code of Federal Regulations.

2. Additional Filing Options for Natural Gas Pipelines

41. The Commission proposes that, upon filing of the FERC Form No. 501–G, interstate natural gas pipelines will have four options. The first two options—filing a limited NGA section 4 rate filing or a general section 4 rate case—allow the pipelines to voluntarily make a filing to address the effects of the Tax Cuts and Jobs Act and the Revised Policy Statement. Under the third option, pipelines may file an explanation why no rate change is necessary. Finally, pipelines may simply file the FERC Form No. 501–G described above, without taking any other action at this time. The One-time Report should help inform the pipeline's choice of the four options, as well as assist the Commission in determining what NGA section 5 investigations it should initiate in order to assure that the cost reduction benefits of the Tax Cuts and Jobs Act and the Revised Policy Statement are passed through to consumers.

a. Limited NGA Section 4 Filing

42. Under this option, an interstate natural gas pipeline would file the proposed FERC Form No. 501–G and simultaneously make a separate limited NGA section 4 filing, pursuant to proposed section 154.404, to reduce its reservation charges and any one-part rates that include fixed costs[59] by the percentage reduction in its cost of service calculated in the FERC Form No. 501–G[60] resulting from the reduced corporate income tax rates provided by the Tax Cuts and Jobs Act and the elimination of MLP tax allowances by the Revised Policy Statement. In other words, the Commission proposes to allow interstate pipelines to reduce their rates to reflect the reduced income tax rates and elimination of the MLP income tax allowance on a single-issue basis, without consideration of any other cost or revenue changes. Interested parties may protest the limited NGA section 4 filing, but the Commission will only consider arguments relating to matters within the scope of the proceeding. Thus, interested parties could raise issues as to whether the interstate pipeline is eligible to make the limited NGA section 4 filing,[61] whether the percentage reduction has been properly applied to the pipeline's rates, and whether the correct information was used in calculating the percentage reduction. However, the Commission will consider any other issues raised as being outside the scope of the proceeding and will dismiss it without prejudice. If shippers or other interested parties believe further adjustments to the rate are warranted, they may file an NGA section 5 complaint with the Commission.

43. The Commission believes that FERC Form No. 501–G's comparison of (1) the pipeline's existing cost of service as reported in its FERC Form Nos. 2 or 2–A for 2017 to (2) a revised cost of service using the new income tax rates, or eliminating the income tax allowance of an MLP, is the most reasonable method to estimate the rate reduction to be implemented in a limited NGA section 4 filing. The Commission recognizes that, after the Tax Reform Act of 1986, the Commission established a procedure for public utilities to reduce their rates based on a formula using cost data provided by the public utility in its most recent FPA section 205 rate filing.[62] However, this methodology does not appear workable for many interstate natural gas pipelines. In recent years, many interstate pipelines have filed ''pre-packaged'' uncontested settlements pursuant to § 385.207(a)(5) of the Commission's regulations,[63] without submitting the cost and revenue data required to be filed with a general NGA section 4 rate case by §§ 154.312 or 154.313 of the Commission's regulations.[64] In addition, a number of pipelines have not filed rate cases in many years, with the result that the cost and revenue data underlying their existing rates is stale and may not reflect all their current services or system expansions.

44. The Commission recognizes that it generally does not permit pipelines to change any single component of their cost of service outside of a general NGA

[58] *See Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings,* Appendix, *Instruction Manual for Electronic Filing of Part 154 Rate Filings* (November 14, 2016), found on the Commission's website, *http://www.ferc.gov/docs-filing/etariff/implementation-guide.pdf,* wherein filers are required to show the base figure and then the adjustment and the as-adjusted figures in adjacent columns.

[59] A pipeline's 100 percent load factor rate for interruptible service is an example of a one-part rate containing fixed costs.

[60] That percentage reduction is listed on Page 1, Line 33 of the proposed FERC Form No. 501–G.

[61] The pipeline may not be eligible to make a limited NGA section 4 filing because of a settlement rate moratorium or an ongoing NGA section 4 or 5 proceeding.

[62] *Rate Changes Relating to Federal Corporate Income Tax Rate for Public Utilities,* FERC Stats. & Regs. ¶ 30,752, *order on reh'g,* 41 FERC ¶ 61,029 (1987) (Order No. 475).

[63] 18 CFR 385.207(a)(5) (2017).

[64] 18 CFR 154.312 and 154.313 (2017). *See, e.g., Dominion Transmission, Inc.,* 111 FERC ¶ 61,285 (2005); *Colorado Interstate Gas Co.,* 156 FERC ¶ 61,085 (2016).

section 4 rate case.[65] Here, however, the Commission believes an exception to that policy is justified in order to permit interstate pipelines to voluntarily reduce their rates as soon as possible to reflect a reduction in a single cost component—their federal income tax costs—so as to flow through that benefit to consumers. In addition, our proposed requirement that all interstate pipelines file the abbreviated cost and revenue study in FERC Form No. 501–G will enable pipelines and all other interested parties to evaluate whether there are significant changes in other cost components or revenues that affect the need for a rate reduction with respect to taxes.

45. Finally, any rate reduction implemented pursuant to a limited NGA section 4 filing under this option would be a reduction to the pipeline's maximum recourse rates. Similar to the situation in a general NGA section 4 rate case or an NGA section 5 rate investigation, a pipeline's limited NGA section 4 filing to reduce its maximum recourse rate to reflect reduced income tax rates, or elimination of the MLP income tax allowance, ordinarily will not affect any negotiated rate agreements the pipeline has with individual shippers. In the Negotiated Rate Policy Statement,[66] the Commission allowed pipelines to negotiate individualized rates that are not bound by the maximum and minimum recourse rates in the pipeline's tariff.[67] Among other things, this permits pipelines, as a means of providing rate certainty, to negotiate a fixed rate or rate formula that will continue in effect regardless of changes in the pipeline's maximum recourse rate.[68] Accordingly, unless a negotiated rate agreement expressly provides otherwise, the rates in such agreements will be unaffected by any reduction in the pipeline's maximum rate reductions resulting from the policies adopted in the rulemaking proceeding, whether in a limited or general NGA section 4 rate proceeding or a subsequent NGA section 5 investigation.

46. Discounted rates, by contrast, must remain within the range established by the pipeline's maximum and minimum recourse rates.[69] Accordingly, to the extent a pipeline reduces its maximum rate below the level of a shipper's discounted rate, that shipper's discounted rate will be similarly reduced.

b. Commitment to Make General NGA Section 4 Filing

47. Under this option, an interstate natural gas pipeline would include with its One-time Report a commitment to file either a prepackaged uncontested settlement or, if that is not possible, a general NGA section 4 rate case to revise its rates based upon current cost data. If a pipeline believes that a reduction in its rates by the percentage reduction in its cost of service calculated in its FERC Form No. 501–G would not be reasonable because of other changes in its costs and revenues since its last rate case, this option would permit the pipeline to adjust its rates taking into account all such changes either through an uncontested settlement or a general section 4 rate case. The pipeline would also indicate an approximate time frame regarding when it would file the settlement or make the NGA section 4 filing. The Commission proposes that if the pipeline commits to make such a filing by December 31, 2018, the Commission will not initiate an NGA section 5 investigation of its rates prior to that date.

c. Statement Explaining Why Adjustment in Rates Is not Needed

48. Under this option, an interstate natural gas pipeline would include with its One-time Report a statement explaining why no adjustment in its rates is needed at this time. The Commission recognizes that, despite the reduction in the corporate income tax and the elimination of MLP income tax allowances, a rate reduction may not be justified for a significant number of pipelines. For example, the Commission is aware from its reviews of pipeline Form Nos. 2 and 2–A financial data for prior years that a number of pipelines may currently have rates that do not fully recover their overall cost of service. Accordingly, the reduction in those pipelines' tax costs may not cause their rates to be excessive. The proposed FERC Form No. 501–G will provide information as to whether an interstate pipeline may fall into this category. Accordingly, a pipeline may include with its FERC Form No. 501–G a full explanation of why, after accounting for its reduction in tax costs, its rates do not over recover its overall cost of service and therefore no rate reduction is justified. The pipeline would provide this statement along with any additional supporting information it deems necessary.

49. In addition, interstate pipelines may provide any other reason they believe a rate reduction is not justified at this time. For example, they may assert that an existing rate settlement provides for a moratorium on rate changes that applies to any rate changes that might result from the Tax Cuts and Jobs Act or the Commission's change in policy concerning MLP income tax allowances. Parties agree to rate moratoria in settlements in order to provide rate certainty, and therefore the Commission generally does not disturb a settlement during a rate moratorium.[70]

50. As described above, interested parties will have an opportunity to comment on any assertion by a pipeline that no adjustment to its rates is needed, and the Commission will then determine whether further action is needed with respect to that pipeline.

d. Take No Action

51. Under this option, the interstate natural gas pipeline would take no action other than making the One-time Report. This option is consistent with the fact that the Commission lacks authority under the NGA to order an interstate pipeline to file a rate change under NGA section 4.[71] While the Commission is permitting interstate pipelines to voluntarily file a limited NGA section 4 filing or commit to make general NGA section 4 filing to modify their rates to reflect the reduction in the income tax rates or elimination of the MLP income tax allowance, the Commission is not ordering interstate pipelines to make such filings. However, based on the information contained in the pipeline's FERC Form No. 501–G, which the Commission is proposing to require each interstate pipeline to file, and comments by interested parties, the Commission will, on a case-by-case basis, consider initiating a section 5 investigation of a pipeline's rates, if it appears those rates may be unjust and unreasonable.

B. Initial Rates Under NGA Section 7

52. The issue of how to address the Tax Cuts and Jobs Act in establishing initial rates for new projects arises in a variety of contexts, depending upon the current status of the certificate proceeding and the type of project at

[65] *See, e.g., Trunkline Gas Co.,* 142 FERC ¶ 61,133, at P 24 n.28 (2013).

[66] Negotiated Rate Policy Statement, 74 FERC ¶ 61,076 at 61,225–61,226.

[67] *Northern Natural Gas Co.,* 105 FERC ¶ 61,299, at PP 15–16 (2003).

[68] *Columbia Gulf Transmission Co.,* 109 FERC ¶ 61,152, at P 13, *reh'g denied,* 111 FERC ¶ 61,338 (2005). *See also Iberdrola Renewables, Inc.* v. *FERC,* 597 F.3d 1299, 1305 (D.C. Cir. 2010).

[69] *Columbia Gulf,* 109 FERC ¶ 61,152 at P 16.

[70] *Iroquois Gas Transmission System L.P.,* 69 FERC ¶ 61,165, at 61,631 (1994); *JMC Power Projects* v. *Tennessee Gas Pipeline Co.,* 69 FERC ¶ 61,162 (1994), *reh'g denied,* 70 FERC ¶ 61,168, at 61,528 (1995), *aff'd, Ocean States Power* v. *FERC,* 84 F.3d 1453 (D.C. Cir. 1996).

[71] *Pub. Serv. Comm. of New York* v. *FERC,* 866 F.2d 487, 492 (D.C. Cir. 1989).

issue. For greenfield pipelines such as PennEast,[72] the Commission added a condition to the certificate order directing the company to recalculate its initial rates consistent with the Tax Cuts and Jobs Act when it files its compliance tariff records before going into service. For other filings, such as the Transco St. James Project,[73] the Commission estimated downward the incremental rate in order to ensure analysis of the appropriate initial rate.

53. For pending incremental expansion certificate filings without near-term deadlines, Commission staff has issued data requests to pipelines directing them to provide an adjusted cost of service and recalculation of the proposed initial recourse rates consistent with the Tax Cuts and Jobs Act. The Commission will take these responses into account when evaluating and approving initial rates.

54. There are a number of certificate projects which have been authorized by the Commission—including approval of initial rates—but which have not yet gone into service. The Commission proposes that existing pipelines, in their FERC Form No. 501–G reports and/or section 154.404 limited NGA section 4 rate reduction filings, address any approved initial rate for services provided by expansion facilities that have not gone into service. We recognize that there is also a finite group of greenfield pipeline projects that have been authorized but are not yet in service and therefore will not file a Form No. 2 or 2A for 2017. As a result, those pipelines also are not required to file a FERC Form No. 501–G report. The Commission proposes to address the issue of the Tax Cuts and Jobs Act and the Revised Policy Statement impact on these pipelines on a case-by-case basis.[74]

C. NGPA Section 311 and Hinshaw Pipelines

55. The Commission believes that its existing regulations and policy concerning the rates charged by NGPA section 311 and Hinshaw pipelines are generally sufficient to provide shippers reasonable rate reductions with respect to the Tax Cuts and Jobs Act and Revised Policy Statement. However, as described below, the Commission is proposing to modify § 284.123 of its regulations to require all NGPA section 311 and Hinshaw pipelines to file a new rate election for interstate service if their rates for intrastate service are reduced to reflect the Tax Cuts and Jobs Act.

56. As described above, § 284.123(b) allows NGPA section 311 and Hinshaw pipelines an election of two different methodologies upon which to base their rates for interstate services.[75] First, § 284.123(b)(1) permits an intrastate pipeline to elect to base its rates on the methodology or rate(s) approved by a state regulatory agency included in an effective firm rate for city-gate service. Second, § 284.123(b)(2) provides that the pipeline may petition for Commission approval of rates and charges using its own data to show its proposed rates are fair and equitable. The Commission has a policy of requiring a review of the rates of each NGPA section 311 and Hinshaw pipeline every five years.[76] Consistent with that policy, when the Commission issues an order approving rates filed by an NGPA section 311 pipeline, the Commission requires the pipeline to file a new rate election within five years. When the Commission approves rates filed by a Hinshaw pipeline, it requires the pipeline to file a cost and revenue study within five years. In addition, the Commission requires NGPA section 311 and Hinshaw pipelines that have elected to use a state rate pursuant to § 284.123(b)(1) to file a new rate election within 30 days after any change in the state rate.[77]

57. The Commission believes that these requirements adequately provide for the approximately 44 NGPA section 311 and Hinshaw pipelines that have elected to use state-derived rates pursuant to § 284.123(b)(1) to pass on to ratepayers the benefit of the reduction in the corporate income tax rate. Pursuant to their rate election, these pipelines are authorized to charge rates approved by their state regulatory agency. Therefore, the decision whether the interstate rates of these pipelines should be reduced to reflect the Tax Cuts and Jobs Act is in the hands of the state regulatory agency. If the state regulatory agency requires any of these pipelines to reduce their intrastate rates to reflect the decreased income tax, Commission policy, as explained above, requires those pipelines to file with the Commission to reduce their interstate rates correspondingly within 30 days of the effective date of the reduced intrastate rates.

58. We now turn to the approximately 61 NGPA section 311 and Hinshaw pipelines which have elected to use Commission-established cost-based rates pursuant to § 284.123(b)(2). Pursuant to our five-year rate review policy, we estimate that almost half of these pipelines will have their rates restated within the next 24 months. In addition, a review of the quarterly transactional reports filed by these pipelines pursuant to § 284.126(b)[78] indicates that these pipelines rarely charge their maximum rates. Instead, they charge discounted rates for most of their transactions so that any reduction in their maximum rates is unlikely to provide significant benefits to the customers in those transactions.

59. However, the Commission believes that, if an NGPA section 311 or Hinshaw pipeline using Commission-established cost-based rates reduces its intrastate rates to reflect the reduced income taxes resulting from the Tax Cuts and Jobs Act, it would be reasonable for that pipeline to make a corresponding reduction in its rates for interstate service. This would give the same rate reduction benefit to any interstate shippers on those pipelines as the intrastate shippers receive, thereby ensuring that the two groups of shippers are treated similarly. Therefore, for the purposes of the Tax Cuts and Jobs Act only, the Commission proposes a new § 284.123(i), which would impose the same re-filing requirement on § 284.123(b)(2) rates as on pipelines electing to use state-derived rates under § 284.123(b)(1). Namely, if any intrastate pipeline adjusts its state-jurisdictional rates to reflect the reduced corporate income tax rates adopted in the Tax Cuts and Jobs Act, then the intrastate pipeline must file a new rate election pursuant to paragraph (b) of this section no later than 30 days after the reduced intrastate rate becomes effective.

60. The Commission notes that, for any pipeline that the Commission does identify that charges an excessive Commission-established cost-based maximum rate to captive shippers (whether through staff investigation or a shipper-filed complaint), the Commission could exercise its authority under NGPA section 311(c) to order any such section 311 intrastate pipeline to

[72] *PennEast Pipeline Co., LLC,* 162 FERC ¶ 61,053, at P 66 (2018).

[73] *Transcontinental Gas Pipe Line Co., LLC,* 162 FERC ¶ 61,050, at P 17 (2018).

[74] For example, the Commission may, under section 5 of the NGA, direct the greenfield pipeline to recalculate its initial recourse rates consistent with the Tax Cuts and Jobs Act and Revised Policy Statement when it files actual tariff records before going into service. *See, e.g., PennEast Pipeline Co., LLC,* 162 FERC ¶ 61,053 at P 66.

[75] 18 CFR 284.123(b) (2017).

[76] *Contract Reporting Requirements of Intrastate Natural Gas Companies,* FERC Stats & Regs. ¶ 31,310 at P 96. Pipelines using state-approved rates pursuant to section 284.123(b)(1) may certify that those rates continue to meet the requirements of section 284.123(b)(1) on the same basis on which they were approved.

[77] 18 CFR 284.123(g)(9)(iii) (2017). *See also Lobo Pipeline Co. L.P.,* 145 FERC ¶ 61,168, at P 5 (2013) and *Atmos Pipeline—Texas,* 156 FERC ¶ 61,094, at P 8 (2016).

[78] 18 CFR 284.126(b) (2012). These reports are set forth in Form No. 549D.

reduce its rates to reflect the reduced income tax rates, and take similar action against any such Hinshaw pipeline under NGA section 5.[79]

61. Finally, the Commission will not take any action with respect to the market-based rates it has approved for some NGPA section 311 and Hinshaw pipelines. Market-based rates are, by definition, subject to change according to market forces, and do not have cost-based rates that directly account for taxes. For such rates, no change is required.

IV. Implementation

62. The Commission proposes staggered dates for pipelines filing the FERC Form No. 501–G report. In the *Implementation Guide* for the proposed FERC Form No. 501–G, 133 interstate natural gas pipelines with cost-based rates are split into four groups. The due date for the first group will be 28 days from the effective date of any final rule in this proceeding, and the due date for each subsequent group will be 28 days from the previous group's due date. When the final due dates are known, the Office of the Secretary will issue a Notice and update the FERC Form No. 501–G *Implementation Guide*. Pipelines may file their FERC Form No. 501–G report earlier than the proposed dates. The Commission will post the FERC Form No. 501–G form and the FERC Form No. 501–G *Implementation Guide* on its website at *http://www.ferc.gov/legal/maj-ord-reg.asp#gas*. As noted in the discussion above, this form is in spreadsheet format. The Commission proposes to require that the form be filed with the Commission in the same spreadsheet format. Respondents should not modify the formulas. If respondents, in addition to the required spreadsheet version of the report, wish to attach a PDF version of the report, they may do so. The Commission proposes to require that FERC Form No. 501–G forms be filed through eTariff. The Commission will establish a new Type of Filing Code (TOFC)[80] just for these reports. Respondents may include with this filing, as appropriate, a statement explaining why no adjustment in its rates is needed, or their commitment to make a general NGA section 4 rate case filing in lieu of a limited NGA section 4 filing as permitted by § 154.404. The *Implementation Guide* provides contact information for Commission staff if assistance is needed regarding FERC Form No. 501–G.

63. For the limited NGA section 4 rate reduction option proposed in § 154.404, the Commission proposes to establish a new TOFC. Pipelines are required to incorporate by reference their filed FERC Form No. 501–G as a supporting document. No other documentation is necessary if the pipelines propose to reduce their rates by the percentage shown on their FERC Form No. 501–G. Pipelines may file a § 154.404 rate reduction earlier than the proposed FERC Form No. 501–G compliance dates.

64. Each report and limited NGA section 4 filing will receive a new root docket number. The Commission will issue a Notice for each report and filing, with interventions and comments due under the standard § 154.210 notice period.[81] The following table lists the proposed new TOFCs. FERC Form No. 501–G is a one-time form. As such, the Commission proposes to retire these TOFCs after the end of the staggered compliance dates provided in the FERC Form No. 501–G *Implementation Guide*.

Type of filing code	Filing title	Citation	Type of filing category
1430	FERC Form No. 501–G Report	260.402	Compliance.
1440	Limited Sec. 4 Tax Reduction	154.404	Normal/Statutory.

65. Intrastate pipelines with cost-based rates established pursuant to § 284.123(b)(2) of the Commission's regulations that are filing to reduce rates pursuant to proposed § 284.123(i) may use any appropriate existing TOFC under the NGPA Gas Tariff Program options.

V. Regulatory Requirements

A. Information Collection Statement

66. The Office of Management and Budget (OMB) regulations require that OMB approve certain reporting, record keeping, and public disclosure requirements (information collection) imposed by an agency.[82] Therefore, the Commission is submitting its proposed information collection to OMB for review in accordance with section 3507(d) of the Paperwork Reduction Act of 1995. Upon approval of a collection of information, OMB will assign an OMB control number and an expiration date. Respondents subject to the filing requirements of a rule will not be penalized for failing to respond to the collection of information unless the collection of information displays a valid OMB control number.

67. *Public Reporting Burden:* The overall proposed data collection (FERC–501G, One-time Report on Rate Effect of the Tax Cuts and Jobs Act) includes the following requirements.

68. The Commission has identified 133 interstate natural gas pipelines with cost-based rates that will be required to file the proposed FERC Form No. 501–G. That figure is based upon a review of the pipeline tariffs on file with the Commission. Interstate natural gas pipelines have four options as to how to address the results of the formula contained in FERC Form No. 501–G. Each option has a different burden profile and a different cost per response. Companies will make their own business decisions as to which option they will select, thus the estimate for the number of respondents for each option as shown in the table below is just an estimate.

69. The number of NGPA section 311 and Hinshaw pipelines that will be required to file a rate case pursuant to proposed § 284.123(i) is a function of state actions outside of the control of the Commission. Thus, the estimate for the number of respondents for NGPA section 311 and Hinshaw pipelines filing a rate case in compliance with proposed § 284.123(i) as shown in the table below is just an estimate.

70. Based on these assumptions, we estimate the one-time burden and cost[83]

[79] The courts have held that the Commission's conditioning authority under NGPA section 311(c) permits the Commission to order changes in section 311 pipelines' rates, terms, and conditions of service. *See Associated Gas Distributors* v. *FERC,* 824 F.2d 981, 1016–7 (D.C. Cir. 1987). *See also Bay Gas Storage Co.,* 126 FERC ¶ 61,018, at PP 22–24 (2009) (requiring a prospective change in intrastate pipeline's Statement of Operating Conditions).

[80] The type of filing business process categories are described in the *Implementation Guide for Electronic Filing of Parts 35, 154, 284, 300, and 341 Tariff Filings* (November 14, 2016), found on the Commission's website, *http://www.ferc.gov/docs-filing/etariff/implementation-guide.pdf*.

[81] 18 CFR 154.210 (2017).

[82] 5 CFR 1320.11 (2017).

[83] The estimated average hourly cost of $79.77 (rounded) assumes equal time is spent by an accountant, management, lawyer, and office and administrative support. The average hourly cost (salary plus benefits) is: $53.00 for accountants (occupation code 13–2011), $81.52 for management (occupation code 11–0000), $143.68 for lawyers (occupation code 23–0000), and $40.89 for office and administrative support (occupation code 43–

for the information collection requirements as follows.

FERC–501G: ONE-TIME REPORT ON RATE EFFECT OF THE TAX CUTS AND JOBS ACT

	Number of respondents (1)	Number of responses per respondent (2)	Total responses (3)	Avg. burden hr. per response (4)	Avg. cost per response (5)	Total burden hours (3)*(4)=(6)	Total cost ($) (3)*(5)=(7)
Interstate Natural Gas Pipelines with Cost-Based Rates							
FERC Form No. 501–G, One-time Report[84]	133	1	133	9	718	1,197	95,485
Optional Response							
No Response	53	0	0	0	0	0	0
Case for no change	64	1	64	5	399	320	25,526
Limited Sec 4 filing[85]	15	1	15	6	479	90	7,179
General Sec. 4 filing[86]	1	1	1	[87] 512	40,842	512	40,842
NGPA section 311 and Hinshaw Pipelines with Cost-Based Rates							
NGPA rate filing[88]	[89] 15	1	15	24	1,914	360	28,717
Total	[90] 148		228			2,479	197,749

71. The Commission does not expect any mandatory or voluntary reporting requirements other than those listed above.

72. *Action:* Proposed information collection, FERC–501G (One-time Report on Rate Effect of the Tax Cuts and Jobs Act).

73. *OMB Control No.:* To be determined.

74. *Respondents for this Rulemaking:* Interstate natural gas pipelines with cost-based rates, and certain NGPA section 311 and Hinshaw pipelines.

75. *Frequency of Information:* One-time, for each indicated reporting requirement.

76. *Necessity of Information:* The Commission requires information in order to determine the effect of the Tax and Jobs Act on the rates of natural gas pipelines to ensure those rates continue to be just and reasonable.

77. *Internal Review:* The Commission has reviewed the proposed information collection requirements and has determined that they are necessary. These requirements conform to the Commission's need for efficient information collection, communication, and management within the energy industry. The Commission has specific, objective support for the burden estimates associated with the information collection requirements.

78. The Commission requests comments on the utility of the proposed information collection, the accuracy of the burden estimates, how the quality, quantity, and clarity of the information to be collected might be enhanced, and any suggested methods for minimizing the respondent's burden, including the use of automated information techniques. Interested persons may obtain information on the reporting requirements or submit comments by contacting the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426 (Attention: Ellen Brown, Office of the Executive Director, (202) 502–8663, or email *DataClearance@ferc.govmailto:*). Comments may also be sent to the Office of Management and Budget (Attention: Desk Officer for the Federal Energy Regulatory Commission), by email at *oira_submission@omb.eop.gov.*

B. Environmental Analysis

79. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[91] The actions proposed to be taken here fall within categorical exclusions in the Commission's regulations for rules regarding information gathering, analysis, and dissemination, and for rules regarding sales, exchange, and transportation of natural gas that require no construction of facilities.[92] Therefore, an environmental review is unnecessary and has not been prepared in this rulemaking.

C. Regulatory Flexibility Act Certification

80. The Regulatory Flexibility Act of 1980 (RFA)[93] generally requires a description and analysis of rules that will have significant economic impact on a substantial number of small entities. The Commission is not required to make such analysis if proposed regulations would not have such an effect.

81. As noted in the above Information Collection Statement, approximately 133 interstate natural gas pipelines, both large and small, are respondents subject to the requirements adopted by this rule. In addition, the Commission estimates that another 59 NGPA natural gas pipelines may be required to file restated rates pursuant to proposed § 284.123(i). However, the actual

000). (The figures are taken from the Bureau of Labor Statistics, October 2017 for the year ending May 2016, figures at *http://www.bls.gov/oes/current/naics2_22.htm.*).

[84] 18 CFR 260.402 (proposed).

[85] 18 CFR 154.404 (proposed).

[86] 18 CFR 154.312 (2017).

[87] The estimate for hours is based on the estimated average hours per response for the FERC–545 (OMB Control No. 1902–0154), with general NGA section 4, 18 CFR 154.312 filings weighted at a ratio of 20 to one.

[88] 18 CFR 284.123(i) (proposed).

[89] Estimate of number of respondents assumes that states will act within one year to reduce NGPA section 311 and Hinshaw pipeline rates to reflect the Tax Cuts and Jobs Act.

[90] Number of unique respondents = (One-time FERC Form No. 501–G) + (NGPA rate filing).

[91] Order No. 486, *Regulations Implementing the National Environmental Policy Act,* 52 FR 47897 (Dec. 17, 1987), FERC Stats. & Regs. ¶ 30,783 (1987).

[92] *See* 18 CFR 380.4(a)(2)(ii), 380.4(a)(5) and 380.4(a)(27) (2017).

[93] 5 U.S.C. 601–612 (2012).

number of NGPA section 311 and Hinshaw pipelines that will be required to file is a function of actions taken at the state level. The Commission estimates that only 15 of the 59 NGPA natural gas pipelines will file a rate case pursuant to proposed § 284.123(i).

82. Most of the natural gas pipelines regulated by the Commission do not fall within the RFA's definition of a small entity,[94] which is currently defined for natural gas pipelines as a company that, in combination with its affiliates, has total annual receipts of $27.5 million or less.[95] For the year 2016 (the most recent year for which information is available), only five of the 133 interstate natural gas pipeline respondents had annual revenues in combination with its affiliates of $27.5 million or less and therefore could be considered a small entity under the RFA. This represents 3.8 percent of the total universe of potential NGA respondents that may have a significant burden imposed on them. For NGPA section 311 and Hinshaw pipelines, three of the 59 potential respondents could be considered a small entity, or 5.1 percent. However, it is not possible to predict whether any of these small companies may be required to make a rate filing. In view of these considerations, the Commission certifies that this proposed rule's amendments to the regulations will not have a significant impact on a substantial number of small entities.

D. Comment Procedures

83. The Commission invites interested persons to submit comments on the matters and issues proposed in this notice to be adopted, including any related matters or alternative proposals that commenters may wish to discuss. Comments are due April 25, 2018. Comments must refer to Docket No. RM18–11–000, and must include the commenter's name, the organization they represent (if applicable), and their address in their comments.

84. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's website at *http://www.ferc.gov*. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

85. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

86. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

E. Document Availability

87. In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street NE, Room 2A, Washington, DC 20426.

88. From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

89. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at 202–502–8371, TTY 202–502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov*.

90. The proposed FERC Form No. 501–G and the *Implementation Guide* are available on the Commission's eLibrary and website. These will not be published in the **Federal Register** or the Code of Federal Regulations.

List of Subjects in 18 CFR Parts 154, 260, & 284

Part 154

Natural gas, Pipelines, Reporting and recordkeeping requirements.

Part 260

Natural gas, Reporting and recordkeeping requirements.

Part 284

Continental shelf, Natural gas, Reporting and recordkeeping requirements.

By direction of the Commission.

Issued: March 15, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

In consideration of the foregoing, the Commission proposes to amend parts 154, 260, and 284, Chapter I, Title 18, Code of Federal Regulations, as follows.

PART 154— RATE SCHEDULES AND TARIFFS

■ 1. The authority citation for part 154 continues to read as follows:

Authority: 15 U.S.C. 717–717w; 31 U.S.C. 9701; 42 U.S.C. 7102–7352.

■ 2. Add § 154.404 to read as follows:

§ 154.404 Tax Cuts and Jobs Act Rate Reduction.

(a) *Purpose.* The limited rate filing permitted by this section is intended to permit:

(1) A natural gas company subject to the federal corporate income tax to reduce its maximum rates to reflect the decrease in the federal corporate income tax rate pursuant to the Tax Cuts and Jobs Act of 2017,

(2) A natural gas company organized as a master limited partnership to reduce its maximum rates to reflect the elimination of any tax allowance included in its current rates, and

(3) A natural gas company organized as a partnership (but not a master limited partnership) either

(i) To eliminate any income tax allowance included in its current rates or

(ii) To justify why it should continue to receive an income tax allowance and to reduce its maximum rates to reflect the decrease in the federal income tax rates applicable to partners pursuant to the Tax Cuts and Jobs Act of 2017.

(b) *Applicability.* (1) Except as provided in paragraph (b)(2) of this section, any natural gas company with cost-based rates may submit the limited rate filing permitted by this section.

(2) If a natural gas company has a rate case currently pending before the Commission in which the change in the federal corporate income tax rate can be reflected, the public utility may not use this section to adjust its rates.

(c) *Determination of Rate Reduction.* A natural gas company submitting a filing pursuant to this section shall reduce:

(1) Its maximum reservation rates for firm service, and

[94] *See* 5 U.S.C. 601(3) citing section 3 of the Small Business Act, 15 U.S.C. 623. Section 3 of the SBA defines a ''small business concern'' as a business which is independently owned and operated and which is not dominant in its field of operation (2017).

[95] 13 CFR 121.201 (Subsector 486—Pipeline Transportation; North American Industry Classification System code 486210; Pipeline Transportation of Natural Gas) (2017). ''Annual Receipts'' are total income plus cost of goods sold.

(2) Its one-part rates that include fixed costs, by

(3) The percentage calculated consistent with the instructions to FERC Form No. 501–G prescribed by § 260.402 of this chapter.

(d) *Timing.* Any natural gas company filing to reduce its rates pursuant to this section must do so no later than the date that it files its FERC Form No. 501–G pursuant to § 260.402.

(e) *Hearing Issues.* (1) The only issues that may be raised by Commission staff or any intervenor under the procedures established in this section are:

(i) Whether or not the natural gas company may file under this section.

(ii) Whether or not the percentage reduction permitted in § 154.402(c)(iii) has been properly applied, and

(iii) Whether or not the correct information was used in that calculation.

(2) Any other issue raised will be severed from the proceeding and dismissed without prejudice.

PART 260—STATEMENTS AND REPORTS (SCHEDULES)

■ 3. The authority citation for part 260 continues to read as follows:

Authority: 15 U.S.C. 717–717w, 3301–3432; 42 U.S.C. 7101–7352.

■ 4. Add § 260.402 to read as follows:

§ 260.402 FERC Form No. 501–G. One-time Report on Rate Effect of the Tax Cuts and Jobs Act.

(a) *Prescription.* The form for the One-time Report on Rate Effect of the Tax Cuts and Jobs Act of 2017, designated herein as FERC Form No. 501–G is prescribed.

(b) *Filing requirement.* (1) *Who must file.* (i) Except as provided in paragraph (b)(1)(ii) of this section, every natural gas company that is required under this part to file a Form No. 2 or 2A for 2017 and has cost-based rates for service under any rate schedule that were filed electronically pursuant to part 154 of this chapter, must prepare and file with the Commission a FERC Form No. 501–G pursuant to the definitions and instructions set forth in that form and the Implementation Guide.

(ii) A natural gas company whose rates are being examined in a general rate case under section 4 of the Natural Gas Act or in an investigation under section 5 of the Natural Gas Act need not file FERC Form No. 501–G. In addition, a natural gas company that files an uncontested settlement of its rates pursuant to § 385.207(a)(5) of this chapter after March 26, 2018 need not file FERC Form No. 501–G.

(2) FERC Form No. 501–G must be filed as prescribed in § 385.2011 of this chapter as indicated in the instructions set out in the form and Implementation Guide, and must be properly completed and verified. Each natural gas company must file FERC Form No. 501–G according to the schedule set forth in the Implementation Guide set out in that form. Each report must be prepared in conformance with the Commission's form and guidance posted and available for downloading from the FERC website (*http://www.ferc.gov*). One copy of the report must be retained by the respondent in its files.

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY ACT OF 1978 AND RELATED AUTHORITIES

■ 5. The authority citation for part 284 continues to read as follows:

Authority: 15 U.S.C. 717–717z, 3301–3432; 42 U.S.C. 7101–7352; 43 U.S.C. 1331–1356.

■ 6. In § 284.123, add paragraph (i) to read as follows:

§ 284.123 Rates and charges.

* * * * *

(i) If an intrastate pipeline's rates on file with the appropriate state regulatory agency are reduced to reflect the reduced income tax rates adopted in the Tax Cuts and Jobs Act of 2017, the intrastate pipeline must file a new rate election pursuant to paragraph (b) of this section not later than 30 days after the reduced intrastate rate becomes effective. This requirement applies regardless of whether the intrastate pipeline's existing interstate rates are based on § 284.123(b)(1) or (2).

[FR Doc. 2018–05669 Filed 3–23–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 1100, 1140, and 1143

[Docket No. FDA–2017–N–6107]

RIN 0910–AH88

Regulation of Premium Cigars

AGENCY: Food and Drug Administration, HHS.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Food and Drug Administration (FDA) is issuing this advance notice of proposed rulemaking (ANPRM) to obtain information related to the regulation of premium cigars under the Federal Food, Drug, and Cosmetic Act (FD&C Act), as amended by the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act), and regulations regarding the sale and distribution of tobacco products. Specifically, this ANPRM is seeking comments, data, research results, or other information that may inform regulatory actions FDA might take with respect to premium cigars.

DATES: Submit either electronic or written comments by June 25, 2018.

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 June 25, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of June 25, 2018. 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–6107 for ''Regulation of Premium Cigars.'' 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:

Nathan Mease or Deirdre Jurand, Center for Tobacco Products, Food and Drug Administration, 10903 New Hampshire Ave., Silver Spring, MD 20993, 1–877–287–1373, *AskCTP@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

On July 28, 2017, FDA announced a new comprehensive plan for tobacco and nicotine regulation that will serve as a multi-year roadmap to better protect children and significantly reduce tobacco-related disease and death. As part of that announcement, FDA stated that it would solicit additional comments and scientific data related to the patterns of use and resulting public health impacts from premium cigars and consider the appropriate regulatory status of premium cigars. The goal is to ensure that FDA has a broad scientific and regulatory foundation to efficiently and effectively implement the Tobacco Control Act. Moreover, the regulatory considerations with respect to premium cigars, their use, and related public health issues continue to be of significant interest to some stakeholders, as well as a topic of ongoing and emerging research. Given the ongoing interest from many parties and sectors, such as industry and Members of Congress, in the regulatory status of premium cigars, FDA is issuing this ANPRM to request relevant new and different information, data, and analysis not submitted in response to FDA's proposed deeming rule (79 FR 23142, discussed below) that could inform FDA's regulation of premium cigars.

The Tobacco Control Act was enacted on June 22, 2009, amending the FD&C Act and providing FDA with the authority to regulate tobacco products (Pub. L. 111–31). Specifically, section 101(b) of the Tobacco Control Act amends the FD&C Act by adding a new chapter that provides FDA with authority over tobacco products. Section 901 of the FD&C Act (21 U.S.C. 387a), as amended by the Tobacco Control Act, states that the new chapter in the FD&C Act (chapter IX—Tobacco Products) (21 U.S.C. 387 through 387u) [1] applies to all cigarettes, cigarette tobacco, roll-your-own tobacco, smokeless tobacco, and any other tobacco products that the Secretary of Health and Human Services by regulation deems to be subject to the chapter.

In the **Federal Register** of April 25, 2014 (79 FR 23142), FDA published a proposed rule seeking to deem additional products meeting the statutory definition of ''tobacco product'' in section 201(rr) of the FD&C Act (21 U.S.C. 321(rr)), except accessories to those products, to be subject to chapter IX of the FD&C Act (the proposed deeming rule). In that proposed rule, FDA proposed two, alternative, options: Option 1 proposed to extend the Agency's tobacco product authorities to all products that meet the definition of ''tobacco product'' in the FD&C Act, except accessories of newly deemed tobacco products, while Option 2 proposed to extend the Agency's tobacco product authorities to all tobacco products set forth in Option 1, except so-called premium cigars (79 FR 23142 at 23150 through 23152). After carefully considering the public comments on the rule, the Agency decided to adopt Option 1, concluding that there was no appropriate public health justification to exclude premium cigars from regulation. Specifically, FDA concluded that: (1) All cigars pose serious negative health risks, (2) the available evidence does not provide a basis for FDA to conclude that the patterns of premium cigar use sufficiently reduce the health risks to warrant exclusion, and (3) premium cigars are used by youth and young adults. FDA noted that, although some premium cigar smokers might smoke these products infrequently or report that they do not inhale, these behaviors do not negate the adverse health effects of tobacco smoke or demonstrate that cigars do not cause secondhand smoke-related disease in others. Consequently, premium cigars were included in the scope of the final deeming rule published on May 10, 2016 (81 FR 28974 at 29020) to more effectively protect the public health.

We received numerous comments on the deeming proposed rule with respect to premium cigars, both in favor of and against regulating these products. However, the comments against regulation provided little data to support the opinions expressed and, where studies were submitted, provided little information about the studies cited.

FDA is seeking comments, evidence, information, data, and analysis that were not submitted in response to the proposed deeming rule, or that may have become available since then, that could further inform FDA's thinking about the regulation of premium cigars. One example of the type of information that would be responsive to this request is a recent publication that assessed use patterns and related behaviors of smokers of ''premium'' and other cigar types (Ref. 1). This paper, the PATH

[1] In the U.S. Code, the tobacco control provisions constitute a new Subchapter IX of Chapter 9, which constitutes the Federal Food, Drug, and Cosmetic Act.

Study Paper, analyzed findings from the 2013–2014 Population Assessment of Tobacco and Health (PATH) Study with a focus on smokers of filtered cigars, cigarillos, and traditional cigars, which were further classified by study authors as either ''premium'' or ''non-premium.'' [2] With respect to this group of smokers, the PATH Study Paper described similarities and differences in user characteristics, tobacco use patterns, and purchasing behaviors according to cigar type. Among the findings stated in this PATH Study Paper were that those who smoked ''premium'' cigars tended to report smoking them on fewer days compared with smokers of the other cigar types and reported consuming fewer cigars per day, on average, compared with smokers of other cigar types. In its conclusion, the PATH Study Paper highlighted the importance of adequately describing the cigar type studied and, where appropriate, differentiating results by cigar type.

When reviewing the PATH Study Paper and any other studies concerning cigars, it should be noted that tobacco research studies have not used a single, consistent definition of ''premium'' cigars. As demonstrated by FDA's request for definitional information in this document, FDA considers it important to understand what definitions of premium cigar are used when analyzing and comparing results across studies and papers.

For the purposes of the questions in this ANPRM, ''cigar'' means a tobacco product that: (1) Is not a cigarette and (2) is a roll of tobacco wrapped in leaf tobacco or any substance containing tobacco (see 21 CFR 1143.1).

II. Requests for Comments and Information

FDA is seeking comments, data, research results, and other information related to the following topics:

- Definition of premium cigars
- Use patterns of premium cigars
- Public health considerations associated with premium cigars

Please provide any evidence or other information supporting your comments. Also, provide the definition of ''premium cigar,'' ''youth,'' and ''young adult'' used for the studies, information, or views provided in your responses.

[2] While authors of the PATH Study Paper included FDA employees, the definition of premium cigars reported in the PATH Study Paper was used for research purposes only, and does not necessarily reflect FDA's current thinking on regulatory policy.

A. Definition of Premium Cigars

1. Explain what data may be used to assess (a) the universe of cigar products that are currently available to consumers and (b) their relevant characteristics, including ''premium'' status. How can available sources of information, such as manufacturer registrations and/or product listings with FDA, be used in this assessment?

2. Explain what you believe to be the particular defining characteristics of premium cigars. These characteristics could include, but not be limited to:

a. Size (*e.g.,* length, ring gauge, total weight).

b. Tobacco filler type and minimum required percentages of each filler per cigar.

c. Fermentation type.

d. Wrapper and binder composition (*e.g.,* whole leaf, reconstituted or homogenized tobacco leaf).

e. Where the tobacco used for premium cigar filler or wrappers is grown, and whether differences in growing practices for that tobacco, as compared to tobacco used in other cigars, result in different health impacts.

f. Presence or absence of a filter.

g. Presence or absence of a mouthpiece.

h. Manufacturing and assembly process (*e.g.,* including any production by hand or by machine).

i. Rate of production (*e.g.,* ''produced at no more than [insert number] units per minute'').

j. Presence or absence of flavor imparting compounds, flavor additives, or characterizing flavors other than tobacco.

k. Presence or absence of any additives other than cigar glue.

l. Nicotine content.

m. Tar delivery amounts (and how this should be defined and measured).

n. Carbon monoxide delivery amounts (and how this should be defined and measured).

o. Retail price.

p. Frequency with which price changes are initiated by particular levels in the distribution chain (retailers, manufacturers, importers, and/or distributors).

q. Packaging quantity and size.

r. Any action directed to consumers, by a retailer or manufacturer, such as through labeling, advertising, or marketing, which would reasonably be expected to result in consumers believing that the tobacco product is a premium cigar.

3. If available to you, provide annual sales data, including market size and volume, for products that you believe should be categorized as premium cigars, along with the information's source and the definition of ''premium cigar'' used in the data provided.

B. Use Patterns of Premium Cigars

If available to you, provide the following information related to the use patterns of premium cigars generally and among youth and young adults specifically:

1. Studies or information regarding the potential role of premium cigars on tobacco initiation and progression to use of other tobacco products, especially compared and contrasted against the potential roles of other cigars.

2. Studies or information regarding behavioral data related to dual use of premium cigars and other tobacco products, especially compared and contrasted against dual use of other cigars.

3. Studies or information regarding the frequency and intensity (*e.g.,* number of cigars smoked per day, depth of smoke inhalation, number of days smoking during a particular time period) of premium cigar use, especially compared and contrasted against other cigars.

4. Studies or information regarding the proportion of premium cigar smokers showing symptoms of dependence, especially compared and contrasted against other cigars.

5. Studies or information regarding the abuse liability of premium cigars compared with other tobacco products, especially compared and contrasted against other cigars.

6. Studies or information regarding the impact of premium cigar labeling, advertising, and marketing efforts on patterns of use, especially compared and contrasted against other cigars.

7. Information on the extent to which users of other tobacco products might switch to premium cigars if FDA were to exempt premium cigars from regulation or to regulate premium cigars differently from other cigars, and the measures that could be taken to prevent this from occurring. Where you discuss the potential effects of FDA regulating premium cigars differently from other cigars, please describe the specific different treatment that you envision.

C. Public Health Considerations

If available to you, provide the following information related to public health considerations:

1. Studies or information on any applicable manufacturing, marketing, sale, distribution, advertising, labeling, and/or packaging requirements and restrictions in the FD&C Act and its implementing regulations, and whether they should be applied differently to

premium cigars compared to other tobacco products, including other cigars.

2. Studies or information regarding nicotine concentrations for premium cigars compared to other tobacco products, including other cigars.

3. Studies or information regarding the risk of oral cancer, esophageal cancer, laryngeal cancer, lung cancer, or any other form of cancer associated with premium cigars, especially compared and contrasted with risks for other cigars.

4. Studies or information regarding the risk of heart disease associated with premium cigars, especially compared and contrasted with risks for other cigars.

5. Studies or information regarding the risk of aortic aneurysm associated with premium cigars, especially compared and contrasted with risks for other cigars.

6. Studies or information regarding the risk of periodontal disease associated with premium cigars, especially compared and contrasted with risks for other cigars.

7. Studies or information regarding the risk of stroke associated with premium cigars, especially compared and contrasted with risks for other cigars.

8. Studies or information regarding the risk of chronic obstructive pulmonary disease associated with premium cigars, especially compared and contrasted with risks for other cigars.

9. Studies or information regarding risk of cancers of the mouth and throat for premium cigar users who do not inhale or who report that they do not inhale, especially compared and contrasted with risks for other cigars.

10. Studies or information on the impact of premium cigar use on other public health endpoints, including users and non-users, especially compared and contrasted with the impact of other cigars.

11. Studies or information regarding the addictiveness of premium cigars.

12. Studies or information regarding consumer perceptions of the health risks of premium cigars when compared to other tobacco products, including other cigars.

13. Studies or information regarding consumer perceptions of the addictiveness of premium cigars, especially compared and contrasted with perceptions for other cigars.

14. Studies or information on the required warning statements, shown below and which will be required to appear on cigar packaging and advertising in the near future (21 CFR 1143.5(a)(1)). Comment on whether any additional or alternative warning statements would be appropriate and provide your suggested language and any relevant studies or information.

a. WARNING: Cigar smoking can cause cancers of the mouth and throat, even if you do not inhale.

b. WARNING: Cigar smoking can cause lung cancer and heart disease.

c. WARNING: Cigars are not a safe alternative to cigarettes.

d. WARNING: Tobacco smoke increases the risk of lung cancer and heart disease, even in nonsmokers.

e. WARNING: Cigar use while pregnant can harm you and your baby; or SURGEON GENERAL WARNING: Tobacco Use Increases the Risk of Infertility, Stillbirth and Low Birth Weight.

f. WARNING: This product contains nicotine. Nicotine is an addictive chemical.

III. Reference

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

1. Corey, C.G., E. Holder-Hayes, A.B. Nguyen, et al. ''U.S. Adult Cigar Smoking Patterns, Purchasing Behaviors, and Reasons for Use According to Cigar Type: Findings From the Population Assessment of Tobacco and Health (PATH) Study, 2013–2014'', *Nicotine & Tobacco Research,* September 15, 2017, available at *https://academic.oup.com/ntr/article/4159211/U-S-adult-cigar-smoking-patterns-purchasing*.

Dated: March 21, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–06047 Filed 3–23–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Parts 57, 70, 72, and 75

[Docket No. MSHA–2014–0031]

RIN 1219–AB86

Exposure of Underground Miners to Diesel Exhaust

AGENCY: Mine Safety and Health Administration, Labor.

ACTION: Request for information; reopening of the rulemaking record for public comments.

SUMMARY: In response to requests from the public, the Mine Safety and Health Administration (MSHA) is reopening the rulemaking record for public comments on the Agency's request for information on Exposure of Underground Miners to Diesel Exhaust.

DATES: The comment period for the request for information, published on June 8, 2016 (81 FR 36826), which closed on January 9, 2018 (82 FR 2284), is reopened. Comments must be received on or before midnight Eastern Standard Time on March 26, 2019.

ADDRESSES: Submit comments and informational materials for the rulemaking record, identified by RIN 1219–AB86 or Docket No. MSHA–2014–0031, by one of the following methods:

- *Federal E-Rulemaking Portal: http://www.regulations.gov*. Follow the on-line instructions for submitting comments.
- *Email: zzMSHA-comments@dol.gov*.
- *Mail:* MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Suite 4E401, Arlington, Virginia 22202–5452.
- *Hand Delivery or Courier:* 201 12th Street South, Suite 4E401, Arlington, Virginia, between 9:00 a.m. and 5:00 p.m. Monday through Friday, except Federal holidays. Sign in at the receptionist's desk on the 4th floor East, Suite 4E401.
- *Fax:* 202–693–9441.

Instructions: All submissions must include ''RIN 1219–AB86'' or ''Docket No. MSHA–2014–0031.'' Do not include personal information that you do not want publicly disclosed; MSHA will post all comments without change to *http://www.regulations.gov* and *http://arlweb.msha.gov/currentcomments.asp,* including any personal information provided.

Docket: For access to the docket to read comments received, go to *http://www.regulations.gov* or *http://arlweb.msha.gov/currentcomments.asp*. To read background documents, go to *http://www.regulations.gov*. Review the docket in person at MSHA, Office of Standards, Regulations, and Variances, 201 12th Street South, Arlington, Virginia, between 9:00 a.m. and 5:00 p.m. Monday through Friday, except Federal Holidays. Sign in at the receptionist's desk in Suite 4E401.

Email Notification: To subscribe to receive an email notification when MSHA publishes rules in the **Federal Register**, go to *http://www.msha.gov/subscriptions*.

FOR FURTHER INFORMATION CONTACT: Sheila A. McConnell, Director, Office of Standards, Regulations, and Variances, MSHA, at *mcconnell.sheila.a@dol.gov* (email), 202–693–9440 (voice); or 202–693–9441 (facsimile). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: On June 8, 2016 (81 FR 36826), MSHA published a request for information (RFI) on Exposure of Underground Miners to Diesel Exhaust. The RFI sought input from the public that will help MSHA evaluate the Agency's existing standards and policy guidance on controlling miners' exposures to diesel exhaust and to evaluate the effectiveness of the protections now in place to preserve miners' health.

MSHA held four public meetings on the RFI in 2016 (81 FR 41486), and the comment period was scheduled to close on September 6, 2016; however, in response to requests from the public, MSHA extended the comment period until November 30, 2016 (81 FR 58424).

Also in response to requests from stakeholders during the comment period, MSHA and the National Institute for Occupational Safety and Health convened a Diesel Exhaust Health Effects Partnership (Partnership) with the mining industry, diesel engine manufacturers, academia, and representatives of organized labor to gather information regarding the complex questions contained in the RFI. The Partnership provides an opportunity for all relevant stakeholders from the mining community to come together to understand the health effects from underground miners' exposure to diesel exhaust. The Partnership also provides stakeholders an opportunity to consider best practices and new technologies, including engineering controls that enhance control of diesel exhaust exposures to improve protections for miners.

The first meeting of the Partnership was held on December 8, 2016, in Washington, Pennsylvania; and the second meeting was held on September 19, 2017, in Triadelphia, West Virginia. During the comment period and at the first Partnership meeting, MSHA received requests from stakeholders to reopen the rulemaking record for comment on the RFI and allow the comment period to remain open during the Partnership proceedings. In response to those requests, MSHA reopened the record for comment and extended the comment period for one year, until January 9, 2018 (82 FR 2284).

However, since the close of the RFI rulemaking record, MSHA received additional stakeholder requests to reopen the record and further extend the comment period on the RFI during the Partnership proceedings. In response, MSHA is reopening the record and extending the comment period to March 26, 2019. The reopening of the rulemaking record for public comments will allow all interested parties an additional opportunity to re-evaluate all issues related to miners' exposure to diesel exhaust and to determine if improvements can be made.

David G. Zatezalo,

Assistant Secretary of Labor for Mine Safety and Health.

[FR Doc. 2018–05978 Filed 3–23–18; 8:45 am]

BILLING CODE 4520–43–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2017–0117; FRL–9975–53-Region 1]

Approval and Promulgation of Air Quality Implementation Plans; Maine; Infrastructure State Implementation Plan Requirements

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve elements of State Implementation Plan (SIP) submissions from Maine regarding the infrastructure requirements of the Clean Air Act (CAA or Act) for the 2008 lead (Pb), 2008 ozone, and 2010 nitrogen dioxide (NO_2) National Ambient Air Quality Standards (NAAQS). EPA is also proposing to conditionally approve one element of Maine's infrastructure SIP. Finally, EPA is proposing to approve several statutes submitted by Maine in support of its demonstrations that the infrastructure requirements of the CAA have been met. The infrastructure requirements are designed to ensure that the structural components of each state's air quality management program are adequate to meet the state's responsibilities under the CAA.

DATES: Comments must be received on or before April 25, 2018.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OAR–2017–0117 at *https://www.regulations.gov,* or via email to *conroy.dave@epa.gov*. For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *www.epa.gov/dockets/commenting-epa-dockets*.

Publicly available docket materials are available either electronically in *https://www.regulations.gov* or at the U.S. Environmental Protection Agency, Region 1, Air Programs Branch, 5 Post Office Square, Boston, Massachusetts. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays. The interested persons wanting to examine these documents should make an appointment with the office at least 24 hours in advance.

FOR FURTHER INFORMATION CONTACT: Richard P. Burkhart, Air Quality Planning Unit, Air Programs Branch (Mail Code OEP05–02), U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, Suite 100, Boston, Massachusetts, 02109–3912; (617) 918–1664; *burkhart.richard@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever "we," "us," or "our" is used, we mean EPA. This supplementary information section is arranged as follows:

I. What should I consider as I prepare my comments for EPA?

When submitting comments, remember to:

1. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date, and page number).
2. Follow directions—EPA may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
3. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
4. Describe any assumptions and provide any technical information and/or data that you used.
5. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
6. Provide specific examples to illustrate your concerns, and suggest alternatives.
7. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
8. Make sure to submit your comments by the comment period deadline identified.

II. What is the background of these SIP submissions?

A. Which Maine SIP submissions does this rulemaking address?

This rulemaking addresses submissions from the Maine Department of Environmental Protection (ME DEP). The state submitted its infrastructure SIP for each NAAQS on the following dates: 2008 Pb—August 21, 2012; 2008 ozone—June 7, 2013; and 2010 NO_2—June 7, 2013. Also, on April 23, 2013, Maine DEP submitted a SIP revision to incorporate conflict of interest state law provisions into the SIP from 38 Maine Revised Statutes Annotated (MRSA) Section 341–C(7) and 5 MRSA Section 18. The April 23, 2013 SIP revision addresses element E(ii) requirements. Furthermore, on February 14, 2013, Maine submitted a SIP revision addressing amendments to certain provisions of 06–096 Code of Maine Regulations (CMR) Chapters 100 and 115. The February 14, 2013 SIP revision both defines $PM_{2.5}$ and incorporates $PM_{2.5}$ into the Prevention of Significant Deterioration (PSD) permitting program. This submission was supplemented on May 31, 2016. EPA approved these SIP revisions on August 1, 2016 (81 FR 50353) and June 24, 2014 (79 FR 35695). These revisions address element A, as well as elements C, D(i)(II), and (J) as they relate to PSD. Finally, on March 1, 2018, Maine submitted a letter providing information and clarification in support of its infrastructure SIP submittals.

B. Why did the state make these SIP submissions?

Under sections 110(a)(1) and (2) of the CAA, states are required to submit infrastructure SIPs to ensure that their SIPs provide for implementation, maintenance, and enforcement of the NAAQS, including the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS. These submissions must contain any revisions needed for meeting the applicable SIP requirements of section 110(a)(2), or certifications that their existing SIPs for the NAAQS already meet those requirements.

EPA highlighted this statutory requirement in an October 2, 2007 guidance document entitled ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 1997 8-hour ozone and $PM_{2.5}$ National Ambient Air Quality Standards'' (2007 Memo). On September 25, 2009, EPA issued an additional guidance document pertaining to the 2006 $PM_{2.5}$ NAAQS entitled ''Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) National Ambient Air Quality Standards (NAAQS)'' (2009 Memo), followed by the October 14, 2011, ''Guidance on Infrastructure SIP Elements Required Under Sections 110(a)(1) and (2) for the 2008 Lead (Pb) National Ambient Air Quality Standards (NAAQS)'' (2011 Memo). Most recently, EPA issued ''Guidance on Infrastructure State Implementation Plan (SIP) Elements under Clean Air Act Sections 110(a)(1) and (2)'' on September 13, 2013 (2013 Memo). The SIP submissions referenced in this rulemaking pertain to the applicable requirements of sections 110(a)(1) and (2) and address the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

C. What is the scope of this rulemaking?

EPA is acting upon the SIP submissions from Maine that address the infrastructure requirements of CAA sections 110(a)(1) and (2) for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

The requirement for states to make an infrastructure SIP submission arises out of CAA sections 110(a)(1) and (2). Pursuant to these sections, each state must submit a SIP that provides for the implementation, maintenance, and enforcement of each primary or secondary NAAQS. States must make such SIP submission ''within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a new or revised NAAQS.'' This requirement is triggered by the promulgation of a new or revised NAAQS and is not conditioned upon EPA's taking any other action. Section 110(a)(2) includes the specific elements that ''each such plan'' must address.

EPA commonly refers to such SIP submissions made for the purpose of satisfying the requirements of CAA sections 110(a)(1) and (2) as ''infrastructure SIP'' submissions. Although the term ''infrastructure SIP'' does not appear in the CAA, EPA uses the term to distinguish this particular type of SIP submission from submissions that are intended to satisfy other SIP requirements under the CAA, such as ''nonattainment SIP'' or ''attainment plan SIP'' submissions to address the nonattainment planning requirements of part D of title I of the CAA.

This rulemaking will not cover three substantive areas that are not integral to acting on a state's infrastructure SIP submission: (i) Existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources (''SSM'' emissions) that may be contrary to the CAA and EPA's policies addressing such excess emissions; (ii) existing provisions related to ''director's variance'' or ''director's discretion'' that purport to permit revisions to SIP-approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA (''director's discretion''); and, (iii) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's ''Final New Source Review (NSR) Improvement Rule,'' 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (''NSR Reform''). Instead, EPA has the authority to address each one of these substantive areas separately. A detailed history, interpretation, and rationale for EPA's approach to infrastructure SIP requirements can be found in EPA's May 13, 2014, proposed rule entitled, ''Infrastructure SIP Requirements for the 2008 Lead NAAQS'' in the section, ''What is the scope of this rulemaking?'' *See* 79 FR 27241 at 27242–45.

III. What guidance is EPA using to evaluate these SIP submissions?

EPA reviews each infrastructure SIP submission for compliance with the applicable statutory provisions of section 110(a)(2), as appropriate. Historically, EPA has elected to use non-binding guidance documents to make recommendations for states' development and EPA review of infrastructure SIPs, in some cases conveying needed interpretations on newly arising issues and in some cases conveying interpretations that have already been developed and applied to individual SIP submissions for particular elements. EPA guidance applicable to these infrastructure SIP submissions is embodied in several documents. Specifically, attachment A of the 2007 Memo (Required Section 110 SIP Elements) identifies the statutory elements that states need to submit in order to satisfy the requirements for an infrastructure SIP submission. The 2009 Memo provides additional guidance for certain elements regarding the 2006 $PM_{2.5}$ NAAQS, and the 2011 Memo provides guidance specific to the 2008 Pb NAAQS. Lastly, the 2013 Memo identifies and further clarifies aspects of infrastructure SIPs that are not NAAQS-specific.

IV. What is the result of EPA's review of these SIP submissions?

EPA is soliciting comment on our evaluation of Maine's infrastructure SIP submissions in this notice of proposed rulemaking. In each of Maine's submissions, a detailed list of Maine Laws and, previously SIP-approved Air Quality Regulations, show precisely how the various components of Maine's EPA-approved SIP meet each of the requirements of section 110(a)(2) of the CAA for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS, as applicable. The following review evaluates the state's submissions in light of section 110(a)(2) requirements and relevant EPA guidance.

A. Section 110(a)(2)(A)—Emission Limits and Other Control Measures

This section (also referred to in this action as an element) of the Act requires SIPs to include enforceable emission limits and other control measures, means or techniques, schedules for compliance, and other related matters. However, EPA has long interpreted emission limits and control measures for attaining the standards as being due when nonattainment planning requirements are due.[1] In the context of an infrastructure SIP, EPA is not evaluating the existing SIP provisions for this purpose. Instead, EPA is only evaluating whether the state's SIP has basic structural provisions for the implementation of the NAAQS.

Maine's infrastructure submittals for this element cite Maine laws and regulations that include enforceable emissions limitations and other control measures, means or techniques, as well as schedules and timetables for compliance to meet the applicable requirements of the CAA. Maine DEP statutory authority with respect to air quality is set out in 38 MRSA Chapter 4, ''Protection and Improvement of Air.'' Legislative authority giving DEP general authority to promulgate Regulations is codified at 38 MRSA Chapter 2, Subchapter 1: ''Organization and Powers.''[2] Statutory authority to establish emission standards and regulations implementing ambient air quality standards is contained in 38 MRSA Chapter 4, sections 585 and 585–A.

The Maine submittals cite more than two dozen specific rules that the state has adopted to control the emissions of Pb, volatile organic compounds[3] (VOCs), and NO_X. A few, with their EPA approval citation are listed here: 06–096 Code of Maine Regulations (CMR) Chapter 102, ''Open Burning Regulation'' (73 FR 9459, February 21, 2008); 06–096 CMR Chapter 103, ''Fuel Burning Equipment Particulate Emission Standard'' (50 FR 7770, February 26, 1985); and 06–096 CMR Chapter 130, ''Solvent Cleaners'' (70 FR 30367, May 26, 2005); Chapter 152, ''Control of Emissions of Volatile Organic Compounds from Consumer Products'' (77 FR 30216, May 22, 2012). The Maine regulations listed above were previously approved into the Maine SIP by EPA. *See* 40 CFR 52.1020. Furthermore, on August 21, 2012, Maine submitted a SIP revision containing Maine's updated Chapter 110, ''Ambient Air Quality Standards.'' The updates to Maine's regulation relevant to today's action include updating Maine's ambient air quality standards to be consistent with the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS. EPA approved this SIP revision on June 24, 2014 (79 FR 35695).

Based upon EPA's review of Maine's infrastructure SIP submittals and Maine's updated Chapter 110 SIP submittal, EPA proposes that Maine meets the infrastructure SIP requirements of section 110(a)(2)(A) with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS. As previously noted, EPA is not proposing to approve or disapprove any existing state provisions or rules related to SSM or director's discretion in the context of section 110(a)(2)(A).

B. Section 110(a)(2)(B)—Ambient Air Quality Monitoring/Data System

This section requires SIPs to include provisions to provide for establishing and operating ambient air quality monitors, collecting and analyzing ambient air quality data, and making these data available to EPA upon request. Each year, states submit annual air monitoring network plans to EPA for review and approval. EPA's review of these annual monitoring plans includes our evaluation of whether the state: (i) Monitors air quality at appropriate locations throughout the state using EPA-approved Federal Reference Methods or Federal Equivalent Method monitors; (ii) submits data to EPA's Air Quality System (AQS) in a timely manner; and (iii) provides EPA Regional Offices with prior notification of any planned changes to monitoring sites or the network plan.

Pursuant to authority granted to it by 38 MRSA §§ 341–A(1) and 584–A, Maine DEP operates an air quality monitoring network, and EPA approved the state's most recent Annual Air Monitoring Network Plan for Pb, ozone, and NO_2 on August 23, 2017.[4] Furthermore, ME DEP populates AQS with air quality monitoring data in a timely manner, and provides EPA with

[1] *See, e.g.,* EPA's final rule on ''National Ambient Air Quality Standards for Lead.'' 73 FR 66964, 67034 (November 12, 2008).

[2] Maine DEP consists of the Board of Environmental Protection (''Board'') and a Commissioner. 38 MRSA § 341–A(2). In general, the Board is authorized to promulgate ''major substantive rules'' and the Commissioner has rulemaking authority with respect to rules that are ''not designated as major substantive rules.'' *Id.* § 341–H.

[3] VOCs and NOx contribute to the formation of ground-level ozone. NOx contribute to the formation of NO_2.

[4] *See* EPA approval letter located in the docket for this action.

prior notification when considering a change to its monitoring network or plan. EPA proposes that ME DEP has met the infrastructure SIP requirements of section 110(a)(2)(B) with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

C. Section 110(a)(2)(C)—Program for Enforcement of Control Measures and for Construction or Modification of Stationary Sources

States are required to include a program providing for enforcement of all SIP measures and the regulation of construction of new or modified stationary sources to meet NSR requirements under PSD and nonattainment new source review (NNSR) programs. Part C of the CAA (sections 160–169B) addresses PSD, while part D of the CAA (sections 171–193) addresses NNSR requirements. The evaluation of each state's submission addressing the infrastructure SIP requirements of section 110(a)(2)(C) covers the following: (i) Enforcement of SIP measures; (ii) PSD program for major sources and major modifications; and (iii) a permit program for minor sources and minor modifications.

Sub-Element 1: Enforcement of SIP Measures

Maine's authority for enforcing SIP measures is established in 38 MRSA Section 347–A, ''Violations,'' 38 MRSA Section 347–C, ''Right of inspection and entry,'' 38 MRSA Section 348, ''Judicial Enforcement,'' 38 MRSA Section 349, ''Penalties,'' and 06–096 CMR Chapter 115, ''Major and Minor Source Air Emission License Regulations,'' and includes processes for both civil and criminal enforcement actions. Construction of new or modified stationary sources in Maine is regulated by 06–096 CMR Chapter 115, ''Major and Minor Source Air Emission License Regulations,'' which requires best available control technology (BACT) controls for PSD sources, including for Pb, $PM_{2.5}$, VOC and NO_X. EPA proposes that Maine has met the enforcement of SIP measures requirements of section 110(a)(2)(C) with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

Sub-Element 2: PSD Program for Major Sources and Major Modifications

Prevention of significant deterioration (PSD) applies to new major sources or modifications made to major sources for pollutants where the area in which the source is located is in attainment of, or unclassifiable with regard to, the relevant NAAQS. Maine DEP's EPA–approved PSD rules, contained at 06–096 CMR Chapter 115, ''Major and Minor Source Air Emission License Regulations,'' contain provisions that address applicable requirements for all regulated NSR pollutants, including Greenhouse Gases (GHGs).

EPA's ''Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard—Phase 2; Final Rule to Implement Certain Aspects of the 1990 Amendments Relating to New Source Review and Prevention of Significant Deterioration as They Apply in Carbon Monoxide, Particulate Matter, and Ozone NAAQS; Final Rule for Reformulated Gasoline'' (Phase 2 Rule) was published on November 29, 2005 (70 FR 71612). Among other requirements, the Phase 2 Rule obligated states to revise their PSD programs to explicitly identify NO_X as a precursor to ozone. *See* 70 FR 71679. This requirement was codified in 40 CFR 51.166, and requires that states submit SIP revisions incorporating the requirements of the rule, including provisions that would treat NO_X as a precursor to ozone provisions. These SIP revisions were to have been submitted to EPA by states by June 15, 2007. *See* 70 FR 71683.

Maine has adopted, and EPA has approved, rules addressing the changes to 40 CFR 51.166 required by the Phase 2 Rule, including amending its SIP to include NO_X and VOC as precursor pollutants to ozone, in order to define what constitutes a ''significant'' increase in actual emissions from a source of air contaminants. *See* 81 FR 50353 (August 1, 2016). Therefore, we propose to approve Maine's infrastructure SIP submittals for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS with respect to the requirements of the Phase 2 Rule and the PSD sub-element of section 110(a)(2)(C).

On May 16, 2008 (73 FR 28321), EPA issued the Final Rule on the ''Implementation of the New Source Review (NSR) Program for Particulate Matter Less than 2.5 Micrometers ($PM_{2.5}$)'' (2008 NSR Rule). The 2008 NSR Rule finalized several new requirements for SIPs to address sources that emit direct $PM_{2.5}$ and other pollutants that contribute to secondary $PM_{2.5}$ formation. One of these requirements is for NSR permits to address pollutants responsible for the secondary formation of $PM_{2.5}$, otherwise known as precursors. In the 2008 rule, EPA identified precursors to $PM_{2.5}$ for the PSD program to be SO_2 and NO_X (unless the state demonstrates to the Administrator's satisfaction or EPA demonstrates that NO_X emissions in an area are not a significant contributor to that area's ambient $PM_{2.5}$ concentrations). The 2008 NSR Rule also specifies that VOCs are not considered to be precursors to $PM_{2.5}$ in the PSD program unless the state demonstrates to the Administrator's satisfaction or EPA demonstrates that emissions of VOCs in an area are significant contributors to that area's ambient $PM_{2.5}$ concentrations.

The explicit references to SO_2, NO_X, and VOCs as they pertain to secondary $PM_{2.5}$ formation are codified at 40 CFR 51.166(b)(49)(i)(*b*) and 40 CFR 52.21(b)(50)(i)(*b*). As part of identifying pollutants that are precursors to $PM_{2.5}$, the 2008 NSR Rule also required states to revise the definition of ''significant'' as it relates to a net emissions increase or the potential of a source to emit pollutants. Specifically, 40 CFR 51.166(b)(23)(i) and 40 CFR 52.21(b)(23)(i) define ''significant'' for $PM_{2.5}$ to mean the following emissions rates: 10 tons per year (tpy) of direct $PM_{2.5}$; 40 tpy of SO_2; and 40 tpy of NO_X (unless the state demonstrates to the Administrator's satisfaction or EPA demonstrates that NO_X emissions in an area are not a significant contributor to that area's ambient $PM_{2.5}$ concentrations). The deadline for states to submit SIP revisions to their PSD programs incorporating these changes was May 16, 2011. *See* 73 FR 28321 at 28341.[5]

On August 1, 2016, EPA approved revisions to Maine's PSD program at 81 FR 50353 that identify SO_2 and NO_X as precursors to $PM_{2.5}$ and revise the state's

[5] EPA notes that on January 4, 2013, the U.S. Court of Appeals for the DC Circuit, in *Natural Resources Defense Council* v. *EPA,* 706 F.3d 428 (DC Cir.), held that EPA should have issued the 2008 NSR Rule in accordance with the CAA's requirements for PM_{10} nonattainment areas (Title I, part D, subpart 4), and not the general requirements for nonattainment areas under subpart 1 (*Natural Resources Defense Council* v. *EPA,* No. 08–1250). As the subpart 4 provisions apply only to nonattainment areas, EPA does not consider the portions of the 2008 rule that address requirements for $PM_{2.5}$ attainment and unclassifiable areas to be affected by the court's opinion. Moreover, EPA does not anticipate the need to revise any PSD requirements promulgated by the 2008 NSR rule in order to comply with the court's decision. Accordingly, EPA's approval of Maine's infrastructure SIP as to Elements C, D(i)(II), or J with respect to the PSD requirements promulgated by the 2008 implementation rule does not conflict with the court's opinion.

The Court's decision with respect to the nonattainment NSR requirements promulgated by the 2008 implementation rule also does not affect EPA's action on the present infrastructure action. EPA interprets the CAA to exclude nonattainment area requirements, including requirements associated with a nonattainment NSR program, from infrastructure SIP submissions due three years after adoption or revision of a NAAQS. Instead, these elements are typically referred to as nonattainment SIP or attainment plan elements, which would be due by the dates statutorily prescribed under subpart 2 through 5 under part D, extending as far as 10 years following designations for some elements.

regulatory definition of ''significant'' for $PM_{2.5}$ to mean 10 tpy or more of direct $PM_{2.5}$ emissions, 40 tpy or more of SO_2 emissions, or 40 tpy or more of NO_X emissions.

The 2008 NSR Rule did not require states to immediately account for gases that could condense to form particulate matter, known as condensables, in $PM_{2.5}$ and PM_{10} emission limits in NSR permits. Instead, EPA determined that states had to account for $PM_{2.5}$ and PM_{10} condensables for applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and PM_{10} in PSD permits beginning on or after January 1, 2011. *See* 73 FR 28321 at 28334. This requirement is codified in 40 CFR 51.166(b)(49)(i)(*a*) and 40 CFR 52.21(b)(50)(i)(*a*).

Maine's SIP-approved PSD program defines $PM_{2.5}$ and PM_{10} emissions in such a manner that gaseous emissions which would condense under ambient conditions are treated in an equivalent manner as required by EPA's definition of ''regulated air pollutant'' in 40 CFR 51.166((b)(49)(i)*(a)*. EPA approved these definitions into the SIP on August 1, 2016. *See* 81 FR 50353. Consequently, we propose that the state's PSD program adequately accounts for the condensable fraction of $PM_{2.5}$ and PM_{10}. Therefore, we propose to approve Maine's infrastructure SIP submittals for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS with respect to the requirements of the 2008 NSR Rule and the PSD sub-element of section 110(a)(2)(C).

On October 20, 2010 (75 FR 64864), EPA issued the final rule on the ''Prevention of Significant Deterioration (PSD) for Particulate Matter Less Than 2.5 Micrometers ($PM_{2.5}$)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC)'' (2010 NSR Rule). This rule established several components for making PSD permitting determinations for $PM_{2.5}$, including a system of ''increments,'' which is the mechanism used to estimate significant deterioration of ambient air quality for a pollutant. These increments are codified in 40 CFR 51.166(c) and 40 CFR 52.21(c). On June 24, 2014 (79 FR 35695), EPA approved $PM_{2.5}$ increments in 06–096 CMR Chapter 110 of Maine's regulations.

The 2010 NSR Rule also established a new ''major source baseline date'' for $PM_{2.5}$ as October 20, 2010, and a new trigger date for $PM_{2.5}$ of October 20, 2011 in the definition of ''minor source baseline date.'' These revisions are codified in 40 CFR 51.166(b)(14)(i)(*c*) and (b)(14)(ii)(*c*), and 40 CFR 52.21(b)(14)(i)(*c*) and (b)(14)(ii)(*c*). Lastly, the 2010 NSR Rule revised the definition of ''baseline area'' to include a level of significance (SIL) of 0.3 micrograms per cubic meter ($\mu g/m^3$), annual average, for $PM_{2.5}$. This change is codified in 40 CFR 51.166(b)(15)(i) and 40 CFR 52.21(b)(15)(i). On August 1, 2016, EPA approved revisions to the Maine SIP that address EPA's 2010 NSR rule. *See* 81 FR 50353. Therefore, with respect to the 2010 NSR Rule and the PSD sub-element of section 110(a)(2)(C), we are proposing to approve Maine's infrastructure SIP submittals for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

With respect to Elements (C) and (J), EPA interprets the Clean Air Act to require each state to make an infrastructure SIP submission for a new or revised NAAQS that demonstrates that the air agency has a complete PSD permitting program meeting the current requirements for all regulated NSR pollutants. The requirements of Element D(i)(II) may also be satisfied by demonstrating the air agency has a complete PSD permitting program correctly addressing all regulated NSR pollutants. Maine has shown that it currently has a PSD program in place that covers all regulated NSR pollutants, including GHGs.

On June 23, 2014, the United States Supreme Court issued a decision addressing the application of PSD permitting requirements to GHG emissions. *Utility Air Regulatory Group* v. *Environmental Protection Agency,* 134 S.Ct. 2427. The Supreme Court said that EPA may not treat GHGs as an air pollutant for purposes of determining whether a source is a major source required to obtain a PSD permit. The Court also said that EPA could continue to require that PSD permits, otherwise required based on emissions of pollutants other than GHGs, contain limitations on GHG emissions based on the application of BACT.

In accordance with the Supreme Court decision, on April 10, 2015, the U.S. Court of Appeals for the District of Columbia Circuit (the DC Circuit) issued an amended judgment vacating the regulations that implemented Step 2 of the EPA's PSD and Title V Greenhouse Gas Tailoring Rule, but not the regulations that implement Step 1 of that rule. Step 1 of the Tailoring Rule covers sources that are required to obtain a PSD permit based on emissions of pollutants other than GHGs. Step 2 applied to sources that emitted only GHGs above the thresholds triggering the requirement to obtain a PSD permit. The amended judgment preserves, without the need for additional rulemaking by EPA, the application of the Best Available Control Technology (BACT) requirement to GHG emissions from Step 1 or ''anyway'' sources. With respect to Step 2 sources, the DC Circuit's amended judgment vacated the regulations at issue in the litigation, including 40 CFR 51.166(b)(48)(v), ''to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant emission increase from a modification.''

On August 19, 2015, EPA amended its PSD and title V regulations to remove from the Code of Federal Regulations portions of those regulations that the DC Circuit specifically identified as vacated. EPA intends to further revise the PSD and title V regulations to fully implement the Supreme Court and DC Circuit rulings in a separate rulemaking. This future rulemaking will include revisions to additional definitions in the PSD regulations.

Some states have begun to revise their existing SIP-approved PSD programs in light of these court decisions, and some states may prefer not to initiate this process until they have more information about the additional planned revisions to EPA's PSD regulations. EPA is not expecting states to have revised their PSD programs in anticipation of EPA's additional actions to revise its PSD program rules in response to the court decisions for purposes of infrastructure SIP submissions. Instead, EPA is only evaluating such submissions to assure that the state's program addresses GHGs consistent with both the court decision, and the revisions to PSD regulations that EPA has completed at this time.

On October 5, 2012 (77 FR 49404), EPA approved revisions to the Maine SIP that modified Maine's PSD program to establish appropriate emission thresholds for determining which new stationary sources and modification projects become subject to Maine's PSD permitting requirements for their GHG emissions. Therefore, EPA has determined that Maine's SIP is sufficient to satisfy Elements (C), (D)(i)(II), and (J) with respect to GHGs. The Supreme Court decision and subsequent DC Circuit judgment do not prevent EPA's approval of Maine's infrastructure SIP as to the requirements of Elements (C), (as well as sub-elements (D)(i)(II), and (J)(iii)).

For the purposes of today's rulemaking on Maine's infrastructure SIPs, EPA reiterates that NSR Reform is not in the scope of these actions.

In summary, we are proposing to approve Maine's submittals for this sub-element with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

Sub-Element 3: Preconstruction Permitting for Minor Sources and Minor Modifications

To address the pre-construction regulation of the modification and construction of minor stationary sources and minor modifications of major stationary sources, an infrastructure SIP submission should identify the existing EPA-approved SIP provisions and/or include new provisions that govern the minor source pre-construction program that regulate emissions of the relevant NAAQS pollutants. EPA last approved revisions to Maine's minor NSR program on August 1, 2016 (81 FR 50353). Maine and EPA rely on the existing minor NSR program in 06–096 CMR Chapter 115 to ensure that new and modified sources not captured by the major NSR permitting programs do not interfere with attainment and maintenance of the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

We are proposing to find that Maine has met the requirement to have a SIP-approved minor new source review permit program as required under Section 110(a)(2)(C) for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

D. Section 110(a)(2)(D)—Interstate Transport

This section contains a comprehensive set of air quality management elements pertaining to the transport of air pollution with which states must comply. It covers the following five topics, categorized as sub-elements: Sub-element 1, Contribute to nonattainment, and interference with maintenance of a NAAQS; Sub-element 2, PSD; Sub-element 3, Visibility protection; Sub-element 4, Interstate pollution abatement; and Sub-element 5, International pollution abatement. Sub-elements 1 through 3 above are found under section 110(a)(2)(D)(i) of the Act, and these items are further categorized into the four prongs discussed below, two of which are found within sub-element 1. Sub-elements 4 and 5 are found under section 110(a)(2)(D)(ii) of the Act and include provisions insuring compliance with sections 115 and 126 of the Act relating to interstate and international pollution abatement.

Sub-Element 1: Section 110(a)(2)(D)(i)(I)—Contribute to Nonattainment (Prong 1) and Interfere With Maintenance of the NAAQS (Prong 2)

Section 110(a)(2)(D)(i)(I) addresses any emissions activity in one state that contributes significantly to nonattainment, or interferes with maintenance, of the NAAQS in another state. The EPA sometimes refers to these requirements as prong 1 (significant contribution to nonattainment) and prong 2 (interference with maintenance).

With respect to the 2008 Pb NAAQS, the 2011 Memo notes that the physical properties of Pb prevent it from experiencing the same travel or formation phenomena as, for example, $PM_{2.5}$ or ozone. Specifically, there is a sharp decrease in Pb concentrations as the distance from a Pb source increases. Accordingly, although it may be possible for a source in a state to emit Pb at a location and in such quantities that contribute significantly to nonattainment in, or interference with maintenance by, any other state, EPA anticipates that this would be a rare situation, *e.g.,* sources emitting large quantities of Pb in close proximity to state boundaries. The 2011 Memo suggests that the applicable interstate transport requirements of section 110(a)(2)(D)(i)(I) with respect to Pb can be met through a state's assessment as to whether or not emissions from Pb sources located in close proximity to its borders have emissions that impact a neighboring state such that they contribute significantly to nonattainment or interfere with maintenance in that state.

Maine's infrastructure SIP submission for the 2008 Pb NAAQS states that Maine has no Pb sources that exceed, or even approach, 0.5 ton/year. No single source of Pb, or group of sources, anywhere within the state emits enough Pb to cause ambient concentrations to approach the Pb NAAQS. Our review of the Pb emissions data from Maine sources, which the state has entered into the EPA National Emissions Inventory (NEI) database, confirms this, and therefore, EPA agrees with Maine and proposes that Maine has met this set of requirements related to section 110(a)(2)(D)(i)(I) for the 2008 Pb NAAQS.

Maine's June 7, 2013 infrastructure SIP submission for the 2010 NO_2 NAAQS does not address section 110(a)(2)(D)(i)(I). Therefore, EPA is not taking any action with respect to this sub-element for the NO_2 NAAQS for Maine at this time. Maine's June 7, 2013 infrastructure SIP submission for the 2008 ozone NAAQS likewise does not address section 110(a)(2)(D)(i)(I). However, Maine subsequently submitted a SIP revision on October 26, 2015, addressing this sub-element and EPA approved this SIP revision on October 13, 2016 (81 FR 70631).

Therefore, EPA proposes to approve Maine's submittal for the 2008 Pb NAAQS for sub-element 1 of section 110(a)(2)(D)(i)(I).

Sub-Element 2: Section 110(a)(2)(D)(i)(II)—PSD (Prong 3)

One aspect of section 110(a)(2)(D)(i)(II) requires SIPs to include provisions prohibiting any source or other type of emissions activity in one state from interfering with measures required to be in any other state's SIP under Part C of the Act to prevent significant deterioration of air quality. One way for a state to meet this requirement, specifically with respect to those in-state sources and pollutants that are subject to PSD permitting, is through a comprehensive PSD permitting program that applies to all regulated NSR pollutants and that satisfies the requirements of EPA's PSD implementation rules. For in-state sources not subject to PSD, this requirement can be satisfied through a fully-approved nonattainment new source review (NNSR) program with respect to any previous NAAQS. EPA last approved revisions to Maine's NNSR regulations on February 14, 1996, (61 FR 5690)

To meet requirements of Prong 3, Maine cites to Maine's PSD permitting programs under 06–096 CMR Chapter 115, ''Major and Minor Source Air Emission License Regulations,'' to ensure that new and modified major sources of Pb, NO_X, and VOC emissions do not contribute significantly to nonattainment or interfere with maintenance of those standards. As noted above in our discussion of Element C, Maine's PSD program fully satisfies the requirements of EPA's PSD implementation rules. Consequently, we are proposing to approve Maine's infrastructure SIPs for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS related to section 110(a)(2)(D)(i)(II) for the reasons discussed under Element C.

Sub-Element 3: Section 110(a)(2)(D)(i)(II)—Visibility Protection (Prong 4)

With regard to the applicable requirements for visibility protection of section 110(a)(2)(D)(i)(II), states are subject to visibility and regional haze program requirements under part C of the CAA (which includes sections 169A and 169B). The 2009 Memo, the 2011 Memo, and 2013 Memo state that these requirements can be satisfied by an approved SIP addressing reasonably attributable visibility impairment, if required, or an approved SIP addressing regional haze. A fully approved regional haze SIP meeting the requirements of 40 CFR 51.308 will ensure that emissions from sources under an air agency's jurisdiction are not interfering with measures required to be included in other air agencies' plans to protect visibility. Maine's Regional Haze SIP was approved by EPA on April 24, 2012 (77 FR 24385). Accordingly, EPA proposes that Maine has met the visibility protection requirements of 110(a)(2)(D)(i)(II) for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

Sub-Element 4: Section 110(a)(2)(D)(ii)—Interstate Pollution Abatement

One aspect of section 110(a)(2)(D)(ii) requires each SIP to contain adequate provisions requiring compliance with the applicable requirements of section 126 relating to interstate pollution abatement. Section 126(a) requires new or modified sources to notify neighboring states of potential impacts from the source. The statute does not specify the method by which the source should provide the notification. States with SIP-approved PSD programs must have a provision requiring such notification by new or modified sources. A lack of such a requirement in state rules would be grounds for disapproval of this element.

EPA-approved regulations require the Maine DEP to provide pre-construction notice of new or modified sources to, among others, ''any State . . . whose lands may be affected by emissions from the source or modification.'' *See* 06–096 CMR Chapter 115, § IX(E)(3); approved March 23, 1993 (58 FR 15422). Such notice ''shall announce availability of the application, the Department's preliminary determination in the form of a draft order, the degree of increment consumption that is expected from the source or modification, as well as the opportunity for submission of written public comment.'' *See* 06–096 CMR Chapter 115, § IX(E)(2). These provisions are consistent with EPA's PSD regulations and require notice to affected states of a determination to issue a draft PSD permit. Regarding section 126(b), no source or sources within the state are the subject of an active finding with respect to the particular NAAQS at issue. Consequently, EPA proposes to approve Maine's infrastructure SIP submittals for this sub-element with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

Sub-Element 5: Section 110(a)(2)(D)(ii)—International Pollution Abatement

One portion of section 110(a)(2)(D)(ii) requires each SIP to contain adequate provisions requiring compliance with the applicable requirements of section 115 relating to international pollution abatement. There are no final findings under section 115 against Maine with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS. Therefore, EPA is proposing that Maine has met the applicable infrastructure SIP requirements of section 110(a)(2)(D)(ii) related to section 115 of the CAA (international pollution abatement) for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

E. Section 110(a)(2)(E)—Adequate Resources

This section requires each state to provide for adequate personnel, funding, and legal authority under state law to carry out its SIP and related issues. Additionally, Section 110(a)(2)(E)(ii) requires each state to comply with the requirements with respect to state boards under section 128. Finally, section 110(a)(2)(E)(iii) requires that, where a state relies upon local or regional governments or agencies for the implementation of its SIP provisions, the state retain responsibility for ensuring adequate implementation of SIP obligations with respect to relevant NAAQS. This last sub-element, however, is inapplicable to this action, because Maine does not rely upon local or regional governments or agencies for the implementation of its SIP provisions.

Sub-Element 1: Adequate Personnel, Funding, and Legal Authority Under State Law to Carry Out Its SIP, and Related Issues

Maine, through its infrastructure SIP submittals, has documented that its air agency has the requisite authority and resources to carry out its SIP obligations. Maine cites to 38 MRSA § 341–A, ''Department of Environmental Protection,'' 38 MRSA § 341–D, ''Board responsibilities and duties,'' 38 MRSA § 342, ''Commissioner, duties'' and 38 MRSA § 581, ''Declaration of findings and intent.'' These statutes provide the ME DEP with the legal authority to enforce air pollution control requirements and carry out SIP obligations with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS. Additionally, state law provides the ME DEP with the authority to assess preconstruction permit fees and annual operating permit fees from air emissions sources and establishes a general revenue reserve account within the general fund to finance the state clean air programs. Maine also receives CAA sections 103 and 105 grant funds through Performance Partnership Grants along with required state-matching funds to provide funding necessary to carry out SIP requirements. Chapter 8 of the 1972 ME SIP describes the resources and manpower estimates for ME DEP. Finally, Maine states, in its June 7, 2013 submittal for 2008 ozone, that for FY 2012, the Bureau of Air Quality had a staff of 59, and a budget of $5.7 million. EPA proposes that Maine has met the infrastructure SIP requirements of this portion of section 110(a)(2)(E) with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

Sub-Element 2: State Board Requirements Under Section 128 of the CAA

Section 110(a)(2)(E) also requires each SIP to contain provisions that comply with the state board requirements of section 128 of the CAA. That provision contains two explicit requirements: (1) That any board or body which approves permits or enforcement orders under this chapter shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits and enforcement orders under this chapter, and (2) that any potential conflicts of interest by members of such board or body or the head of an executive agency with similar powers be adequately disclosed.

As mentioned earlier, the Maine DEP consists of a Commissioner and a Board of Environmental Protection (''BEP'' or ''Board''), which is an independent authority under state law that reviews certain permit applications in the first instance and also renders final decisions on appeals of permitting actions taken by the Commissioner as well as some enforcement decisions by the Commissioner. Because the Board has authority under state law to hear appeals of some CAA permits and enforcement orders, EPA considers that the Board has authority to ''approve'' those permits or enforcement orders, as recommended in the 2013 Guidance at 42, and that the requirement of CAA § 128(a)(1) applies to Maine — that is, that ''any board or body which approves permits or enforcement orders under this chapter shall have at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits and enforcement orders under this chapter.''

Pursuant to state law, the BEP consists of seven members appointed by the Governor, subject to confirmation by the State Legislature. *See* 38 MRSA § 341–C(1). The purpose of the Board ''is to provide informed, independent and timely decisions on the interpretation, administration and enforcement of the laws relating to environmental protection and to provide for credible, fair and responsible public participation in department decisions.'' *Id.* § 341–B. State law further provides that Board members ''must be chosen to represent the broadest possible interest and experience that can be brought to bear on the administration and implementation of'' Maine's environmental laws and that ''[a]t least 3 members must have technical or scientific backgrounds in environmental issues and no more than 4 members may be residents of the same congressional district.'' *Id.* § 341–C(2). EPA proposes to find that these provisions fulfill the requirement that at least a majority of Board members represent the public interest but do not address the requirement that at least a majority ''not derive any significant portion of their income from persons subject to'' air permits and enforcement orders. Furthermore, section 341–C is not currently in Maine's SIP. By letter dated March 1, 2018, however, DEP committed to revise section 341–C to address the CAA § 128(a)(1) requirement that at least a majority of Board members ''not derive a significant portion of their income from persons subject to'' air permits or enforcement orders and to submit, for inclusion in the SIP, the necessary provisions to EPA within one year of EPA final action on these infrastructure SIPs. Consequently, EPA proposes to conditionally approve Maine's submittals for this requirement of CAA § 128(a)(1).

With respect to the requirements in § 128(a)(2) (regarding potential conflicts of interest), on April 23, 2013, Maine submitted 5 MRSA § 18 and 38 MRSA § 341–C(7) to EPA and requested that they be incorporated into the Maine SIP. Pursuant to 5 MRSA § 18(2), ''[a]n executive employee commits a civil violation if he personally and substantially participates in his official capacity in any proceeding in which, to his knowledge, any of the following have a direct and substantial financial interest: A. Himself, his spouse or his dependent children; B. His partners; C. A person or organization with whom he is negotiating or has agreed to an arrangement concerning prospective employment; D. An organization in which he has a direct and substantial financial interest; or E. Any person with whom the executive employee has been associated as a partner or a fellow shareholder in a professional service corporation pursuant to Title 13, chapter 22–A, during the preceding year.'' Section 18 defines ''executive employee'' to include, among others, ''members of the state boards.'' *Id.* § 18(1). Moreover, 38 MRSA § 341–C(7) specifically provides that the state's conflict of interest provisions at 5 MRSA § 18 apply to Board members. Section 18 further provides that ''[e]very executive employee shall endeavor to avoid the appearance of a conflict of interest by disclosure or by abstention'' and that, for purposes of this requirement, the term '''conflict of interest' includes receiving remuneration, other than reimbursement for reasonable travel expenses, for performing functions that a reasonable person would expect to perform as part of that person's official responsibility as'' a Board member. *Id.* § 18(7). EPA proposes that 5 MRSA § 18 and 38 MRSA § 341–C(7) satisfy the conflict of interest requirements of CAA § 128(a)(2) with respect to members of a board that approves permits or enforcement orders and proposes to incorporate them into the Maine SIP.

As noted above, section 128(a)(2) of the Act provides that ''any potential conflicts of interest by members of such board or body *or the head of an executive agency with similar powers* be adequately disclosed.'' (emphasis added). As EPA has explained in other infrastructure SIP actions, the purpose of section 128(a)(2) is to assure that conflicts of interest are disclosed by the ultimate decision maker in permit or enforcement order decisions. *See, e.g.,* 80 FR 42446, 42454 (July 17, 2015). Although the Board is the ultimate decision maker on air permitting decisions in Maine, certain air enforcement orders of the DEP Commissioner are not reviewable by the Board, but rather may be appealed directly to Maine Superior Court. For this reason, EPA interprets the potential conflict of interest requirements of CAA § 128(a)(2) to be applicable in Maine to *both* Board members *and* the DEP Commissioner. Pursuant to 38 MRSA § 341–A(3)(D), however, the Commissioner of DEP ''is subject to the conflict-of-interest provisions of'' 5 MRSA § 18, thus satisfying this requirement. Because Maine has not yet submitted 38 MRSA § 341–A(3)(D) for inclusion in the SIP, but by letter dated March 1, 2018, has committed to doing so within one year of EPA's final action on Maine's infrastructure SIP submissions, EPA proposes to conditionally approve Maine's submissions for the conflict of interest requirement with respect to the DEP Commissioner.

F. Section 110(a)(2)(F)—Stationary Source Monitoring System

States must establish a system to monitor emissions from stationary sources and submit periodic emissions reports. Each plan shall also require the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources. The state plan shall also require periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and correlation of such reports by each state agency with any emission limitations or standards established pursuant to this chapter. Lastly, the reports shall be available at reasonable times for public inspection.

Maine's infrastructure submittals reference several existing state regulations previously approved by EPA that require sources to monitor emissions and submit reports. The first is 06–096 CMR Chapter 117, ''Source Surveillance.'' This regulation specifies which air emission sources are required to operate continuous emission monitoring systems (CEMS) and details the performance specifications, quality assurance requirements and procedures for such systems, and subsequent record keeping and reporting requirements. Maine also references EPA-approved 06–096 CMR Chapter 137, ''Emission Statements,'' which requires sources to monitor and report annually to DEP emissions of criteria pollutants and other emissions-related information under certain circumstances. EPA most recently approved Chapter 137 into the SIP on May 1, 2017. *See* 82 FR 20257.

In addition, Maine refers to its regulations implementing its operating permit program pursuant to 40 CFR part 70: 06–096 CMR Chapter 140, ''Part 70 Air Emission License Regulations.'' This regulation, although not in the SIP, identifies the sources of air emissions that require a Part 70 air emission license and incorporates the requirements of Title IV and Title V of the Clean Air Act, as amended, 42 U.S.C. 7401, *et seq.;* and 38 MRSA §§ 344 and 590. This regulation contains compliance assurance requirements regarding monitoring and reporting for licensed sources requiring a Part 70 air emission license. The regulation was approved by EPA on October 18, 2001

(66 FR 52874). Finally, Maine references 06–096 CMR Chapter 115, ''Major and Minor Source Air Emission License Regulations.'' This regulation contains compliance assurance requirements for licensed sources and stipulates that licenses shall include the following compliance assurance elements:(a) A description of all required monitoring and analysis procedures or test methods required under the requirements applicable to the source;(b) A description of all recordkeeping requirements; and (c) A description of all reporting requirements. While Chapter 140 and the referenced provisions of Chapter 115 are not formally approved into Maine's SIP, they are legal mechanisms the state can use to assure the enforcement of the monitoring requirements approved in the SIP.

Regarding the section 110(a)(2)(F) requirements that the SIP provide for the correlation and public availability of emission reports, Maine's emission statement rule, Chapter 137, requires facilities to report emissions of air pollutants on an annual basis. The DEP uses a web-based electronic reporting system, the Maine Air Emissions Inventory Reporting System (''MAIRIS''), for this purpose that allows it to package and electronically submit reported emissions data to EPA under the national emission inventory (NEI) program. NEI data are available to the public. *See www.epa.gov/air-emissions-inventories/national-emissions-inventory-nei.* The MAIRIS system is structured to electronically correlate reported emissions with permit conditions and other applicable standards, and identify all inconsistencies and potential compliance concerns.

Furthermore, pursuant to DEP's EPA-approved regulations, ''Except as expressly made confidential by law; the commissioner shall make all documents available to the public for inspection and copying including the following: 1. All applications or other forms and documents submitted in support of any license application: 2. All correspondence, into or out of the Department, and any attachments thereto . . . .'' *See* 06–096 CMR Chapter 1, § 6(A). Furthermore, ''The Commissioner shall keep confidential only those documents which may remain confidential pursuant to 1 MRSA Section 402.'' *Id.* § 6(B). In its August 21, 2012, submittal, DEP certified that, ''[e]xcept as specifically exempted by the Maine statute (1 MRSA Chapter 13 Public Records and Proceedings), Maine makes all records, reports or information obtained by the MEDEP or referred to at public hearings available to the public.'' Maine DEP further certified therein that the reports required under 117 and 137 are ''available to the public . . . pursuant to Maine law.'' We also note that the Maine Freedom of Access Law does not expressly make emissions statements confidential, 1 MRSA § 402, and that, pursuant to DEP's EPA-approved regulations, ''[i]nformation concerning the nature and extent of the emissions of any air contaminant by a source''—which includes emission reports—''shall not be confidential.'' *See* 06–096 CMR Chapter 115, § IX(B)(1). By letter dated March 1, 2018, Maine further certified that Maine's Freedom of Access law does not include any exceptions that apply to stationary source emissions. For these reasons, we propose to find that Maine satisfies the requirement that emissions statements be available at reasonable times for public inspection.

Finally, in the March 1, 2018, letter, DEP also certified that there are no provisions in Maine law that would prevent the use of any credible evidence of noncompliance, as required by 40 CFR 51.212. *See also* 06–096 CMR Chapter 140, § 3(E)(7)(a)(v) (''Notwithstanding any other provision in the State Implementation Plan approved by the EPA or Section 114(a) of the CAA, any credible evidence may be used for the purpose of establishing whether a person has violated or is in violation of any statute, regulation, or Part 70 license requirement.''). For the above reasons, EPA is proposing to approve Maine's submittals for this requirement of section 110(a)(2)(F) for the 2008 ozone, 2008 Pb, and 2010 NO_2 NAAQS.

G. Section 110(a)(2)(G)—Emergency Powers

This section requires that a plan provide for state authority comparable to that provided to the EPA Administrator in section 303 of the CAA, and adequate contingency plans to implement such authority. Section 303 of the CAA provides authority to the EPA Administrator to seek a court order to restrain any source from causing or contributing to emissions that present an ''imminent and substantial endangerment to public health or welfare, or the environment.'' Section 303 further authorizes the Administrator to issue ''such orders as may be necessary to protect public health or welfare or the environment'' in the event that ''it is not practicable to assure prompt protection . . . by commencement of such civil action.''

We propose to find that a combination of state statutes and regulations discussed in Maine's submittals and a March 1, 2018 DEP letter provides for authority comparable to that given the Administrator in CAA section 303, as explained below. First, 38 MRSA § 347–A, ''Emergency Orders,'' provides that ''[w]henever it appears to the commissioner, after investigation, that there is a violation of the laws or regulations [DEP] administers or of the terms or conditions of any of [DEP's] orders that is creating or is likely to create a substantial and immediate danger to public health or safety or to the environment, the commissioner may order the person or persons causing or contributing to the hazard to immediately take such actions as are necessary to reduce or alleviate the danger.'' *See* 38 MRSA § 347–A(3). Section 347–A further authorizes the DEP Commissioner to initiate an enforcement action in state court in the event of a violation of such emergency order issued by the Commissioner. *Id.* § 347–A(1)(A)(4). Similarly, 38 MRSA § 348, ''Judicial Enforcement,'' authorizes DEP to institute injunction proceedings ''[i]n the event of a violation of any provision of the laws administered by [DEP] or of any order, regulation, license, permit, approval, administrative consent agreement or decision of the board or commissioner.'' *Id.* § 348(1). Section 348 also authorizes DEP to seek a court order to a restrain a source if it ''finds that the discharge, emission or deposit of any materials into any waters, air or land of th[e] State constitutes a substantial and immediate danger to the health, safety or general welfare of any person, persons or property.'' *Id.* § 348(3). Thus, these provisions authorize DEP to issue an administrative order or to seek a court order to restrain any source from causing or contributing to emissions that present an imminent and substantial endangerment to public health or welfare, or the environment, if there is also a violation of a law, regulation, order, or permit administered or issued by DEP, as the case may be.

Second, by letter dated March 1, 2018, Maine also cites to 38 MRSA § 591, ''Prohibitions,'' as contributing to its authority. Section 591 provides that ''[n]o person may discharge air contaminants into ambient air within a region in such manner as to violate ambient air quality standards established under this chapter or emission standards established pursuant to section 585, 585–B or 585–K.'' In those cases where emissions of NO_2, Pb, ozone, or ozone precursors may be causing or contributing to an ''imminent and substantial endangerment to public health or welfare, or the environment,'' a violation of § 591 would also occur, since Maine law provides that ambient air quality standards are designed to prevent ''air pollution,'' *id.* § 584, which state law expressly defines as ''the presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration *as to be injurious to human, plant or animal life or to property,* or which unreasonably interfere with the enjoyment of life and property,'' *id.* § 582(3) (emphasis added). In its March 1, 2018 letter, Maine further explains that sections 347–A and 591 ''together authorize the Commissioner to issue an emergency order upon finding an apparent violation of DEP laws or regulations to address emissions of criteria pollutants, air contaminants governed by standards promulgated under section 585, and hazardous air pollutants governed by standards promulgated under section 585–B.''

Third, in the unlikely event that air emissions are creating a substantial or immediate threat to the public health, safety or to the environment without violating any DEP law, regulation, order, or permit, emergency authority to issue an order to restrain a source may also be exercised pursuant to 37–B MRSA § 742, ''Emergency Proclamation.'' Maine explains that the DEP Commissioner can notify the Governor of an imminent ''disaster,'' and the Governor can then exercise authority to ''declare a state of emergency in the State or any section of the State.'' *See* 37–B MRSA § 742(1)(A). State law defines ''disaster'' in this context to mean ''the occurrence or imminent threat of widespread or severe damage, injury or loss of life or property resulting from any natural or man-made cause, including, but not limited to . . . air contamination.'' *Id.* § 703(2). Upon the declaration of a state of emergency, the Governor may, among other things, ''[o]rder the termination, temporary or permanent, of any process, operation, machine or device which may be causing or is understood to be the cause of the state of emergency,'' *id.* § 742(1)(C)(11), or ''[t]ake whatever action is necessary to abate, clean up or mitigate whatever danger may exist within the affected area,'' *id.* § 742(1)(C)(12). Thus, even if there may otherwise be no violation of a DEP-administered or -issued law, regulation, order, or permit, state authorities exist to restrain the source.

Finally, Maine's submittals cite 06–096 CMR Chapter 109, ''Emergency Episode Regulations,'' which sets forth various emission reduction plans intended to prevent air pollution from reaching levels that would cause imminent and substantial harm and recognizes the Commissioner's authority to issue additional emergency orders pursuant to 38 MRSA § 347–A, as necessary to the health of persons, by restricting emissions during periods of air pollution emergencies. For these reasons, we propose to find that Maine's submittals and certain state statutes and regulations provide for authority comparable to that provided to the Administrator in CAA § 303.

Section 110(a)(2)(G) also requires that, for any NAAQS, Maine have an approved contingency plan for any Air Quality Control Region (AQCR) within the state that is classified as Priority I, IA, or II. *See* 40 CFR 51.152(c). A contingency plan is not required if the entire state is classified as Priority III for a particular pollutant. *Id.* All AQCRs in Maine are classified as Priority III areas for NO_2 and ozone, pursuant to 40 CFR 52.1021. Consequently, as relevant to this proposed rulemaking action, Maine's SIP does not need to contain an emergency contingency plan meeting the specific requirements of 51.152 with respect to NO_2 and ozone. Moreover, we note that Pb is not explicitly included in the contingency plan requirements of 40 CFR subpart H. In any event, as discussed earlier in this document with respect to Element D(i)(I), according to EPA's 2014 NEI, there are no Pb sources within Maine that exceed, or even approach, EPA's reporting threshold of 0.5 tons per year. Although not expected, if Pb conditions were to change, Maine DEP does have general authority, as noted previously, to order a source to immediately take such actions as are necessary to reduce or alleviate a danger to public health or safety or to the environment.

EPA proposes that Maine has met the applicable infrastructure SIP requirements for section 110(a)(2)(G) with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

H. Section 110(a)(2)(H)—Future SIP Revisions

This section requires that a state's SIP provide for revision from time to time as may be necessary to take account of changes in the NAAQS or availability of improved methods for attaining the NAAQS and whenever the EPA finds that the SIP is substantially inadequate. To address this requirement, Maine's infrastructure submittals reference 38 MRSA § 581, ''Declaration of findings and intent,'' which characterizes the state's laws regarding the Protection and Improvement of Air as an exercise of ''the police power of the State in a coordinated state-wide program to control present and future sources of emission of air contaminants to the end that air polluting activities of every type shall be regulated in a manner that reasonably insures the continued health, safety and general welfare of all of the citizens of the State; protects property values and protects plant and animal life.'' In addition, we note that Maine DEP is required by statute to ''prevent, abate and control the pollution of the air[, to] preserve, improve and prevent diminution of the natural environment of the State[, and to] protect and enhance the public's right to use and enjoy the State's natural resources.'' *See* 38 MRSA § 341–A(1). Furthermore, DEP is authorized to ''adopt, amend or repeal rules and emergency rules necessary for the interpretation, implementation and enforcement of any provision of law that the department is charged with administering.'' *Id.* § 341–H(2); *see also id.* § 585–A (recognizing DEP's rulemaking authority to propose SIP revisions). These statutes give Maine DEP the power to revise the Maine SIP from time to time as may be necessary to take account of changes in the NAAQS or availability of improved methods for attaining the NAAQS and whenever the EPA finds that the SIP is substantially inadequate.

EPA proposes that Maine has met the infrastructure SIP requirements of CAA section 110(a)(2)(H) with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

I. Section 110(a)(2)(I)—Nonattainment Area Plan or Plan Revisions Under Part D

The CAA requires that each plan or plan revision for an area designated as a nonattainment area meet the applicable requirements of part D of the CAA. Part D relates to nonattainment areas. EPA has determined that section 110(a)(2)(I) is not applicable to the infrastructure SIP process. Instead, EPA takes action on part D attainment plans through separate processes.

J. Section 110(a)(2)(J)—Consultation With Government Officials; Public Notifications; Prevention of Significant Deterioration; Visibility Protection

The evaluation of the submissions from Maine with respect to the requirements of CAA section 110(a)(2)(J) are described below.

Sub-Element 1: Consultation With Government Officials

States must provide a process for consultation with local governments and Federal Land Managers (FLMs) carrying out NAAQS implementation requirements.

Pursuant to state law, Maine DEP is authorized to, among other things, ''educate the public on natural resource use, requirements and issues.'' *See* 38 MRSA § 341–A(1). State law further provides that one of the purposes of the BEP is ''to provide for credible, fair and responsible public participation in department decisions,'' *id.* § 341–B, and authorizes it to ''cooperate with other state or federal departments or agencies to carry out'' its responsibilities, *id.* § 341–F(6). Furthermore, pursuant to Maine's EPA-approved regulations, the DEP is required to provide notice to relevant municipal officials and FLMs, among others, of DEP's preparation of a draft permit for a new or modified source. *See* 06–096 CMR Chapter 115, § IX(E)(3); approved March 23, 1993 (58 FR 15422). In addition, with respect to area reclassifications to Class I, II, or III for PSD purposes, the DEP is required to offer an opportunity for a public hearing and to consult with appropriate FLMs. *See* 38 MRSA § 583–B; and also 06–096 CMR Chapter 114, § 1(E). Maine's Transportation Conformity rule at 06–096 CMR Chapter 139 also provides procedures for interagency consultation, resolution of conflicts, and public consultation and notification. Finally, the Maine Administrative Procedures Act (Maine Revised Statutes Title 5, Chapter 375, subchapter 2) requires notification and provision of comment opportunities to all parties affected by proposed regulations. All SIP revisions undergo public notice and opportunity for hearing, which allows for comment by the public, including local governments.

EPA proposes that Maine has met the infrastructure SIP requirements of this portion of section 110(a)(2)(J) with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

Sub-Element 2: Public Notification

Section 110(a)(2)(J) also requires states to: Notify the public if NAAQS are exceeded in an area; advise the public of health hazards associated with exceedances; and enhance public awareness of measures that can be taken to prevent exceedances and of ways in which the public can participate in regulatory and other efforts to improve air quality.

As mentioned elsewhere in this notice, state law directs Maine DEP to, among other things, ''prevent, abate and control the pollution of the air . . . improve and prevent diminution of the natural environment of the State [, and] protect and enhance the public's right to use and enjoy the State's natural resources.'' *See* 38 MRSA § 341–A(1). State law also authorizes DEP ''educate the public on natural resource use, requirements and issues. *Id.* § 341–A(1). To that end, the ME DEP makes real-time and historical air quality information available on its website. The agency also provides extended range air quality forecasts, which give the public advanced notice of air quality events. This advance notice allows the public to limit their exposure to unhealthy air and enact a plan to reduce pollution at home and at work. The ME DEP forecasts daily ozone and particle levels and issues these forecasts to the media and to the public via its website, telephone hotline and email. DEP states in its submittals that, in the event that a Pb monitor is established in Maine in the future, the Department will also put the data collected from such a monitor on its website. Alerts include information about the health implications of elevated pollutant levels and list actions to reduce emissions and to reduce the public's exposure. In addition, Air Quality Data Summaries of the year's air quality monitoring results are issued annually and posted on the ME DEP Bureau of Air Quality website. Maine is also an active partner in EPA's AirNow and EnviroFlash air quality alert programs.

EPA proposes that Maine has met the infrastructure SIP requirements of this portion of section 110(a)(2)(J) with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

Sub-Element 3: PSD

States must meet applicable requirements of section 110(a)(2)(C) related to PSD. Maine's PSD program in the context of infrastructure SIPs has already been discussed in the paragraphs addressing sections 110(a)(2)(C) and 110(a)(2)(D)(i)(II) and, as we have noted, fully satisfies the requirements of EPA's PSD implementation rules. Consequently, we are proposing to approve the PSD sub-element of section 110(a)(2)(J) for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS, consistent with the actions we are proposing for sections 110(a)(2)(C) and 110(a)(2)(D)(i)(II).

Sub-Element 4: Visibility Protection

With regard to the applicable requirements for visibility protection, states are subject to visibility and regional haze program requirements under part C of the CAA (which includes sections 169A and 169B). In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus, as noted in EPA's 2013 Memo, we find that there is no new visibility obligation ''triggered'' under section 110(a)(2)(J) when a new NAAQS becomes effective. In other words, the visibility protection requirements of section 110(a)(2)(J) are not germane to infrastructure SIPs for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

K. Section 110(a)(2)(K)—Air Quality Modeling/Data

To satisfy Element K, the state air agency must demonstrate that it has the authority to perform air quality modeling to predict effects on air quality of emissions of any NAAQS pollutant and submission of such data to EPA upon request. Maine state law implicitly authorizes DEP to perform air quality monitoring and provide such modeling data to EPA upon request. *See* 38 MRSA §§ 341–A(1), 581, 591–B. In addition, Maine cites 06–096 CMR Chapter 115, which requires an applicant to provide a demonstration, that may include air-quality modeling, that shows its emissions will not violate the NAAQS. We note that EPA-approved Chapter 115 requires DEP to notify EPA of any PSD application, *see* § IX(E), and that EPA-approved 06–096 CMR Chapter 1 requires DEP to make ''[a]ll applications or other forms and documents submitted in support of any license application'' publicly available. *See* § 6(A)(1), which naturally includes EPA. In its August 21, 2012 submittal, DEP further states that it performs modeling, provides modeling data to EPA upon request, and will continue to do both. Maine also cites to 06–096 Chapter 116, ''Prohibited Dispersion Techniques,'' which includes regulations applicable to the State's air quality modeling consistent with federal requirements concerning stack height and other dispersion techniques, such as merging of plumes. These regulations also define the area surrounding the source where ambient air quality standards do not have to be met. Finally, Maine cites 06–096 CMR Chapter 140, which contains air quality modeling requirements for sources subject to 40 CFR part 70 that are analogous to those in Chapter 115. Maine also collaborates with the Ozone Transport Commission (OTC) and the Mid-Atlantic Regional Air Management Association and EPA in order to perform large-scale urban air shed modeling for ozone if necessary.

EPA proposes that Maine has met the infrastructure SIP requirements of section 110(a)(2)(K) with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

L. Section 110(a)(2)(L)—Permitting Fees

This section requires SIPs to mandate that each major stationary source pay permitting fees to cover the cost of reviewing, approving, implementing, and enforcing a permit. Maine implements and operates a Title V permit program. *See* 38 MRSA § 353–A; 06–096 CMR Chapter 140, which was approved by EPA on October 18, 2001 (66 FR 52874). To gain this approval, Maine demonstrated the ability to collect sufficient fees to run the program. *See* 61 FR 49289, 49291 (Sept. 19, 1996). Maine also notes in its submittals that the costs of all CAA permitting, implementation, and enforcement for new or modified sources are covered by Title V fees and that Maine state law provides for the assessment of application fees from air emissions sources for permits for the construction or modification of air contaminant sources and sets permit fees. *See* 38 MRSA §§ 353–A (establishing annual air emissions license fees), 352(2)(E) (providing that such fees ''must be assessed to support activities for air quality control including licensing, compliance, enforcement, monitoring, data acquisition and administration'').

EPA proposes that Maine has met the infrastructure SIP requirements of section 110(a)(2)(L) for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

M. Section 110(a)(2)(M)—Consultation/Participation by Affected Local Entities

To satisfy Element M, states must consult with, and allow participation from, local political subdivisions affected by the SIP. Maine's infrastructure submittals reference the Maine Administrative Procedure Act, 5 MRSA Chapter 375, and explain that it requires public notice of all SIP revisions prior to their adoption, which allows for comment by the public, including local political subdivisions. In addition, Maine cites 38 MRSA § 597, ''Municipal air pollution control,'' which provides that municipalities are not preempted from studying air pollution and adopting and enforcing ''air pollution control and abatement ordinances'' that are more stringent than those adopted by DEP or that ''touch on matters not dealt with'' by state law. Finally, Maine cites Chapter 9 of Maine's initial SIP, which was approved on May 31, 1972 (37 FR 10842), and contains intergovernmental cooperation provisions.

EPA proposes that Maine has met the infrastructure SIP requirements of section 110(a)(2)(M) with respect to the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS.

N. Maine Statute and Executive Order Submitted for Incorporation Into the SIP

As noted above, in the discussion of element E, on April 23, 2013, Maine submitted, and EPA is proposing to approve 38 MRSA § 341–C(7), ''Conflict of Interest,'' and 5 MRSA § 18, ''Disqualification of executive employees from participation in certain matters,'' into the SIP.

V. What action is EPA taking?

EPA is proposing to approve the infrastructure SIPs submitted by Maine for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS. The state submitted its infrastructure SIP for each NAAQS on the following dates: 2008 Pb—August 21 2012; 2008 ozone—June 7, 2013; and 2010 NO_2—June 7, 2013. Also, we are proposing to approve into the SIP, Maine's conflict of interest provisions found in 38 MRSA Section 341–C(7) and 5 MRSA Section 18, which DEP submitted as a SIP revision on April 23, 2013. Specifically, EPA's proposed actions regarding each infrastructure SIP requirement are contained in Table 1 below.

TABLE 1—PROPOSED ACTION ON MAINE'S INFRASTRUCTURE SIP SUBMITTALS

Element	2008 Pb	2008 Ozone	2010 NO_2
(A): Emission limits and other control measures	A	A	A
(B): Ambient air quality monitoring and data system	A	A	A
(C)1: Enforcement of SIP measures	A	A	A
(C)2: PSD program for major sources and major modifications	A	A	A
(C)3: preconstruction permitting for minor sources and minor modifications	A	A	A
(D)1: Contribute to nonattainment/interfere with maintenance of NAAQS	A	PA	NS
(D)2: PSD	A	A	A
(D)3: Visibility Protection	A	A	A
(D)4: Interstate Pollution Abatement	A	A	A
(D)5: International Pollution Abatement	A	A	A
(E): Adequate resources	A	A	A
(E): State boards	CA	CA	CA
(E): Necessary assurances with respect to local agencies	NA	NA	NA
(F): Stationary source monitoring system	A	A	A
(G): Emergency power	A	A	A
(H): Future SIP revisions	A	A	A
(I): Nonattainment area plan or plan revisions under part D	NG	NG	NG
(J)1: Consultation with government officials	A	A	A
(J)2: Public notification	A	A	A
(J)3: PSD	A	A	A
(J)4: Visibility protection	NG	NG	NG
(K): Air quality modeling and data	A	A	A
(L): Permitting fees	A	A	A
(M): Consultation and participation by affected local entities	A	A	A

In the above table, the key is as follows:

A	Approve.
CA ...	Conditionally Approve.
NA ...	Not applicable.
NG ..	Not germane to infrastructure SIPs.
NS ...	No Submittal.
PA ...	Previously approved (see 81 FR 70631, Oct. 13, 2016).

As noted in Table 1, we are proposing to conditionally approve portions of Maine's infrastructure SIP submittals pertaining to the state's Board for the 2008 Pb, 2008 ozone, and 2010 NO_2 NAAQS. Under section 110(k)(4) of the Act, EPA may conditionally approve a plan based on a commitment from the State to adopt specific enforceable measures by a date certain, but not later than 1 year from the date of approval. If EPA conditionally approves the commitment in a final rulemaking action, the State must meet its commitment to submit an update to its State Board rules that fully remedies the deficiencies mentioned above under element E. If the State fails to do so, this action will become a disapproval one year from the date of final approval. EPA will notify the State by letter that this action has occurred. At that time, this commitment will no longer be a part of the approved Maine SIP. EPA subsequently will publish a document in the **Federal Register** notifying the public that the conditional approval automatically converted to a disapproval. If the State meets its commitment, within the applicable time frame, the conditionally approved submission will remain a part of the SIP until EPA takes final action approving or disapproving the new submittal. If EPA disapproves the new submittal, the conditionally approved infrastructure SIP elements for all affected pollutants will be disapproved. In addition, a final disapproval triggers the Federal Implementation Plan requirement under section 110(c). If EPA approves the new submittal, the State Board rule and relevant infrastructure SIP elements will be fully approved and replace the conditionally approved program in the SIP.

EPA is soliciting public comments on the issues discussed in this proposal or on other relevant matters. These comments will be considered before EPA takes final action. Interested parties may participate in the Federal rulemaking procedure by submitting written comments to the EPA New England Regional Office listed in the **ADDRESSES** section of this **Federal Register**, or by submitting comments electronically, by mail, or through hand delivery/courier following the directions in the **ADDRESSES** section of this **Federal Register**.

VI. Incorporation by Reference

In this rule, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference the two Maine statutes listed in Section V above. EPA has made, and will continue to make, these documents generally available electronically through *https://www.regulations.gov* and/or in hard copy at the appropriate EPA office (see the **ADDRESSES** section of this preamble for more information).

VII. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: March 15, 2018.

Alexandra Dapolito Dunn,

Regional Administrator, EPA Region 1.

[FR Doc. 2018–06006 Filed 3–23–18; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 61 and 63

[EPA–R01–OAR–2017–0641; FRL–9975–51–Region 1]

Approval of the Clean Air Act, Section 112(l), Authority for Hazardous Air Pollutants: Asbestos Management and Control; State of New Hampshire Department of Environmental Services

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to grant the New Hampshire Department of Environmental Services (NH DES) the authority to implement and enforce the amended Asbestos Management and Control Rule in place of the National Emission Standard for Asbestos (Asbestos NESHAP) as it applies to certain asbestos-related activities. Upon approval, NH DES's amended rule would apply to all sources that otherwise would be regulated by the Asbestos NESHAP with the exception of inactive waste disposal sites that ceased operation on or before July 9, 1981. These inactive disposal sites are already regulated by State rules that were approved by EPA on January 11, 2013. This proposed approval would make NH DES's amended Asbestos

Management and Control Rule federally enforceable.

DATES: Written comments must be received by April 25, 2018.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–OAR–2017–0641 at *https://www.regulations.gov,* or via email to *lancey.susan@epa.gov*. For comments submitted at *Regulations.gov*, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the ''For Further Information Contact'' section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets*. EPA will forward copies of all submitted comments to the New Hampshire Department of Environmental Services.

FOR FURTHER INFORMATION CONTACT: Susan Lancey, Air Permits, Toxics, and Indoor Programs Unit, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square—Suite 100, (Mail code OEP05–2), Boston, MA 02109–3912, telephone number 617–918–1656, *lancey.susan@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document whenever ''we,'' ''us,'' or ''our'' is used, we mean the EPA.

Table of Contents

I. General Information

A. Does this proposed rule apply to me?

Categories and entities potentially regulated by this proposed rule include:

Category	NAICS [1]	Examples of regulated entities
Industrial	23	Construction.
Industrial	23594	Wrecking and Demolition Contractors.
Industrial	562112	Hazardous Waste Collection.
Industrial	562211	Hazardous Waste Treatment and Disposal.
Industrial	5629	Remediation and Other Waste Management Services.
Industrial	56191	Packaging and Labeling Services.
Industrial	332992	Small Arms Ammunition Manufacturing.
Industrial	33634	Motor Vehicle Systems Manufacturing.
Industrial	327	Nonmetallic Mineral Product Manufacturing.
Industrial	3279	Other Nonmetallic Mineral Product Manufacturing.
Industrial	32791	Abrasive Product Manufacturing.
Industrial	32799	All Other Nonmetallic Mineral Product Manufacturing.

[1] North American Industry Classification System.

This Table is not intended to be exhaustive, but rather provides a guide for readers regarding entities potentially regulated by this proposed rule. To determine whether your facility is affected you should examine the applicability criteria in the amended New Hampshire Asbestos Management and Control Rule. If you have questions regarding the applicability of any aspect of this action to a particular entity, please contact the person identified in the ''For Further Information Contact'' section.

B. What should I consider as I prepare my comments for the EPA?

Do not submit information containing CBI to the EPA through *https://www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on a disk or CD–ROM that you mail to the EPA, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, a copy of the comments that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: ''EPA–R01–OAR–2017–0641,'' Susan Lancey, U.S. Environmental Protection Agency, EPA New England Regional Office, 5 Post Office Square (mail code OEP05–2), Boston, MA 02109–3912.

II. Background

Under CAA section 112(l), the EPA may approve state or local rules or programs to be implemented and enforced in place of certain otherwise applicable Federal rules, emissions standards, or requirements. The Federal regulations governing EPA's approval of state and local rules or programs under section 112(l) are located at 40 CFR part 63, subpart E. *See* 58 FR 62262 (November 26, 1993), as amended by 65 FR 55810 (September 14, 2000). Under these regulations, a state air pollution control agency has the option to request EPA's approval to substitute a state rule for the applicable Federal rule (*e.g.,* the National Emission Standards for Hazardous Air Pollutants). Upon approval by the EPA, the state agency is authorized to implement and enforce its rule in place of the Federal rule, and the state rule becomes federally enforceable in that state.

The EPA first promulgated standards to regulate asbestos emissions on April 6, 1973. *See* 38 FR 8826. These standards have since been amended several times and re-codified in 40 CFR part 61, subpart M, ''National Emission

Standard for Asbestos'' (Asbestos NESHAP). On January 11, 2013, the EPA approved the New Hampshire regulation Env-A 1800 titled ''Asbestos Management and Control'' (Asbestos Management and Control Rule) as a rule adjustment for the Asbestos NESHAP, applicable to all sources in New Hampshire except for inactive waste disposal sites not operated after July 9, 1981. *See* 78 FR 2333.[1] These inactive disposal sites are regulated by other State rules that were also approved by the EPA on January 11, 2013. *See id.*[2]

Under 40 CFR 63.91(e), within 90 days of any state amendment, repeal, or revision of any state rule approved as an alternative to a Federal requirement, the state must provide the EPA with a copy of the revised authorities and satisfy either 63.91(e)(1) or (e)(2). Under 63.91(e)(2), the State shall request approval of the revised rule. In a letter dated July 21, 2017, supplemented on August 21, 2017, September 21, 2017, and March 1, 2018, NH DES requested approval of its amended rules pertaining to asbestos management in New Hampshire. Specifically, NH requested approval of Env-A 1800 titled ''Asbestos Management and Control,'' effective as of May 5, 2017, Sections 1801–1807, Appendices B, C and D.[3] The EPA has determined it is appropriate to consider the request to approve the amended Asbestos Management and Control Rule under the rule substitution criteria in 40 CFR 63.93.

III. What requirements must a state rule meet to substitute for a section 112 rule?

A state must demonstrate that it has satisfied the up-front approval criteria contained in 40 CFR 63.91(d). The process of providing up-front approval assures that a state has met the delegation criteria in section 112(l)(5) of the CAA as implemented by EPA's regulations at 40 CFR 63.91(d). These criteria require, among other things, that the state has demonstrated that its NESHAP program contains adequate authorities to assure compliance with each applicable Federal requirement, adequate resources for implementation, and an expeditious compliance schedule. Under 40 CFR 63.91(d)(3), interim or final Title V program approval under 40 CFR part 70 satisfies the criteria set forth in 40 CFR 63.91(d) for up-front approval. On October 2, 1996, EPA promulgated interim approval of NH DES's operating permits program, and also approved New Hampshire's authority to implement and enforce unchanged section 112 standards for part 70 sources under 40 CFR 63.91. *See* 61 FR 51371. Subsequently, on September 24, 2001, EPA promulgated full approval of NH DES's operating permits program. *See* 66 FR 48806. Accordingly, NH DES has satisfied the up-front approval criteria of 40 CFR 63.91(d).

Additionally, the regulations governing approval of state requirements that substitute for a section 112 rule require EPA to evaluate the state's submittal to ensure that it meets the stringency and other requirements of 40 CFR 63.93. A rule will be approved if the state requirements contain or demonstrate: (1) Applicability criteria that are no less stringent than the corresponding Federal rule; (2) levels of control and compliance and enforcement measures that result in emission reductions from each affected source that are no less stringent than would result from the otherwise applicable Federal rule; (3) a compliance schedule that requires each affected source to be in compliance within a time frame consistent with the deadlines established in the otherwise applicable Federal rule; and (4) the additional compliance and enforcement measures as specified in 40 CFR 63.93(b)(4). *See* 40 CFR 63.93(b).

A state may also seek, and EPA may approve, a partial delegation of the EPA's authorities. *See* CAA 112(l)(1). To obtain a partial rule substitution, the state's submittal must meet the otherwise applicable requirements in 40 CFR 63.91 and 63.93, and be separable from the portions of the program that the state is not seeking rule substitution for. *See* 40 CFR 63.91(f)(3); 64 FR 1889, January 12, 1999.

Before we can approve alternative requirements in place of a part 61 emissions standard, the state must submit to us detailed information that demonstrates how the alternative requirements compare with the otherwise applicable Federal standard. A detailed discussion of how EPA will determine equivalency for state alternative NESHAP requirements is provided in the preamble to EPA's proposed subpart E amendments on January 12, 1999. *See* 64 FR 1908.

IV. What are the differences between NH's rule and the asbestos NESHAP and what changes did NH make to its Asbestos Management and Control Rule?

NH DES's amended Asbestos Management and Control Rule, effective as of May 5, 2017, continues to incorporate by reference most, but not all, of the federal national emission standards for hazardous air pollutants (40 CFR part 61, subpart M) for asbestos (Asbestos NESHAP). The following discussion compares those sections of 40 CFR part 61, subpart M that NH DES has not adopted with the applicable sections of New Hampshire's rule, demonstrating that New Hampshire's rule is in each case no less stringent than the federal rule, and then describes the material changes to NH's amended Asbestos Management and Control Rule, effective as of May 5, 2017.

The first three exceptions to NH's incorporation by reference of the Asbestos NESHAP under Env-A 1801.06(a), namely 40 CFR 61.145(c)(1)(i), 61.145(c)(1)(ii), and 61.145(c)(1)(iv), are demolition work practices that may be considered together. Section 61.145 contains the standard for asbestos demolition and renovation, subsection (c) contains the procedures for asbestos emission control, and paragraph (1) provides for the removal of all regulated asbestos-containing material (RACM), except RACM need not be removed before demolition if the criteria in paragraph (1) is met.

In Env-A 1805.10, unlike the federal rule, NH DES requires that all ACM without exception must be removed prior to demolition. Because New Hampshire's rule regulates a greater range of asbestos activity than the federal NESHAP, it contains applicability criteria no less stringent than those in the federal rule. *See* 40 CFR 63.93(b)(1).

The next exception to the federal rule in New Hampshire's rule is 40 CFR 61.149(c)(2). This section, together with §§ 61.150(a)(4), 61.151(c), 61.152(b)(3), 61.154(d) and 61.155(a), is non-delegable to the states under 40 CFR 61.157.

NH DES did not adopt 40 CFR 61.150(a)(5), which provides an exception to the standard for waste disposal for manufacturing, fabricating, demolition, renovation, and spraying operations. Section 61.150(a) provides that each owner or operator shall discharge no visible emissions during the collection, processing, packaging, or

[1] The EPA originally approved NH's Asbestos Management and Control Rule on November 28, 2006, *see* 71 FR 68746, and approved an updated version of the rule on January 11, 2013.

[2] The EPA originally approved NH's Inactive Waste Disposal Site Rule on May 28, 2003, *see* 68 FR 31611, and approved an updated version of the rule on January 11, 2013.

[3] NH is not requesting approval of the following provisions 1801.02(e), 1801.07, 1802.02, 1802.04, 1802.07–1802.09, 1802.13, 1802.15–1802.17, 1802.25, 1802.31, 1802.37, 1802.40, 1802.44, and 1803.05–1803.09. In addition, NH DES did not request approval of Env-A 1808 (relating to asbestos analytical requirements), Env-A 1808–1814 (relating to personnel licensing and training), and Appendix A: State Statutes and Federal Regulations Implemented.

transporting of asbestos-containing waste material. Subparagraph (5) provides an exclusion for Category I and II nonfriable ACM. NH DES regulates both Category I and Category II nonfriable ACM in demolitions, and therefore did not adopt the provisions of 40 CFR 61.150(a). *See* Env-A 1805.10(a) and 1805.08. Similarly, NH DES did not adopt 40 CFR 61.150(b)(3). Paragraph 61.150(b) provides that all asbestos-containing waste material shall be deposited as soon as is practical by the waste generator at an approved site. Subparagraph 61.150(b)(3) excludes Category I nonfriable ACM that is not RACM. Again, NH DES has chosen to regulate this material. Because the amended Asbestos Management and Control Rule regulates a greater range of asbestos activity than the federal NESHAP, it contains applicability criteria that are no less stringent than the federal rule. *See* 40 CFR 63.93(b)(1).

NH DES did not adopt 40 CFR 61.151 with respect to disposal sites not operated after July 9, 1981. This is a special case covered by New Hampshire's waste management regulation Env-Sw 2100, which EPA has already approved in a separate action. *See* 78 FR 2333.

Finally, NH DES did not adopt 40 CFR 61.154(c). This section includes the standard for active waste disposal sites. Paragraph (c) provides an alternative to the ''no visible emissions'' standard of 40 CFR 61.154(a), but New Hampshire's rule is no less stringent than the federal rule in that it does not allow this alternative approach. *See* 40 CFR 63.93(b)(2).

In amending Env-A 1800, NH DES made some changes to Env-A 1800, editorial in nature, intended to clarify the Asbestos Management and Control Rule. NH DES also made other, material changes, which we discuss below.

In NH's amended Asbestos Management and Control Rule, NH added section Env-A 1801.05 which reads as follows: ''*Federal Definitions Incorporated.* Terms used in this chapter that are defined in 40 CFR 61.141 shall be as reprinted in Appendix D, except for the following: (a) Asbestos; (b) Facility; (c) Regulated Asbestos-Containing Material (RACM); and (d) Remove.'' These terms are defined in the amended Asbestos Management and Control Rule in either Env-A 1802 or Appendix C and include minor differences from the Asbestos NESHAP. As discussed in greater detail below, the EPA has determined that for each of the four terms NH did not incorporate, NH's regulation includes terms and requirements that are either equivalent to the terms in the Asbestos NESHAP or result in applicability criteria that are no less stringent than those in the NESHAP. *See* 40 CFR 63.93(b)(1).

Under 40 CFR 61.141, ''Asbestos'' is defined to mean ''the asbestiform varieties of serpentinite (chrysotile), riebeckite (crocidolite), cummingtonite-grunerite, anthophyllite, and actinolite-tremolite''. In Appendix C of the State rule, NH defines ''Asbestos'' to mean ''amosite, chrysotile, crocidolite, or asbestiform tremolite, actinolite, or anthophylite.'' The mineral series cummingtonite-grunerite is also referred to as amosite. Therefore, EPA has determined NH's definition of asbestos is equivalent to the federal definition.

NH's definition of ''Facility,'' unlike the federal definition, does not explicitly exclude residential buildings having four or fewer dwelling units. *See* Env-A 1802.27. In addition, NH explicitly includes utility infrastructure in the definition of ''Facility,'' and includes a definition for ''utility infrastructure'' whereas the federal rule regulates utility infrastructures but the federal definition does not include an explicit reference to utility infrastructures. The federal definition of Facility, as found in the Asbestos NESHAP at 40 CFR 61.141, specifies that for purposes of this definition, any building, structure, or installation that contains a loft used as a dwelling is not considered a residential structure, installation, or building. NH did not incorporate this language because NH's rule applies to all residential buildings including residential buildings with fewer than four dwellings. The federal definition also specifies any structure, installation or building that was previously subject to this subpart is not excluded, regardless of its current use or function. NH includes this requirement in section Env-A 1801.02(d), rather than in the definition of Facility. Thus, EPA finds that these aspects of the NH rule result in applicability criteria no less stringent than the applicable NESHAP requirements. *See* 40 CFR 61.93(b)(1).

Under the Asbestos NESHAP, ''Regulated asbestos-containing material (RACM)'' is defined in 40 CFR 61.141 to mean ''(a) Friable asbestos material, (b) Category I nonfriable ACM that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.'' NH's definition of RACM is nearly identical to the federal definition, except that NH uses the term ''sawing'' instead of ''cutting'' and NH's definition uses the phrase ''will likely become'' rather than ''has a high probability of becoming.'' NH's rule incorporates the federal Asbestos NESHAP definition of cutting at 40 CFR 61.141 which means ''to penetrate with a sharp-edged instrument and includes sawing, but does not include shearing, slicing, or punching.'' In addition, NH's rule requires all ACM be removed prior to demolition, requires all ACM during renovation to be adequately wetted before removal and maintained wet during removal, and requires transport and disposal as specified in 40 CFR 61.150 of all ACM, whether RACM or not. *See* Env-A 1805.10(a), 1805.07, and 1805.08(c). Because sawing is referenced in the incorporated Asbestos NESHAP definition of cutting, and because NH's rule regulates all ACM, rather than RACM, during renovation, demolition and disposal, EPA finds this aspect of the NH rule to be no less stringent than the Asbestos NESHAP.

''Remove'' is defined in 40 CFR 61.141 to mean ''to take out RACM or facility components that contain or are covered with RACM from any facility.'' NH's rule includes a definition for ''Removal,'' rather than ''Remove.'' Under the NH rule, ''Removal'' means ''the stripping of any RACM from surfaces or components within or at a facility.'' *See* Env-A 1802.42. The Asbestos NESHAP and the amended NH Asbestos Management and Control Regulation both use the term ''Removal'' as well as ''Remove'' in the regulatory text. NH's definition of ''Removal'' is similar to the Asbestos NESHAP definition of ''Remove''. In addition to incorporating the federal requirements for removing RACM during renovation and demolition, NH's rule includes work practice standards for asbestos removal procedures which require all ACM to be adequately wetted before and during removal, and placed in leak-tight containers for disposal. *See* Env-A 1805.07. NH's rule also includes ACM disposal procedures which require the owner or operator to remove all packaged ACM, whether RACM or not, from the worksite. *See* Env-A 1805.08. EPA finds that because NH's regulatory text requires all ACM, *i.e.,* not just RACM, to be placed into leak-tight containers and removed from the worksite, this aspect of NH's rule is no less stringent than the Asbestos NESHAP. Therefore, the EPA has determined that for each of the four terms NH did not incorporate, NH's regulation includes terms and requirements that are either equivalent to the terms in the Asbestos NESHAP, or result in applicability criteria that are no less stringent than those in the NESHAP. *See* 40 CFR 63.93(b)(1).

In the amended Asbestos Management and Control Rule, NH added section Env-A 1806 Alternative Requirements for Specific ACM which provides certain alternatives for asbestos abatement activities on vinyl asbestos floor tile, asbestos floor sheeting, asbestos roofing materials, asbestos siding and other preformed cementitious asbestos materials. Sections Env-A 1806.02, 1806.03(a), and 1806.04 provide alternatives to ACM that is not sanded, sawed, cut, drilled or otherwise treated to create a fine dust or particles. These alternatives do not apply to RACM so the NESHAP does not regulate these activities. Thus, the NH rule regulates a greater range of asbestos activity than the federal NESHAP, and contains applicability criteria and levels of control that are no less stringent than those in the federal rule. *See* 40 CFR 63.93(b)(1) and 63.93(b)(2). Env-A 1806.03(b) does include alternatives for asbestos containing roofing materials that are cut and therefore become RACM which is regulated by the NESHAP. Under the NESHAP, appendix A section III(A) 3.A.3, the EPA considers a roof removal project to be in compliance with the ''adequately wet'' and ''discharge no visible emission'' requirements of the NESHAP if the roof cutter is equipped with a blade guard that completely encloses the blade and water application is used at the roof surface during the cutting of the roof. Env-A 1806.03(b) permits (in lieu of otherwise applicable requirements at Env-A 1805.04, 1805.05, and 1805.09) a HEPA-filtered tool be used to prevent generation of visible emissions, together with water application at the point of abrasion with an airless sprayer and in sufficient volume so that no visible emissions result from the operation other than water spray. NH's work practice requires ''no visible emissions'' and does not exclude the requirements for ACM to be ''adequately wet,'' as the NESHAP work practice allows. *See* Env-A 1805.07 and Env-A 1806.04(b). The EPA has determined the requirements in Env-A 1806.03(b) are equivalent to the NESHAP and would result in emissions reductions from each affected source that are no less stringent than would result from the NESHAP. *See* 40 CFR 63.93(b)(2).

In addition to the changes described above, in the amended Asbestos Management and Control Rule, NH made the following changes. As an editorial change, NH moved its statutory definitions to Appendix C and moved the federal definitions incorporated to Appendix D. In addition, under Env-A 1805.08 Asbestos Disposal Procedures, NH added a requirement for packaged ACM to be removed from the worksite as soon as practicable, but in no event longer than 30 days following completion of the abatement work. The Asbestos NESHAP requires all asbestos containing waste material to be deposited as soon as practicable but does not specify a timeframe not to be exceeded. *See* 40 CFR 61.150(b). The EPA finds NH's requirement to be no less stringent than the compliance time frame established in the NESHAP. *See* 40 CFR 63.93(b)(3). The EPA has determined that these aspects of the State rule are no less stringent than the Asbestos NESHAP requirements.

In addition to incorporating the federal rule compliance monitoring requirements by reference, NH's rule specifies that the chapter applies to provisions for inspection, compliance monitoring, and enforcement by the department. *See* Env-A 1801.02(f) and 40 CFR 63.93(b)(4). In other aspects, the State rule imposes additional State requirements in addition to the federal requirements. A detailed comparison of the NH additional rule requirements and the federal requirements is available in NH's equivalency demonstration table available in the public docket. Because these State requirements simply add onto the federal requirements, they inherently are no less stringent than their federal counterparts. *See* 40 CFR 63.93(b)(2).

V. What is EPA's evaluation regarding NH's amended Asbestos Management and Control Rule?

After reviewing the request for approval of NH DES's amended Asbestos Management and Control rule, the EPA has determined that this request meets all of the requirements necessary to qualify for a rule substitution approval under CAA section 112(l) and 40 CFR 63.91 and 63.93. Specifically, the EPA has preliminarily determined that NH DES's amended Asbestos Management and Control Rule is equivalent to or not less stringent than the Asbestos NESHAP as required by each of the criteria set forth in 40 CFR 63.93(b)(1)–(3), and satisfies the compliance and enforcement requirements in 40 CFR 63.93(b)(4), as the State rule applies to all sources in New Hampshire, except for inactive waste disposal sites not operated after July 9, 1981. Therefore, the EPA hereby proposes to approve NH DES's amended Asbestos Management and Control Rule, effective as of May 5, 2017, in lieu of the Asbestos NESHAP, for all sources in New Hampshire except for inactive waste disposal sites not operated after July 9, 1981.

VI. Proposed Action

The EPA is proposing to approve NH DES's amended rules in Env-A 1800, ''Asbestos Management and Control,'' effective as of May 5, 2017, Sections 1801–1807, Appendices B, C, and D (excluding the following provisions: 1801.02(e), 801.07, 1802.02, 1802.04, 1802.07–1802.09, 1802.13, 1802.15–1802.17, 1802.25, 1802.31, 1802.37, 1802.40, 1802.44, and 1803.05–1803.09) as a rule substitution for the Asbestos NESHAP, for all sources in New Hampshire except for inactive waste disposal sites not operating after July 9, 1981.

VII. Incorporation by Reference

In this rulemaking, the EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is proposing to incorporate by reference New Hampshire's Env-A 1800, ''Asbestos Management and Control,'' effective as of May 5, 2017, Sections 1801–1807, Appendices B, C, and D; excluding the following provisions: 1801.02(e), 1801.07, 1802.02, 1802.04, 1802.07–1802.09, 1802.13, 1802.15–1802.17, 1802.25, 1802.31, 1802.37, 1802.40, 1802.44, and 1803.05–1803.09. The EPA is also proposing to incorporate by reference a letter from Clark B. Freise, Assistant Commissioner, Department of Environmental Services, State of New Hampshire, to David J. Alukonis, Interim Director, Office of Legislative Services, dated June 23, 2017, certifying that the copy of the rule enclosed with the letter, Env-A 1800, is the official version of this rule. The EPA has made, and will continue to make, these documents generally available electronically through *https://www.regulations.gov* and/or in hard copy at the appropriate EPA office.

VIII. Statutory and Executive Order Reviews

Under the CAA, the Administrator has the authority to approve section 112(l) submissions that comply with the provisions of the Act and applicable Federal regulations. In reviewing section 112(l) submissions, EPA's role is to approve state choices, provided that they meet the criteria and objectives of the CAA and of EPA's implementing regulations. Accordingly, this action merely proposes to approve the State's request as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

In addition, this rulemaking is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA. It also does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994). And it does not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the EPA is not proposing to approve the submitted rule to apply in Indian country located in the State, and because the submitted rule will not impose substantial direct costs on Tribal governments or preempt Tribal law.

List of Subjects in 40 CFR Parts 61 and 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Incorporation by reference, Intergovernmental relations, Reporting and record keeping requirements.

Dated: March 15, 2018.

Alexandra Dapolito Dunn,

Regional Administrator, EPA Region 1.

[FR Doc. 2018–06005 Filed 3–23–18; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF VETERANS AFFAIRS

[8320–01]

48 CFR Parts 801, 811, 832, 852, and 870

RIN 2900–AP81

Revise and Streamline VA Acquisition Regulation—Parts 811 and 832

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend and update its VA Acquisition Regulation (VAAR) in phased increments to revise or remove any policy superseded by changes in the Federal Acquisition Regulation (FAR), to remove any procedural guidance internal to VA into the VA Acquisition Manual (VAAM), and to incorporate any new agency specific regulations or policies. These changes seek to streamline and align the VAAR with the FAR and remove outdated and duplicative requirements and reduce burden on contractors. The VAAM incorporates portions of the removed VAAR as well as other internal agency acquisition policy. VA will rewrite certain parts of the VAAR and VAAM, and as VAAR parts are rewritten, we'll publish them in the **Federal Register**. VA will combine related topics, as appropriate. In particular, this rulemaking revises VAAR Parts 811—Describing Agency Needs and Part 832—Contract Financing, as well as affected parts 801—Department of Veterans Affairs Acquisition Regulation System, 852—Solicitation Provisions and Contract Clauses, and 870—Special Procurement Controls.

DATES: Comments must be received on or before May 25, 2018 to be considered in the formulation of the final rule.

ADDRESSES: Written comments may be submitted through *www.Regulations.gov*; by mail or hand-delivery to Director, Regulation Policy and Management (00REG), Department of Veterans Affairs, 810 Vermont Avenue NW, Room 1063B, Washington, DC 20420; or by fax to (202) 273–9026. Comments should indicate that they are submitted in response to ''RIN 2900–AP81—Revise and Streamline VA Acquisition Regulation to Adhere to Federal Acquisition Regulation Principles (VAAR Case 2014–V004—parts 811, 832).'' Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at *www.Regulations.gov*.

FOR FURTHER INFORMATION CONTACT: Mr. Ricky Clark, Senior Procurement Analyst, Procurement Policy and Warrant Management Services, 003A2A, 425 I Street NW, Washington DC 20001, (202) 697–3565. (This is not a toll-free telephone number.)

SUPPLEMENTARY INFORMATION:

Background

This rulemaking is issued under the authority of the Office of Federal Procurement Policy (OFPP) Act which provides the authority for an agency head to issue agency acquisition regulations that implement or supplement the FAR.

VA is proposing to revise the VAAR to add new policy or regulatory requirements and to remove any redundant guidance and guidance that is applicable only to VA's internal operating processes or procedures. Codified acquisition regulations may be amended and revised only through rulemaking. All amendments, revisions, and removals have been reviewed and concurred with by VA's Integrated Product Team of agency stakeholders.

The VAAR uses the regulatory structure and arrangement of the FAR and headings and subject areas are broken up consistent with the FAR content. The VAAR is divided into subchapters, parts (each of which covers a separate aspect of acquisition), subparts, sections, and subsections.

The Office of Federal Procurement Policy Act, as codified in 41 U.S.C. 1707, provides the authority for the Federal Acquisition Regulation and for the issuance of agency acquisition regulations consistent with the FAR.

When Federal agencies acquire supplies and services using appropriated funds, the purchase is governed by the FAR, set forth at Title 48 Code of Federal Regulations (CFR), chapter 1, parts 1 through 53, and the agency regulations that implement and supplement the FAR. The VAAR is set forth at Title 48 CFR, chapter 8, parts 801 to 873.

Discussion and Analysis

The VA proposes to make the following changes to the VAAR in this phase of its revision and streamlining initiative. For procedural guidance cited below that is proposed to be deleted from the VAAR, each section cited for removal has been considered for inclusion in VA's internal agency operating procedures in accordance with FAR 1.301(a)(2). Similarly, delegations of authority that are removed from the VAAR will be included in the VA Acquisition Manual (VAAM) as internal agency guidance.

VAAR Part 801—Department of Veterans Affairs Acquisition Regulation System

We propose to amend the authority for part 801 to remove the citation of 38 U.S.C. 501, and to add 41 U.S.C. 1121, 41 U.S.C. 1303, an updated positive law codification of, to reflect additional authority of the VA as an executive agency to issue regulations that are essential to implement Governmentwide policies and procedures in the agency, as well as to issue additional policies and procedures required to satisfy the specific needs of the VA; and 41 U.S.C. 1702, which addresses overall direction of procurement policy, acquisition planning and management responsibilities of VA's Chief Acquisition Officer.

This proposed rule contains existing information collection requirements. The proposed rule would result in multiple actions affecting these information collections, including outright removal of the information collection and redesignating the information collection burden associated with several clauses or provisions by renumbering the clause or provision. We propose to revise certain clause or provision numbers in VAAR part 801 only when removing the actual information collection and its associated burden, or when redesignating and renumbering the clause or provision under the associated Office of Management and Budget (OMB) approval number.

In section 801.106, OMB approval under the Paperwork Reduction Act, we propose to amend section 801.106 table columns titled ''48 CFR part or section where identified and described,'' and ''Current OMB control number.'' We propose to remove the reference to section 832.006–4 and the associated OMB control number 2900–0688. This information collection burden under the associated OMB control number was previously removed via a published Notice of Office of Management and Budget Action dated March 2, 2015, Information Collection Reference (ICR) 201406–2900–017, which approved the removal of the information collection and a reduction of the associated burden under OMB approval number 2900–0688. Therefore, it is proposed for removal from this table. Information collection is approved at the FAR level under FAR OMB approval number 9000–0138, making it unnecessary for a separate information collection approval in the VAAR.

In section 801.106, OMB approval under the Paperwork Reduction Act, we propose to amend section 801.106 table columns titled ''48 CFR part or section where identified and described,'' and ''Current OMB control number.'' We propose to remove the reference to subsection 852.211–71, Special Notice, and discontinue the corresponding OMB control number 2900–0588, as the provision conflicts with FAR 52.214–21. It currently requires literature to be provided after award and thus conflicts with the FAR and the Government's procedures for evaluating relevant materials during source selection and prior to award decisions.

In section 801.106, in reference to the table described, we propose to remove the reference to subsection 852.211–73, Brand Name or Equal, and discontinue the corresponding OMB control number 2900–0585, as the topical area the clause covers, ''brand name or equal,'' or ''items peculiar to one manufacturer,'' has sufficient coverage in FAR 11.105 and the associated provision in FAR 52.211–6, Brand Name or Equal.

In section 801.106, in reference to the table described, we propose to remove the reference to section 852.236–82, Payments under fixed-price construction contracts (without NAS), and remove the reference to section 852.236–83, Payments under fixed-price construction contracts (including NAS). Both of these clauses, pertaining to ''payments under fixed-price construction,'' have been renumbered to reflect their prescription under Part 832. The associated OMB control number 2900–0422 will now reflect information collections under the new clause numbers—852.232–70 and 852.232–71 as described in further detail under the Paperwork Reduction Act section of this preamble, although these are not new collections.

Subchapter B—Competition and Acquisition Planning

We propose to revise the title of Subchapter B to conform to the title in the Federal Acquisition Regulation, 48 CFR, chapter 1, ''Acquisition Planning.''

VAAR Part 811—Describing Agency Needs

We propose to revise the Table of Contents to reflect the revision of subparts 811.1 and 811.2, and the deletion of subparts 811.4, 811.5, and 811.6.

We propose to revise the part 811 authorities to add 41 U.S.C. 1702, which addresses overall direction of procurement policy, acquisition planning and management responsibilities of VA's Chief Acquisition Officer, and 41 U.S.C. 1303, an updated positive law codification to reflect additional authority of the VA as an executive agency to issue regulations that are essential to implement Governmentwide policies and procedures in the agency, as well as to issue additional policies and procedures required to satisfy the specific needs of the VA.

We propose to remove section 811.001, Definitions, because the coverage in FAR 11.104 provides adequate coverage of what brand name or equal purchase descriptions must include. The VAAR had merely paraphrased the same information. In accordance with FAR drafting standards and the requirement in FAR 1.304(b)(1) that agency acquisition regulations shall not unnecessarily repeat, paraphrase, or otherwise restate material contained in the FAR, this section is therefore proposed for removal.

In subpart 811.1, Selecting and Developing Requirements Documents, we propose to remove section 811.103, Market acceptance, and the underlying subsection 811.103–70, Technical industry standards. We propose to revise the prescription to clause 852.211–72, Technical industry standards, for clarity and simplification of the language, and to move the prescription of the clause to 811.204–70 to comport with the FAR structure, as technical industry standards are not related to coverage in FAR 11.103, but would fall under FAR 11.204.

We propose to remove the section title at 811.104, Use of Brand Name or Equal purchase descriptions, and subsection at 811.104–70, Brand name or equal purchase descriptions, because FAR 11.104, provides adequate coverage of what brand name or equal purchase descriptions must include.

We propose to remove subsections 811.104–71, Purchase description clauses, and 811.104–72, Limited application of brand name or equal, because the subject is adequately covered in FAR clause 52.211–6, Brand name or equal.

We propose to remove subsection 811.104–73, Bid samples, as coverage is adequate in FAR 14.202–4, and clause 52.214–20.

We propose to remove subsection 811.104–74, Bid evaluation and award, since it duplicates coverage in FAR clause 52.211–6.

We propose to remove subsection 811.104–75, Procedure for negotiated procurements, since there is no need to have separate policy and procedures for negotiated and sealed bid solicitations. FAR covers ''brand name or equal'' without a distinction between sealed bid and negotiated solicitations.

We propose to remove 811.105, Items peculiar to one manufacturer, since the subject is adequately covered in FAR 11.105.

In subpart 811.1, section 811.107, Contract clauses, we propose to amend the number and title of the existing section to read as 811.107–70, Contract clause, to better reflect its placement in accordance with FAR numbering conventions. It fits intelligibly as a supplement to FAR 11.107, Solicitation provision, but the VAAR is supplementing with a clause in this area and not a provision, necessitating the more accurate title. Subsection 811.107–70 prescribes a new clause 852.211–70, Equipment Operation and Maintenance Manuals, which replaces the existing clause 852.211–70, Service data manuals.

In subpart 811.2, Using and Maintaining Requirements Documents, we propose to remove section 811.202, Maintenance of standardization documents, as it is procedural in nature and will be moved to the VAAM.

Under subpart 811.2, we propose to revise and renumber section 811.204, Contract clause, to subsection 811.204–70, Contract clause, which contains text prescribing clause 852.211–72, Technical industry standards. The prescription for 852.211–72 was moved from 811.103–70 to better comport with FAR structure numbering and arrangement.

We propose to remove subparts 811.4, Delivery or Performance Schedules, and 811.5, Liquidated Damages, as the policy is redundant to FAR guidance.

We propose to remove subpart 811.6, Priorities and Allocations, as it provides internal procedural guidance not having a significant effect beyond the internal operating procedures of the VA (see FAR 1.301(b)) and which will be moved to the VAAM.

VAAR Part 832—Contract Financing

We propose to revise the Table of Contents to reflect the revision of subparts 832.1, 832.2, 832.9 and 832.70, and the deletion of subparts 832.5, 832.8, and 832.11.

We propose to revise the part 832 authorities to add 41 U.S.C. 1702, which addresses overall direction of procurement policy, acquisition planning and management responsibilities of VA's Chief Acquisition Officer; and 41 U.S.C. 1303, to include an updated positive law codification.

We propose to add section 832.001, Definitions. This section would add three definitions of terms relating to electronic invoicing. We propose to amend subsection 832.006–1, General, to spell out the title of Senior Procurement Executive (SPE) and to delete the last sentence as it provides internal procedural guidance not having a significant effect beyond the internal operating procedures of the VA (see FAR 1.301(b)) and which will be moved to the VAAM.

We propose to remove subsection 832.006–2, Definitions, which only included one definition for the Remedy Coordination Official (RCO). This information would be added in subsection 832.006–4 and would make the need for a separate definition repeating the same thing unnecessary.

We propose to remove subsection 832.006–3, Responsibilities, as it provides internal procedural guidance not having a significant effect beyond the internal operating procedures of VA (see FAR 1.301(b)) and which will be moved to the VAAM.

We propose to amend subsection 832.006–4, Procedures, to update the existing VA agency procedures and to delete paragraphs (a) and (c) as internal operating procedures of VA not having a significant effect beyond the internal operating procedures of the VA (see FAR 1.301(b)) and which will be moved to the VAAM. We propose to add new paragraphs (b), (e), and (g) to implement FAR required agency procedures which describes notifying contractors, the contractor's right to provide information on its behalf concerning a finding of fraud in payment requests, the time period to provide the information to the Government and that the Senior Procurement Executive (SPE) will provide a copy of each final determination and supporting documentation to the contractor, the RCO, the Contracting Officer, and the VA Office of Inspector General (OIG).

In subpart 832.1, Non-Commercial Item Purchase Financing, we propose to amend section 832.111, Contract clauses for non-commercial purchases, to renumber the section as subsection 832.111–70, retitle it as ''VA contract clauses for non-commercial purchases,'' and to reconfigure the paragraphs to conform more closely to FAR prescription language for clauses and provisions. Also, the clauses were renumbered to reflect that they are prescribed in part 832 and not 836 as they were previously numbered, and the clauses were retitled for clarification.

In subpart 832.2, Commercial Item Purchase Financing, we propose to remove section 832.201, Statutory authority, and move internal procedural guidance not having a significant effect beyond the internal operating procedures of VA (see FAR 1.301(b)) and which will be moved to the VAAM. It contains a delegation of authority for Contracting Officers to make determinations regarding terms and conditions for payment for commercial items and whether they are appropriate, customary, and in the best interest of the Government.

We propose to amend subsection 832.202–1, Policy, to make the paragraph comport with the corresponding FAR coverage, to reflect that Heads of Contracting Activities (HCAs) shall report no later than December 31 of each calendar year, to the Senior Procurement Executive (SPE) and Deputy Senior Procurement Executive (DSPE), on the number of contracts for commercial items with unusual contract financing, commercial interim or advance payments that were approved for the previous fiscal year (1 October 20XX–30 September 20XX). This would stipulate what is to be included in the report, the amount of such unusual contracting financing, commercial interim or advance payments that were approved, and the kind and amount of security obtained by the contractor for the advance.

We propose to amend subsection 832.202–4, Security for Government financing, to make the paragraphs comport with the corresponding FAR coverage, and to delete the mention of a Dun and Bradstreet report.

In subpart 832.4, Advance Payments for Non-Commercial Items, we propose to amend 832.402, General, to provide updated and revised VA procedures on who in the VA is delegated authority to make the determination described at FAR 32.402(c)(1)(iii) and to approve contract terms concerning advance payments. This is delegated to the Head of the Contracting Activity (HCA). Typically VA delegations are contained in the VAAM but here, where it may impact the use and approval of unique financing arrangements that contractors may need to be aware of, the delegation is being retained in the VAAR.

We propose to amend section 832.404, Exclusions, to renumber the paragraphs so it better comports with the FAR coverage and to clarify language and the citation of the authorities listed. We include information regarding the applicability of 31 U.S.C. 3324(d)(2), which allows VA to issue advance payment for subscriptions or other charges for newspapers, magazines, periodicals, and other publications for official use. In addition, the statutory authority is included in section 832.404 for 31 U.S.C. 1535, and permits the VA to issue advance payment for services and supplies obtained from another Government agency. Further, language is added that includes that as permitted by 5 U.S.C. 4109, VA is permitted to issue advance payment for all or any part of the necessary expenses for training Government employees, including obtaining professional credentials under 5 U.S.C. 5757, in Government or non-Government facilities, including the purchase or rental of books, materials, and supplies or services directly related to the training of a Government employee.

We propose to remove subparts 832.5, Progress Payments Based on Costs and 832.8, Assignment of Claims, as both contain internal procedural guidance not having a significant effect beyond the internal operating procedures of VA (see FAR 1.301(b)) and which will be moved to the VAAM.

In subpart 832.9, Prompt Payment, we propose to revise section 832.904, Determining payment due dates, to remove the text, but retain the title in the VAAR as it is related to a new proposed subsection that will fall underneath it. The procedures in the text will be moved to the VAAM as internal operational procedures of the VA.

We propose to add subsection 832.904–70 to implement OMB Memorandum M–11–32, dated September 14, 2011, and to encourage making payments to small business contractors within 15 days of receipt of invoice.

We propose to remove subpart 832.11, Electronic Funds Transfer, and section 832.1106, EFT mechanisms, as they contain internal procedural guidance not having a significant effect beyond the internal operating procedures of VA (see FAR 1.301(b)) and which will be moved to the VAAM.

In subpart 832.70, Electronic Invoicing Requirements, we propose to amend section 832.7000, General, to reflect that the subpart contains policy requirements rather than procedures.

We propose to remove section 832.7001, Definitions, since two of the definitions are provided in the FAR and the other relevant definitions have been moved to section 832.001, Definitions, which covers the entire part. We propose to revise the title to reflect ''Electronic payment requests,'' and to reflect text now in section 832.7002.

We propose to remove section 832.7002, Electronic payment requests, as the content has been moved to 832.7001.

We propose to amend subsection 832.7002–1, Data transmission, to renumber and redesignate it as subsection 832.7001–1; to remove the website address from paragraph (a); to require the address to be provided in the contract; and to delete from paragraph (b) a website which may in time become obsolete.

We propose to amend subsection 832.7002–2, Contract clause, to renumber and redesignate it as subsection 832.7001–2. We also propose to add a stipulation to the prescription that the clause does not apply to contracts paid with the Governmentwide commercial purchase card.

VAAR Part 852—Solicitation Provisions and Contract Clauses

In part 852, we propose to amend the authority by adding 41 U.S.C. 1303 to include an updated positive law codification, to reflect additional authority of the VA as an executive agency to issue regulations that are essential to implement Governmentwide policies and procedures in the agency, as well as to issue additional policies and procedures required to satisfy the specific needs of the VA.

We propose to amend section 852.211–70, Service data manuals, and to revise the title to read, ''Equipment Operation and Maintenance Manuals.'' This requires Contracting Officers to insert this revised clause in solicitations for technical medical equipment and devices, and/or other technical and mechanical equipment where the requiring activity determines manuals are a necessary requirement for operation and maintenance of the equipment. It removes the prior extensive detailed list of specific information that would need to be developed and instead relies on existing commercial industry practices to provide already developed commercial manuals.

We propose to remove subsection 852.211–71, Special Notice, as it is redundant to guidance contained in the FAR.

We propose to amend subsection 852.211–72, Technical industry standards, to more clearly set forth the requirements that the contractor shall conform to the standards reflected in the clause. It also requires the contractor to submit proof of conformance to the standard, how to obtain the standards and requires the offeror to contact the Contracting Officer if a response is not received within two weeks of the offeror's request.

We propose to remove subsections 852.211–73, Brand Name or Equal; 852.211–74, Liquidated Damages; and 852.211–75, Product Specifications, as they are all redundant to guidance contained in the FAR.

Also in part 852, we propose to add clause 852.232–70, Payments under fixed-price construction contracts (without NAS–CPM). This clause was formerly 852.236–82, Payments under fixed-price construction contracts (without NAS). This clause is revised to renumber it to 852.232–70 to reflect its prescription under part 832, and to revise the title of the ''NAS'' to ''NAS–CPM,'' to clarify the list of conditions in paragraph (c) for allowing progress payments for stored supplies and equipment, and to add a new paragraph (f) requiring notice to the contractor if retainage is to be made on a progress payment.

We propose to add clause 852.232–71, Payments under fixed-price construction contracts (including NAS–CPM). This clause was formerly 852.236–83, Payments under fixed-price construction contracts (including NAS). This clause is revised to renumber it as 852.232–71 to agree with its prescription in Part 832, to revise the title of the ''NAS'' to ''NAS–CPM,'' and to clarify the list of conditions in paragraph (c) for allowing progress payments for stored supplies and equipment, and to add a new paragraph (f) requiring notice to the contractor if retainage is to be made on a progress payment.

We propose to amend clause 852.232–72, Electronic Submission of Payment Requests, to revise the definition of ''designated agency office,'' and to delete a website address and system specifications.

We propose to delete the clauses 852.236–82, Payments Under Fixed-Price Construction Contracts (without NAS), and 852.236–83, Payments Under Fixed-Price Construction Contracts (including NAS) as they have been renumbered to comport with FAR arrangements and more properly belong in VAAR part 832 as noted above.

VAAR Part 870—Special Procurement Controls

We propose to remove section 870.112, Telecommunications equipment, as it contains the prescription and requirement for review of descriptive literature required by the clause 852.211–71, Special notice, which is proposed for removal as noted elsewhere in the preamble.

We propose to remove section 870.113, Paid use of conference facilities, as it contains internal procedural guidance not having a significant effect beyond the internal operating procedures of VA (see FAR 1.301(b)) and which will be moved to the VAAM.

Effect of Rulemaking

Title 48, Federal Acquisition Regulations System, Chapter 8, Department of Veterans Affairs, of the Code of Federal Regulations, as proposed to be revised by this rulemaking, would represent VA's implementation of its legal authority and publication of the Department of Veterans Affairs Acquisition Regulation (VAAR) for the cited applicable parts. Other than future amendments to this rule or governing statutes for the cited applicable parts, or as otherwise authorized by approved deviations or waivers in accordance with Federal Acquisition Regulation (FAR) subpart 1.4, Deviations from the FAR, and as implemented by VAAR subpart 801.4, Deviations from the FAR or VAAR, no contrary guidance or procedures would be authorized. All existing or subsequent VA guidance would be read to conform with the rulemaking if possible or, if not possible, such guidance would be superseded by this rulemaking as pertains to the cited applicable VAAR parts.

Executive Order 12866, 13563 and 13771

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits of reducing costs, of harmonizing rules, and of promoting flexibility. E.O. 12866, Regulatory Planning and Review defines ''significant regulatory action'' to mean any regulatory action that is likely to result in a rule that may: ''(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.''

VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action, and it has been determined this rule is not a significant regulatory action under E.O. 12866.

VA's impact analysis can be found as a supporting document at *http://www.regulations.gov,* usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at *http://www.va.gov/orpm* by following the link for VA Regulations Published from FY 2004 Through Fiscal Year to Date. This proposed rule is expected to be an E.O. 13771 deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's economic analysis.

Paperwork Reduction Act (PRA)

This proposed rule impacts seven existing information collection requirements associated with six Office of Management and Budget (OMB) control number approvals. The proposed actions in this rule result in multiple actions affecting some of these information collections, such as: the proposed outright removal of the information collection; no change in information collection burdens although titles and numbers may be changed or the clauses moved to other parts of the VAAR; a reduction in existing information collection burdens; and the proposed redesignation of the existing approved OMB collection numbers and the associated burden as a result of two clauses we propose to both retitle and renumber.

The Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507) requires that VA consider the impact of paperwork and other information collection burdens imposed on the public. Under 44 U.S.C. 3507(a), an agency may not collect or sponsor the collection of information, nor may it impose an information collection requirement unless it displays a currently valid OMB control number. See also 5 CFR 1320.8(b)(3)(vi).

This proposed rule would impose the following amended information collection requirements to two of the six existing information collection approval numbers associated with this proposed rule. Although this action contains provisions constituting collections of information at 48 CFR 852.236–82 and 852.236–83, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501–3521), no new proposed collections of information are associated with these clauses. The information collection requirements for 48 CFR 852.236–82 and 852.236–83 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control number 2900–0422. However, this information collection has been submitted to OMB to revise the title and to redesignate and renumber the two clauses currently numbered as sections 852.236–82, Payments Under Fixed-Price Construction Contracts (without NAS), and 852.236–83, Payments Under Fixed-Price Construction Contracts (including NAS). Accordingly, if approved, they would reflect the new designation and revised titles as set forth in the preamble and the amendatory language of this proposed rule to read: 852.232–70, Payments Under Fixed-Price Construction Contracts (without NAS–CPM), and 852.232–71, Payments Under Fixed-Price Construction Contracts (including NAS–CPM), respectively, under the associated OMB control number 2900–0422. The references to the old numbers—852.236–82 and 852.236–83, would accordingly be removed. There is no change in the information collection burden that is associated with this proposed request. As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA has submitted these information collection amendments to OMB for its review. Notice of OMB approval for this information collection will be published in a future **Federal Register** document.

This proposed rule would impose the following amended information collection requirements to one of the six existing information collection approval numbers associated with this proposed rule. Although this action contains provisions constituting collections of information at 48 CFR 852.211–70, Service data manuals, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501–3521), no new proposed information collection is associated with this clause. The information collection requirement for 48 CFR 852.211–70 is currently approved by OMB and has been assigned OMB control number 2900–0587. However, this information collection has been submitted to OMB to revise the title from ''Service Data Manuals,'' to read, ''Equipment Operation and Maintenance Manuals.'' We propose to reflect the revised title as set forth in the preamble and the amendatory language of this proposed rule for this clause to read: 852.211–70, Equipment Operation and Maintenance Manuals, under the associated OMB control number 2900–0587. We propose to remove the reference in the existing OMB control number to the old title. There is also a reduction in the information collection burden that is associated with this proposed request. The previously approved estimated annual hourly burden is 621 hours. As a result of revising the clause and removing the requirement to develop Government-specified service manuals, the VA has eliminated an unnecessary burden on the public by making use of commercial operation and maintenance manuals just like the general public and established commercial practices, thereby reducing by half the estimated annual hourly burden which is now estimated at 311 hours, a reduction of 310 annual hours. As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA has submitted this information collection amendment to OMB for its review. Notice of OMB approval for this information collection will be published in a future **Federal Register** document.

This proposed rule would remove two of the six existing information collection requirements associated with this action at 48 CFR 852.211–71, Special Notice, and 48 CFR 852.211–73, Brand Name or Equal. Under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501–3521), it discontinues the associated corresponding approved OMB control numbers, 2900–0588 and 2900–0585, respectively. As a result of this proposed rule, there is a removal in the information collection burden that is associated with the removal of these two information collection requirements. For 48 CFR 852.211–71, Special Notice, and its corresponding OMB control number 2900–0588, this results in a removal of 875 estimated annual burden hours. For 48 CFR 852.211–73, Brand Name or Equal, and its corresponding OMB control number 2900–0585, this results in a removal of 1,125 estimated annual burden hours. As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA has submitted this information collection amendment to OMB for its review. Notice of OMB approval for this information collection will be published in a future **Federal Register** document.

This proposed rule also contains two other provisions constituting a collection of information at 48 CFR 852.211–72, Technical industry standards, and 48 CFR 832.202–4, Security for Government financing, which remain unchanged. Under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), no new or proposed revised collection of information is associated with these provisions as a part of this proposed rule. The information collection requirements for 48 CFR 852.211–72 and 48 CFR 832.202–4 are currently approved by the OMB and have been assigned OMB control numbers 2900–0586 and 2900–0688, respectively. The burden of these information collections remains unchanged. In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), the OMB has approved the reporting or recordkeeping provisions that are included in the clause and the text under section 832.202–4 cited above and has given the VA the following approval numbers: OMB 2900–0586 and OMB 2900–0688, respectively.

Regulatory Flexibility Act

This proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The overall impact of the proposed rule would be of benefit to small businesses owned by Veterans or service-disabled Veterans as the VAAR is being updated to remove extraneous procedural information that applies only to VA's internal operating procedures. VA is merely adding existing and current regulatory requirements to the VAAR and removing any guidance that is applicable only to VA's internal operation processes or procedures. VA estimates no cost impact to individual business would result from these rule updates. This rulemaking does not change VA's policy regarding small businesses, does not have an economic impact to individual businesses, and there are no increased or decreased costs to small business entities. On this basis, the proposed rule would not have an economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. Therefore, under 5 U.S.C. 605(b), this regulatory action is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal Governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal Governments or on the private sector.

List of Subjects

48 CFR Part 801

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements.

48 CFR Part 811and 832

Government procurement.

48 CFR Part 852

Government procurement, Reporting and recordkeeping requirements.

48 CFR Part 870

Asbestos, Frozen foods, Government procurement, Telecommunications.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Gina S. Farrisee, Deputy Chief of Staff, Department of Veterans Affairs, approved this document on August 7, 2017, for publication.

Dated: February 22, 2018.

Consuela Benjamin,

Office of Regulation Policy & Management, Office of the Secretary, Department of Veterans Affairs.

For the reasons set out in the preamble, VA proposes to amend 48 CFR, chapter 8, parts 801, 811, 832, 852, and 870 as follows:

PART 801—DEPARTMENT OF VETERANS AFFAIRS ACQUISITION REGULATION SYSTEM

■ 1. The authority citation for part 801 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1121; 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 801.1—Purpose, Authority, Issuance 801.106 [Amended]

■ 2. Amend the section 801.106 table columns titled ''48 CFR part or section where identified and described'' and ''Current OMB control number'' to—

■ a. Remove the reference to section 832.006–4 and OMB Control Number 2900–0668.

■ b. Remove the reference to section 852.211–71 and OMB Control Number 2900–0588.

■ c. Remove the reference to section 852.211–73 and OMB Control Number 2900–0585.

■ d. Remove ''852.236–82 through'';.

■ e. Add the reference to sections 852.232–70 and 852.232–71 and OMB control number 2900–0422 on the same line.

* * * * *

SUBCHAPTER B—[Amended]

■ 3. The title of subchapter B is revised to read as follows:

SUBCHAPTER B—ACQUISITION PLANNING

PART 811—DESCRIBING AGENCY NEEDS

■ 4. The authority citation for part 811 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

§ 811.001 [Removed]

■ 5. Section 811.001 is removed.

■ 6. Revise subpart 811.1 to read as follows:

Subpart 811.1—Selecting and Developing Requirements Documents

§ 811.107–70 Contract clause.

The Contracting Officer shall insert the clause at 852.211–70, Equipment Operation and Maintenance Manuals, in solicitations and contracts for technical medical, and other technical and mechanical equipment and devices where the requiring activity determines manuals are a necessary requirement for operation and maintenance of the equipment.

■ 7. Revise subpart 811.2 to read as follows:

Subpart 811.2—Using and Maintaining Requirements Documents

§ 811.204–70 Contract clause.

The Contracting Officer shall insert the clause at 852.211–72, Technical industry Standards, in solicitations and contracts requiring conformance to technical industry standards, federal specifications, standards and commercial item descriptions unless comparable coverage is included in the item specification.

Subpart 811.4—[Removed and reserved].

■ 8. Subpart 811.4 is removed and reserved.

Subpart 811.5— Removed and reserved]

■ 9. Subpart 811.5 is removed and reserved.

Subpart 811.6—[Removed and reserved]

■ 10. Subpart 811.6 is removed and reserved.

PART 832—CONTRACT FINANCING

■ 11. The authority citation for part 832 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

■ 12. Section 832.001 is added to read as follows:

§ 832.001 Definitions.

As used in this subpart:

(a) *Designated agency office* means the office designated by the purchase order, agreement, or contract to first receive and review invoices. This office can be contractually designated as the receiving entity. This office may be different from the office issuing the payment.

(b) *Electronic form* means an automated system transmitting information electronically according to the accepted electronic data transmission methods identified in 832.7002–1. Facsimile, email, and scanned documents are not acceptable electronic forms for submission of payment requests.

(c) *Payment request* means any request for contract financing payment or invoice payment submitted by a contractor under a contract.

■ 13. Revise section 832.006–1 to read as follows:

§ 832.006–1 General.

(b) The Senior Procurement Executive (SPE) is authorized to make determinations that there is substantial evidence that contractors' requests for advance, partial, or progress payments are based on fraud and may direct that further payments to the contractors be reduced or suspended, as provided in FAR 32.006.

§ 832.006–2 [Removed].

§ 832.006–3 [Removed].

■ 14. Remove sections 832.006–2 and 832.006–3.

■ 15. Section 832.006–4 is revised to read as follows:

§ 832.006–4 Procedures.

(b) The Remedy Coordination Official (RCO) for VA is the Deputy Senior Procurement Executive (DSPE) and shall carry out the responsibilities of the Secretary or designee in FAR 32.006–4(b). To determine whether substantial evidence exists that the request for payment under a contract is based on fraud.

(e) The RCO shall carry out the responsibilities of the agency head in FAR 32.006–4(e) to notify the contractor of the reasons for the recommended action and of its right to submit information within a reasonable period of time in response to the proposed action under FAR 32.006.

(1) The notice of proposed action will be sent to the last known address of the contractor, the contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other method that provides signed evidence of receipt. In the case of a business, the notice of proposed action may be sent to any partner, principal, officer, director, owner or co-owner, or joint venture. The contractor will be afforded an opportunity to appear before the RCO to present information or argument in person or through a representative and may supplement the oral presentation with written information and argument.

(2) The contractor may supplement the oral presentation with written information and argument. The proceedings will be conducted in an informal manner and without the requirement for a transcript. If the RCO does not receive a reply from the contractor within 30 calendar days, the RCO will base his or her recommendations on the information available. Any recommendation of the RCO under FAR 31.006–4(a) and paragraph (b) of this section, must address the results of this notification and the information, if any, provided by the contractor. After reviewing all the information, the RCO shall make a recommendation to the SPE whether or not substantial evidence of fraud exists.

(g) In addition to following the procedures in *FAR 32.006–4,* the SPE shall provide a copy of each final determination and the supporting documentation to the contractor, the RCO, the Contracting Officer, and the OIG. The Contracting Officer will place a copy of the determination and the supporting documentation in the contract file.

Subpart 832.1—Non-Commercial Item Purchase Financing

■ 16. Section 832.111 is revised to read as follows:

§ 832.111–70 VA contract clauses for non-commercial purchases.

(a)(1) Insert the clause at 852.232–70, Payments under fixed-price construction contracts (without NAS–CPM) in solicitations and contracts that contain the FAR clause at 52.232–5, Payments Under Fixed-Price Construction Contracts, and if the solicitation or contract does not require use of the ''Network Analysis System—Critical Path Method (NAS–CPM).''

(2) If the solicitation or contract includes guarantee period services, the Contracting Officer shall use the clause with its Alternate I.

(b)(1) Insert the clause at 852.232–71, Payments under fixed-price construction contracts (including NAS–CPM), in solicitations and contracts that contain the FAR clause at 52.232–5, Payments Under Fixed-Price Construction Contracts, and if the solicitation or contract requires use of the ''Network Analysis System—Critical Path Method (NAS–CPM).''

(2) If the solicitation or contract includes guarantee period services, the Contracting Officer shall use the clause with its Alternate I.

Subpart 832.2—Commercial Item Purchase Financing

§ 832.201 [Removed].

■ 17. Section 832.201 is removed.

■ 18. Section 832.202–1 is revised to read as follows:

§ 832.202–1 Policy.

(d) HCAs shall report, no later than December 31st of each calendar year, to the Senior Procurement Executive (SPE) and the DSPE, on the number of contracts for commercial items with unusual contract financing or with commercial interim or advance payments approved for the previous fiscal year. The report shall include the contract number and amount, the amount of the unusual contract financing or with commercial interim or advance payments approved, and the kind and amount of security obtained for the advance.

■ 19. Section 832.202–4 is revised to read as follows:

§ 832.202–4 Security for Government financing.

(a)(2) An offeror's financial condition may be considered adequate security to protect the Government's interest when the Government provides contract financing. In assessing the offeror's financial condition, the Contracting Officer may obtain, to the extent required, the following information—

(i) A current year interim balance sheet and income statement and balance sheets and income statements for the two preceding fiscal years. The statements should be prepared in accordance with generally accepted accounting principles and must be audited and certified by an independent public accountant or an appropriate officer of the firm;

(ii) A cash flow forecast for the remainder of the contract term showing the planned origin and use of cash within the firm or branch performing the contract;

(iii) Information on financing arrangements disclosing the availability of cash to finance contract performance, the contractor's exposure to financial risk, and credit arrangements;

(iv) A statement of the status of all State, local, and Federal tax accounts, including any special mandatory contributions;

(v) A description and explanation of the financial effects of any leases, deferred purchase arrangements, patent or royalty arrangements, insurance, planned capital expenditures, pending claims, contingent liabilities, and other financial aspects of the business; and

(vi) Any other financial information deemed necessary.

Subpart 832.4—Advance Payments for Non-Commercial Items

■ 20. Section 832.402 is revised to read as follows:

§ 832.402 General.

(c)(1)(iii) The authority to make the determination required by FAR 32.402(c)(1)(iii) and to approve contract terms is delegated to the head of the contracting activity (HCA). The request for approval shall include the information required by FAR 32.409–1 and shall address the standards for advance payment in FAR 32.402(c)(2). HCAs shall report, no later than December 31st of each calendar year, to the Senior Procurement Executive (SPE) and the DSPE, on number of contracts for non-commercial items with advance payments approved in the previous fiscal year. The report shall include the contract number and amount, the amount of the advance payment, and the kind and amount of security obtained for the advance.

■ 21. Amend section 832.404 by revising paragraph (b) to read as follows:

§ 832.404 Exclusions.

* * * * *

(b)(1) As permitted by 31 U.S.C. 3324(d)(2), VA allows advance payment for subscriptions or other charges for newspapers, magazines, periodicals, and other publications for official use, notwithstanding the provisions of 31 U.S.C. 3324(a). The term ''other publications'' includes any publication printed, microfilmed, photocopied or magnetically or otherwise recorded for auditory or visual use.

(2) As permitted by 31 U.S.C. 1535, VA allows advance payment for services and supplies obtained from another Government agency.

(3) As permitted by 5 U.S.C. 4109, VA allows advance payment for all or any part of the necessary expenses for training Government employees, including obtaining professional credentials under 5 U.S.C. 5757, in Government or non-Government facilities, including the purchase or rental of books, materials, and supplies or services directly related to the training of a Government employee.

* * * * *

Subpart 832.5—5 [Removed and reserved].

■ 22. Subpart 832.5 is removed and reserved.

Subpart 832.8 [Removed and reserved].

■ 23. Subpart 832.8 is removed and reserved.

Subpart 832.9—Prompt Payment

§ 832.904 [Redesignated as 832.904–70].

■ 24. Redesignate section 832.904 as 832.904–70 and revise newly redesignated section 832.904–70 to read as follows:

§ 832.904–70 Determining payment due dates for small businesses.

Pursuant to Office of Management and Budget Memorandum M–11–32, dated September 14, 2011, Contracting Officers shall, to the full extent permitted by law, make payments to small business contractors as soon as practicable, with the goal of making payments within 15 days of receipt of a proper invoice and confirmation that the goods and services have been received and accepted by the Federal Government.

§ 832.11 [Removed and reserved].

■ 25. Subpart 832.11 is removed and reserved.

■ 26. Revise subpart 832.70 to read as follows:

Subpart 832.70—Electronic Invoicing Requirements

Sec

§ 832.7000 General.

This subpart prescribes policy requirements for submitting and processing payment requests in electronic form.

§ 832.7001 Electronic payment requests.

(a) The contractor shall submit payment requests in electronic form unless directed by the Contracting Officer to submit payment requests by mail. Purchases paid with a Government-wide commercial purchase card are considered to be an electronic transaction for purposes of this rule, and therefore no additional electronic invoice submission is required.

(b) The Contracting Officer may direct the contractor to submit payment requests by mail, through the United States Postal Service, to the designated agency office for—

(1) Awards made to foreign vendors for work performed outside the United States;

(2) Classified contracts or purchases when electronic submission and processing of payment requests could compromise the safeguarding of classified or privacy information;

(3) Contracts awarded by Contracting Officers in the conduct of emergency operations, such as responses to national emergencies;

(4) Solicitations or contracts in which the designated agency office is a VA entity other than the VA Financial Services Center in Austin, Texas; or

(5) Solicitations or contracts in which the VA designated agency office does not have electronic invoicing capability as described above.

§ 832.7001–1 Data transmission.

The contractor shall submit electronic payment requests through—

(a) VA's Electronic Invoice Presentment and Payment System at the current website address provided in the contract; or

(b) A system that conforms to the X12 electronic data interchange (EDI) formats established by the Accredited Standards Center (ASC) chartered by the American National Standards Institute (ANSI).

§ 832.7001–2 Contract clause.

The Contracting Officer shall insert the clause at 852.232–72, Electronic submission of payment requests, in solicitations and contracts exceeding the micro-purchase threshold, except those for which the Contracting Officer has directed otherwise under 832.7001, and those paid with a Governmentwide commercial purchase card.

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 27. The authority citation for part 852 is revised to read as follows:

Authority: 38 U.S.C. 8127–8128, and 8151–8153; 40 U.S.C. 121(c); 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

Subpart 852.2—Text of Provisions and Clauses

■ 28. Section 852.211–70 is revised to read as follows:

§ 852.211–70 Equipment Operation and Maintenance Manuals.

As prescribed in 811.107–70, insert the following clause:

EQUIPMENT OPERATION AND MAINTENANCE MANUALS (DATE)

The contractor shall follow standard commercial practices to furnish manual(s), handbook(s) or brochure(s) containing operation, installation, and maintenance instructions, including pictures or illustrations, schematics, and complete repair/test guides, as necessary, for technical medical equipment and devices, and/or other technical and mechanical equipment provided per CLIN(s) # (*Contracting Officer insert CLIN information*). The manuals, handbooks or brochures shall be provided in hard copy, soft copy or with electronic access instructions, consistent with standard industry practices for the equipment or device. Where applicable, the manuals, handbooks or brochures will include electrical data and connection diagrams for all utilities. The documentation shall also contain a complete list of all replaceable parts showing part number, name, and quantity required.

(End of clause)

§ 852.211–71 [Removed and reserved].

■ 29. Section 852.211–71 is removed and reserved.

■ 30. Section 852.211–72 is revised to read as follows:

§ 852.211–72 Technical Industry Standards.

As prescribed in 811.204–70, insert the following clause:

TECHNICAL INDUSTRY STANDARDS (DATE)

(a) The contractor shall conform to the standards established by: (*Contracting Officer: Insert name of organization establishing the requirement, reference title, cite and date, e.g., United States Department of Agriculture (USDA), Institutional Meat Purchase Specifications (IMPS), Series 100, Beef products, Jan 2010*) as to (*Contracting Officer: Insert item and CLIN, e.g. CLIN 0005 Ground Beef*).

(b) The contractor shall submit proof of conformance to the standard. This proof may be a label or seal affixed to the equipment or supplies, warranting that the item(s) have been tested in accordance with the standards and meet the contract requirement. Proof may also be furnished by the organization listed above certifying that the item(s) furnished have been tested in accordance with and conform to the specified standards.

(c) Offerors may obtain the standards cited in this provision by submitting a request, including the solicitation number, title and number of the publication to:
(Organization)____ (Mail or email address) ____

(d) The offeror shall contact the Contracting Officer if response is not received within two weeks of the request.

(End of clause)

§ 852.211–73 [Removed and reserved].

§ 852.211–74 [Removed and reserved].

§ 852.211–75 [Removed and reserved].

■ 31. Remove and reserve sections 852.211–73 through 852.211–75.

■ 32. Add section 852.232–70 to read as follows:

§ 852.232–70 Payments under fixed-price construction contracts (without NAS–CPM).

As prescribed in 832.111–70, insert the following clause in contracts that do not contain a section entitled ''Network Analysis System—Critical Path Method (without NAS–CPM)''

Payments Under Fixed-Price Construction Contracts (Without NAS–CPM) (Date)

The clause FAR 52.232–5, Payments under Fixed-Price Construction Contracts, is implemented as follows:

(a) Retainage.

(1) The Contracting officer may retain funds—

(i) Where performance under the contract has been determined to be deficient or the Contractor has performed in an unsatisfactory manner in the past; or

(ii) As the contract nears completion, to ensure that deficiencies will be corrected and that completion is timely.

(2) Examples of deficient performance justifying a retention of funds include, but are not restricted to, the following—

(i) Unsatisfactory progress as determined by the Contracting Officer;

(ii) Failure to meet schedule in Schedule of Work Progress;

(iii) Failure to present submittals in a timely manner; or

(iv) Failure to comply in good faith with approved subcontracting plans, certifications, or contract requirements.

(3) Any level of retention shall not exceed 10 percent either where there is determined to be unsatisfactory performance, or when the retainage is to ensure satisfactory completion. Retained amounts shall be paid promptly upon completion of all contract requirements, but nothing contained in this subparagraph shall be construed as limiting the Contracting Officer's right to withhold funds under other provisions of the contract or in accordance with the general law and

regulations regarding the administration of Government contracts.

(b) The Contractor shall submit a schedule of cost to the Contracting Officer for approval within 30 calendar days after date of receipt of notice to proceed. Such schedule will be signed and submitted in triplicate. The approved cost schedule will be one of the bases for determining progress payments to the Contractor for work completed. This schedule shall show cost by the work activity/event for each building or unit of the contract, as instructed by the resident engineer.

(1) The work activities/events shall be subdivided into as many sub-activities/events as are necessary to cover all component parts of the contract work.

(2) Costs as shown on this schedule must be true costs and the resident engineer may require the Contractor to submit the original estimate sheets or other information to substantiate the detailed makeup of the schedule.

(3) The sums of the sub-activities/events, as applied to each work activity/event, shall equal the total cost of such work activity/event. The total cost of all work activities/events shall equal the contract price.

(4) Insurance and similar items shall be prorated and included in the cost of each branch of the work.

(5) The cost schedule shall include separate cost information for the systems listed in the table in this subparagraph (b)(5). The percentages listed below are proportions of the cost listed in the Contractor's cost schedule and identify, for payment purposes, the value of the work to adjust, correct and test systems after the material has been installed. Payment of the listed percentages will be made only after the Contractor has demonstrated that each of the systems is substantially complete and operates as required by the contract.

VALUE OF ADJUSTING, CORRECTING, AND TESTING SYSTEM

System	Percent
Pneumatic tube system	10
Incinerators (medical waste and trash)	5
Sewage treatment plant equipment	5
Water treatment plant equipment	5
Washers (dish, cage, glass, etc.)	5
Sterilizing equipment	5
Water distilling equipment	5
Prefab temperature rooms (cold, constant temperature)	5
Entire air-conditioning system (Specified under 600 Sections)	5
Entire boiler plant system (Specified under 700 Sections)	5
General supply conveyors	10
Food service conveyors	10
Pneumatic soiled linen and trash system	10
Elevators and dumbwaiters	10
Materials transport system	10
Engine-generator system	5
Primary switchgear	5
Secondary switchgear	5
Fire alarm system	5
Nurse call system	5
Intercom system	5
Radio system	5
TV (entertainment) system	5

(c) In addition to this cost schedule, the Contractor shall submit such unit costs as may be specifically requested. The unit costs shall be those used by the Contractor in preparing its bid and will not be binding as pertaining to any contract changes.

(d) The Contracting Officer will consider for monthly progress payments material and/or equipment procured by the Contractor and stored on the construction site, as space is available, or at a local approved location off the site, under such terms and conditions as the Contracting Officer approves, including but not limited to the following—

(1) The materials or equipment are in accordance with the contract requirements and/or approved samples and shop drawings;

(2) The materials and/or equipment are approved by the resident engineer;

(3) The materials and/or equipment are stored separately and are readily available for inspection and inventory by the resident engineer;

(4) The materials and/or equipment are protected against weather, theft and other hazards and are not subjected to deterioration; and

(5) The Contractor obtains the concurrence of its surety for off-site storage.

(e) The Government reserves the right to withhold payment until samples, shop drawings, engineer's certificates, additional bonds, payrolls, weekly statements of compliance, proof of title, nondiscrimination compliance reports, or any other requirements of this contract, have been submitted to the satisfaction of the Contracting officer.

(f) The Contracting Officer will notify the Contractor in writing within 10 calendar-days of exercising retainage against any payment in accordance with FAR clause 52.232–5(e). The notice shall disclose the amount of the retainage in value and percent retained from the payment, and provide explanation for the retainage.

(End of clause)

Alternate I (DATE). If the specifications include guarantee period services, the Contracting officer shall include the following paragraphs as additions to paragraph (b) of the basic clause:

(6)(i) The Contractor shall at the time of contract award furnish the total cost of the guarantee period services in accordance with specification section(s) covering guarantee period services. The Contractor shall submit, within 15 calendar days of receipt of the notice to proceed, a guarantee period performance program that shall include an itemized accounting of the number of work-hours required to perform the guarantee period service on each piece of equipment. The Contractor shall also submit the established salary costs, including employee fringe benefits, and what the contractor reasonably expects to pay over the guarantee period, all of which will be subject to the Contracting officer's approval.

(ii) The cost of the guarantee period service shall be prorated on an annual basis and paid in equal monthly payments by VA during the period of guarantee. In the event the installer does not perform satisfactorily during this period, all payments may be withheld and the Contracting Officer shall inform the contractor of the unsatisfactory performance, allowing the contractor 10 days to correct deficiencies and comply with the contract. The guarantee period service is subject to those provisions as set forth in the Payments and Default clauses.

■ 33. Add section 852.232–71 to read as follows:

§ 852.232–71 Payments under fixed-price construction contracts (including NAS–CPM).

As prescribed in 832.111–70, insert the following clause in contracts that contain a section entitled ''Network Analysis System—Critical Path Method (NAS–CPM).''

Payments Under Fixed-Price Construction Contracts (Including NAS–CPM) (Date)

The clause FAR 52.232–5, Payments under Fixed-Price Construction Contracts, is implemented as follows:

(a) Retainage.

(1) The Contracting Officer may retain funds—

(i) Where performance under the contract has been determined to be deficient or the Contractor has performed in an unsatisfactory manner in the past; or

(ii) As the contract nears completion, to ensure that deficiencies will be corrected and that completion is timely.

(2) Examples of deficient performance justifying a retention of funds include, but are not restricted to, the following—

(i) Unsatisfactory progress as determined by the Contracting Officer;

(ii) Failure to meet schedule in Schedule of Work Progress;

(iii) Failure to present submittals in a timely manner; or

(iv) Failure to comply in good faith with approved subcontracting plans, certifications, or contract requirements.

(3) Any level of retention shall not exceed 10 percent either where there is determined to be unsatisfactory performance, or when the retainage is to ensure satisfactory completion. Retained amounts shall be paid promptly upon completion of all contract requirements, but nothing contained in this subparagraph shall be construed as limiting the Contracting Officer's right to withhold funds under other provisions of the contract or in accordance with the general law and regulations regarding the administration of Government contracts.

(b) The Contractor shall submit a schedule of costs in accordance with the requirements of section ''Network Analysis System — Critical Path Method (NAS–CPM)'' to the Contracting Officer for approval within 90 calendar days after date of receipt of notice to proceed. The approved cost schedule will be one of the bases for determining progress payments to the Contractor for work completed.

(1) Costs as shown on this schedule must be true costs and the resident engineer may require the contractor to submit its original estimate sheets or other information to substantiate the detailed makeup of the cost schedule.

(2) The total costs of all work activities/events shall equal the contract price.

(3) Insurance and similar items shall be prorated and included in each work activity/event cost of the critical path method (CPM).

(4) The CPM shall include a separate cost loaded activity for adjusting and testing of the systems listed in the table in paragraph (b)(5) of this section. The percentages listed below will be used to determine the cost of adjust and test work activities/events and identify, for payment purposes, the value of the work to adjust, correct and test systems after the material has been installed.

(5) Payment for adjust and test activities will be made only after the Contractor has demonstrated that each of the systems is substantially complete and operates as required by the contract.

VALUE OF ADJUSTING, CORRECTING, AND TESTING SYSTEM

System	Percent
Pneumatic tube system	10
Incinerators (medical waste and trash)	5
Sewage treatment plant equipment	5
Water treatment plant equipment	5
Washers (dish, cage, glass, etc.)	5
Sterilizing equipment	5
Water distilling equipment	5
Prefab temperature rooms (cold, constant temperature)	5
Entire air-conditioning system (Specified under 600 Sections)	5
Entire boiler plant system (Specified under 700 Sections)	5
General supply conveyors	10
Food service conveyors	10
Pneumatic soiled linen and trash system	10
Elevators and dumbwaiters	10
Materials transport system	10
Engine-generator system	5
Primary switchgear	5
Secondary switchgear	5
Fire alarm system	5
Nurse call system	5
Intercom system	5
Radio system	5
TV (entertainment) system	5

(c) In addition to this cost schedule, the Contractor shall submit such unit costs as may be specifically requested. The unit costs shall be those used by the Contractor in preparing its bid and will not be binding as pertaining to any contract changes.

(d) The Contracting Officer will consider for monthly progress payments material and/or equipment procured by the Contractor and stored on the construction site, as space is available, or at a local approved location off the site, under such terms and conditions as the Contracting Officer approves, including but not limited to the following—

(1) The materials or equipment are in accordance with the contract requirements and/or approved samples and shop drawings;

(2) The materials and/or equipment are approved by the resident engineer;

(3) The materials and/or equipment are stored separately and are readily available for inspection and inventory by the resident engineer;

(4) The materials and/or equipment are protected against weather, theft and other hazards and are not subjected to deterioration; and

(5) The contractor obtains the concurrence of its surety for off-site storage.

(e) The Government reserves the right to withhold payment until samples, shop drawings, engineer's certificates, additional bonds, payrolls, weekly statements of compliance, proof of title, nondiscrimination compliance reports, or any other requirements of this contract, have been submitted to the satisfaction of the Contracting Officer.

(f) The Contracting Officer will notify the Contractor in writing within 10 calendar-days of exercising retainage against any payment in accordance with FAR clause 52.232–5(e). The notice shall disclose the amount of the retainage in value and percent retained from the payment, and provide explanation for the retainage.

(End of clause)

Alternate I (DATE). If the specifications include guarantee period services, the Contracting officer shall include the following paragraphs as additions to paragraph (b) of the basic clause:

(6)(i) The Contractor shall show on the critical path method (CPM) the total cost of the guarantee period services in accordance with the guarantee period service section(s) of the specifications. This cost shall be priced out when submitting the CPM cost loaded network. The cost submitted shall be subject to the approval of the Contracting Officer. The activity on the CPM shall have money only and not activity time.

(ii) The Contractor shall submit with the CPM a guarantee period performance program which shall include an itemized accounting of the number of work-hours required to perform the guarantee period service on each piece of equipment. The Contractor shall also submit the established salary costs, including employee fringe benefits, and what the contractor reasonably expects to pay over the guarantee period, all of which will be subject to the Contracting Officer's approval.

(iii) The cost of the guarantee period service shall be prorated on an annual basis and paid in equal monthly payments by VA during the period of guarantee. In the event the installer does not perform satisfactorily during this period, all payments may be withheld and the Contracting Officer shall inform the contractor of the unsatisfactory performance, allowing the Contractor 10 days to correct and comply with the contract. The guarantee period service is subject to those provisions as set forth in the Payments and Default clauses.

■ 34. Section 852.232–72 is revised to read as follows:

§ 852.232–72 Electronic submission of payment requests.

As prescribed in 832.7001–2, insert the following clause:

Electronic Submission of Payment Requests (Date)

(a) *Definitions.* As used in this clause—

(1) *Contract financing payment* has the meaning given in FAR 32.001.

(2) *Designated agency office* means the office designated by the purchase order, agreement, or contract to first receive and review invoices. This office can be contractually designated as the receiving entity. This office may be different from the office issuing the payment.

(3) *Electronic form* means an automated system transmitting information electronically according to the accepted electronic data transmission methods and formats identified in paragraph (c) of this clause. Facsimile, email, and scanned documents are not acceptable electronic forms for submission of payment requests.

(4) *Invoice payment* has the meaning given in FAR 32.001.

(5) *Payment request* means any request for contract financing payment or invoice payment submitted by the contractor under this contract.

(b) *Electronic payment requests.* Except as provided in paragraph (e) of this clause, the contractor shall submit payment requests in electronic form. Purchases paid with a Government-wide commercial purchase card are considered to be an electronic transaction for purposes of this rule, and therefore no additional electronic invoice submission is required.

(c) *Data transmission.* A contractor must ensure that the data transmission method and format are through one of the following:

(1) VA's Electronic Invoice Presentment and Payment System at the current website address provided in the contract.

(2) Any system that conforms to the X12 electronic data interchange (EDI) formats established by the Accredited Standards Center (ASC) and chartered by the American National Standards Institute (ANSI).

(d) *Invoice requirements.* Invoices shall comply with FAR 32.905.

(e) *Exceptions.* If, based on one of the circumstances below, the Contracting Officer directs that payment requests be made by mail, the contractor shall submit payment requests by mail through the United States Postal Service to the designated agency office. Submission of payment requests by mail may be required for—

(1) Awards made to foreign vendors for work performed outside the United States;

(2) Classified contracts or purchases when electronic submission and processing of payment requests could compromise the safeguarding of classified or privacy information;

(3) Contracts awarded by Contracting Officers in the conduct of emergency operations, such as responses to national emergencies;

(4) Solicitations or contracts in which the designated agency office is a VA entity other than the VA Financial Services Center in Austin, Texas; or

(5) Solicitations or contracts in which the VA designated agency office does not have electronic invoicing capability as described above.

(End of clause)

§ 852.236–82 [Removed and reserved].

§ 852.236–83 [Removed and reserved].

■ 35. Remove and reserve sections 852.236–82 and 852.236–83.

PART 870—SPECIAL PROCUREMENT CONTROLS

■ 36. The authority citation for part 870 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

§ 870.112 [Removed]

§ 870.113 [Removed]

■ 37. Remove sections 870. 112 and 870.113.

[FR Doc. 2018–04002 Filed 3–23–18; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Chapter III, Subchapter B

[Docket No. FMCSA–2018–0037]

Request for Comments Concerning Federal Motor Carrier Safety Regulations (FMCSRs) Which May Be a Barrier to the Safe Testing and Deployment of Automated Driving Systems-Equipped Commercial Motor Vehicles on Public Roads

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Request for comments.

SUMMARY: FMCSA requests public comments on existing Federal Motor Carrier Safety Regulations (FMCSRs) that may need to be updated, modified, or eliminated to facilitate the safe introduction of automated driving systems (ADS) equipped commercial motor vehicles (CMVs) onto our Nation's roadways. To assist in this undertaking, FMCSA commissioned the U.S. Department of Transportation's John A. Volpe National Transportation Systems Center (Volpe) to conduct a preliminary review of the FMCSRs to identify regulations that may relate to the development and safe introduction of ADS. The Agency requests comments on this report, including whether any of FMCSA's current safety regulations may hinder the testing and safe integration of ADS-equipped CMVs. Further, FMCSA requests comment on certain specific regulatory requirements that are likely to be affected by an increased integration of ADS-equipped CMVs. However, the Agency is not seeking comments on its financial responsibility requirements because they are not directly related to CMV technologies and because future insurance requirements will depend in part on the evolution of State tort law with respect to liability for the operation of ADS-equipped vehicles. In addition, to support FMCSA's effort to understand future impacts on the FMCSR's, FMCSA requests information, including from companies engaged in the design, development, testing, and integration of ADS-equipped CMVs into the fleet. Specifically, the Agency requests information about: The scenarios and environments where entities expect that ADS will soon be tested and integrated into CMVs operating on public roads or in interstate commerce; the operational design domains (ODD) in which these systems are being operated or would be tested and eventually deployed; and,

measures they believe are required to ensure the protection of any proprietary or confidential business information they intend to share with the Agency.

DATES: *Public Comments:* Comments on this notice must be received on or before May 10, 2018.

ADDRESSES: You may submit comments identified by Docket Number FMCSA–2018–0037 using any of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the online instructions for submitting comments.

• *Mail:* Docket Management Facility, U.S. Department of Transportation, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

• *Hand Delivery or Courier:* West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays.

• *Fax:* 1–202–493–2251.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Huntley, Division Chief, Vehicle and Roadside Operations Division, Office of Carrier, Driver, and Vehicle Safety, MC–PSV, (202) 366–9209, *michael.huntley@dot.gov,* Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Submitting Comments

If you submit a comment, please include the docket number for this notice (FMCSA–2018–0037), indicate the specific section of this document and the Volpe report to which each comment applies, provide a reason for each suggestion or recommendation, and identify the source of any data informing your comment. You may submit your comments and material online or by fax, mail, or hand delivery, but please use only one of these means. FMCSA recommends that you include your name and mailing address, an email address, or a phone number in the body of your document so that FMCSA can contact you if there are questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* put the docket number, FMCSA–2018–0037, in the keyword box, and click ''Search.'' When the new screen appears, click on the ''Comment Now!'' button and type your comment into the text box on the following screen. Choose whether you are submitting your comment as an individual or on behalf of a third party and then submit.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed postcard or envelope.

Viewing Comments and Documents

To view comments, as well as any documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*. Insert the docket number, FMCSA–2018–0037, in the keyword box, and click ''Search.'' Next, click the ''Open Docket Folder'' button and choose the document to review. If you do not have access to the internet, you may view the docket by visiting the Docket Management Facility in Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., E.T., Monday through Friday, except Federal holidays.

Privacy Act

The Department of Transportation (DOT) solicits comments from the public to better inform its decision-making processes. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy*.

I. Background

On September 12, 2017, the Department published the *Automated Driving Systems (ADS): A Vision for Safety 2.0.* (Publication No. DOT HS 812 442) (the Voluntary Guidance). The Voluntary Guidance offers a path forward for the safe integration of automated vehicles by:

• Encouraging new entrants and ideas that deliver safer vehicles;

• Making the Departmental regulatory processes more nimble to help match the pace of private sector innovation; and,

• Supporting industry innovation and encouraging open communication with the public and with stakeholders.

The Voluntary Guidance is rooted in the Department's view that ADS-equipped vehicles hold enormous potential benefits for safety, mobility, and the efficiency of our transportation system. The primary focus of the Voluntary Guidance is on levels of ADS that can take full control of the driving tasks in at least some circumstances. Portions of the Voluntary Guidance also apply to lower levels of automation, including some of the driver assistance systems already being deployed by automakers today. The full document can be found at: *https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13069a-ads2.0_090617_v9a_tag.pdf*.

The Voluntary Guidance adopts the SAE International (SAE) J3016 standard's definitions for levels of automation. The SAE definitions divide vehicles into levels based on ''who does what, when.'' Generally:

• *SAE Level 0, No Driving Automation;* the driver performs all driving tasks.

• *SAE Level 1, Driver Assistance;* the vehicle is controlled by the driver, but some driving assist features may be included in the vehicle design.

• *SAE Level 2, Partial Driving Automation;* the vehicle has combined automated functions, like acceleration and steering, but the driver must remain engaged with the driving task and monitor the environment at all times.

• *SAE Level 3, Conditional Driving Automation;* the driver is a necessity, but is not required to monitor the environment. The driver must be ready to take control of the vehicle at all times with notice.

• *SAE Level 4, High Driving Automation;* the vehicle is capable of performing all driving functions under certain conditions. The driver may have the option to control the vehicle.

• *SAE Level 5, Full Driving Automation:* the vehicle is capable of performing all driving functions under all conditions.

Using the SAE levels described above, the Department draws a distinction between Levels 0–2 and 3–5 based on whether the human driver or the automated system is primarily responsible for monitoring the driving environment. For the purposes of this **Federal Register** notice, the Agency's primary focus is SAE Levels 3–5 ADS.

FMCSA encourages the development of these advanced safety technologies for use on CMVs, and at the same time, recognizes the need to work with the States to ensure that, from an operations standpoint, all testing and use of these advanced safety systems is conducted in a manner that ensures the safe operation of ADS-equipped commercial vehicles.

FMCSA is responsible for the safety oversight of motor carriers operating CMVs in interstate commerce, the drivers of CMVs, and the vehicles. The Agency works with its State partners to deliver programs intended to prevent CMV crashes, and the associated injuries and fatalities.

The FMCSRs provide rules to ensure the safe operation of CMVs, as defined in 49 CFR 390.5, which includes vehicles with a gross vehicle weight/gross combination weight or gross vehicle weight rating/gross combination weight rating, whichever is greater, of 10,001 pounds or more; passenger-carrying vehicles designed or used to transport 9 to 15 passengers for direct compensation; passenger-carrying vehicles designed or used to transport 16 or more passengers; and any size vehicle transporting hazardous materials in a quantity requiring placards.

On April 24, 2017, FMCSA held a public listening session to solicit information on issues relating to the design, development, testing, and integration of ADS-equipped commercial motor vehicles (82 FR 18096, April 17, 2017). The listening session provided interested parties an opportunity to share their views and any data or analysis on this topic with Agency representatives. The Agency also invited interested parties to submit written comments by July 17, 2017. A full transcript of the listening session and all written comments is available in public docket, FMCSA–2017–0114, at *www.regulations.gov*.

II. Request for Public Comments: The Applications of the FMCSRs to ADS-Equipped CMVs

In addition to the public listening session discussed above, FMCSA commissioned Volpe to conduct a preliminary review of the FMCSRs to identify regulations that relate to the development and safe introduction of automated driving systems. FMCSA subsequently received from Volpe its final report, ''Review of the Federal Motor Carrier Safety Regulations for Automated Commercial Vehicles: Preliminary Assessment of Interpretation and Enforcement Challenges, Questions, and Gaps,'' report number MCSA–RRT–17–013, August 2017. A copy of the report is included in the docket referenced at the beginning of this notice.

Volpe found several provisions in the FMCSRs that might present challenges for automated CMVs that continue to require a human driver. Additionally, Volpe indicated that automated CMVs either requiring an onboard (non-driving) human technician or not requiring an onboard human at all may face compliance challenges. Volpe noted, however, that the nature and extent of these challenges will depend on how key terms and applicability statements are interpreted.

Notwithstanding the findings of the Volpe analysis, the Policy released on September 12, 2017, indicated (see page 2 of the publication) that FMCSA believes its regulations require that ''a trained commercial driver must be behind the wheel at all times, regardless of any automated driving technologies available on the CMV, unless a petition for a waiver or exemption has been granted.'' In light of the comments the Agency received in response to its April 17, 2017, request for public comments and the remarks of those in attendance at the April 24, 2017, public listening session, the Agency is reconsidering its views on this matter. The absence of specific regulatory text requiring a driver be behind the wheel may afford the Agency the flexibility to allow, under existing regulations, ADS to perform the driver's functions in the operational design domain in which the system would be relied upon, without the presence of a trained commercial driver in the driver's seat.

FMCSA notes that in the event regulatory relief is necessary to allow the operation of a commercial motor vehicle without a person in the driver's seat, the Agency has authority to grant waivers for up to three months, grant exemptions for up to five years (with the possibility of renewals of the exemptions), or allow pilot programs for up to three years, provided certain conditions are satisfied [see 49 CFR part 381].

To that end, the Agency seeks information concerning the extent to which the public, including industry, safety advocates, the motoring public, and those engaged in the design, development, testing, and integration of ADS for CMVs believe any of FMCSA's current safety regulations may hinder the testing and safe deployment of ADS-equipped CMVs, including, but not limited to, the regulations preliminarily identified by Volpe. In particular, the agency is interested in comments concerning how different interpretations of the applicability of FMCSRs to ADS-equipped CMVs could represent a barrier, *e.g.,* whether the FMCSRs, under certain conditions, could be read to require, or not require, the presence of a trained commercial driver in the driver's seat. To the extent commenters do identify unnecessary barriers, how could FMCSA use its available regulatory relief mechanism to appropriately remove or reduce those barriers?

In addition to the issues in the Volpe Report, the agency also requests comment on how ADS-equipped CMVs could interact with certain specific regulations.

Inspection, Repair, and Maintenance

The FMCSRs require all CMVs to be systematically inspected, repaired, and maintained. All parts must be in safe and proper operating condition at all times. With limited exceptions, motor carriers are prohibited from operating a CMV unless there is proof that it has passed an annual inspection.

How should motor carriers ensure the proper functioning of ADS prior to operating in an automated mode?

Should the Agency consider minimum requirements for motor carrier personnel responsible for maintaining the equipment used to achieve certain levels of automated operations (for example, a requirement that technicians be trained by the ADS developers, etc.)?

What Information Technology (IT) security/safety assurances can be provided by maintenance personnel and CMV drivers/operators that the ADS systems are functioning properly?

For State representatives with experience inspecting traditional CMVs, what types of malfunctions or damage on an ADS-equipped CMV should be considered an imminent hazard?

Do you have any additional comments regarding inspection, repair, and maintenance?

Roadside and Annual Inspections

FMCSA and its State partners conduct roadside inspections of CMVs to identify and remove from service unsafe drivers and vehicles. The inspection criteria represent enforcement tolerances, which are thresholds for determining whether the level of noncompliance with the applicable safety regulations is severe enough to warrant placing the vehicle or driver out-of-service.

How could an enforcement official identify CMVs capable of various levels of automated operation? For example, should CMVs with ADS be visibly marked to indicate the level of automated operation they are designed to achieve, or would making these vehicles so easily identifiable cause other road users to interact unfavorably with CMVs with ADS?

Do you have any additional comments regarding roadside and annual inspections?

Distracted Driving (Prohibition Against Texting and Using Handheld Wireless Phones) and Driver Monitoring

This section applies to situations involving a Level 3 human-monitored ADS. Current regulations prohibit individuals from texting and using hand-held wireless phones while driving CMVs in interstate commerce.

What changes, if any, should be made to the distracted driving regulations for human drivers of CMVs with ADS while in automated mode? For example, should a human driver in a CMV with ADS be allowed to use a hand-held wireless phone while the ADS is in complete control of the vehicle?

Should driver fatigue monitoring be required, and if so, what method(s) should be used to conduct such monitoring? For example, the Trucking Fatigue Meter [*See https://pulsarinformatics.com/products/trucking*] samples data throughout the day and alerts fleet managers once a human driver exceeds a company-determined fatigue threshold.

Additionally, should these systems be required to provide ''alertness assistance'' to human drivers? For example, should these systems be required to periodically request input from human drivers, or should they be required to request input from human drivers only when the driver appears to be losing focus or when the ADS in control of the vehicle is confronted with situations outside its parameters?

What level of human driver inattentiveness (or how long a period of inattentiveness) should be allowed in a vehicle controlled by an ADS before the vehicle is required to enter its minimal risk condition? How long after entering the minimal risk condition must a human driver wait to re-engage an ADS (*e.g.*, a minimum 30-minute break may provide the driver an opportunity to rest)? What should the requirements be for re-engaging the CMV with ADS in an automated mode in this scenario?

Medical Qualifications

FMCSA's regulations include physical qualification standards for humans driving CMVs to ensure that they are medically qualified to do so. As technology advances, humans may be required only to monitor the operation of CMVs with ADS on public roadways, or they may not be required at all. Thus, as technology develops, changes to the physical qualification rules will be required, and some medical conditions may become inapplicable.

What medical conditions currently precluding issuance of a medical card could become inapplicable as ADS technology develops?

What medical conditions currently precluding issuance of a medical card should NOT be considered disqualifying for a human driver who is simply monitoring a CMV with ADS?

Hours of Service for Drivers

FMCSA's regulations include requirements intended to reduce the risk of driver fatigue and fatigue-related crashes. Generally, the rules for truck drivers allow up to 11 hours driving time in the work day, following 10 consecutive hours off-duty. And all driving must be completed within 14 hours of the beginning of the work day. The rules prohibit driving after a driver has accumulated a certain amount of on-duty time (which includes the time spent driving and time spent performing other work) during the work week. Current regulations require that all time spent at the operating controls of the CMV be recorded as on-duty, driving time. Given the SAE levels of automation discussed above, FMCSA seeks public comments on how drivers' hours of service should be recorded if the ADS is relied upon to perform some or all of the driving tasks.

Commercial Driver's License (CDL) Endorsements

FMCSA requires all drivers of CMVs to have the knowledge and skills necessary to operate a CMV safely. States are required to include specific items in the knowledge and skills tests administered to CDL applicants. CDL applicants wishing to obtain specific endorsements must satisfy additional knowledge and skill test requirements. Existing endorsements include: Double/triple trailers, passenger, tank vehicle, hazardous materials, and school bus.

Due to potential variations in ADS technology across various providers, FMCSA seeks to ensure that human drivers and operators of CMVs with ADS receive training for the specific technologies present in the vehicles they operate.

Should an endorsement be considered for human drivers and operators of CMVs with ADS to ensure they (1) understand the capabilities and limitations of the advanced technologies, and (2) know when it is appropriate to rely on automatic rather than manual operation? If so, what types of tests—knowledge, skills, or both—should be required to obtain such an endorsement; and should there be separate endorsements for different types of ADS?

If an ADS-equipped CMV is to be deployed without a human driver onboard, should the computer system be required to demonstrate autonomous capabilities for the same maneuvers included on the CDL skills test?

III. Request for Information: Current Testing and Operation of CMVs With ADS

Data Sharing

FMCSA would like to ensure that the Agency is able to receive and review data and information from the private sector to understand a driver's experience with ADS technologies in real-world settings.

If you are a developer or tester of ADS technologies, what types of data and/or safety measures are you currently collecting—or do you plan to collect—during testing? How often is this data collected?

How can FMCSA ensure that data and/or safety measures collected are presented in a comparable format?

How can FMCSA assess whether a CMV equipped with an ADS is being operated as safely as a traditional CMV operating on a public roadway?

What pieces of information are entities using to evaluate how a driver is using an ADS- equipped commercial vehicle?

Testing and Interstate Operations of CMVs With ADS on Public Roadways

What type of ADS-equipped CMVs are currently being tested? Are they Level 4 ADS-equipped vehicles that can only operate on certain roadways, Level 4 vehicles with more extensive ODDs, or full Level 5 vehicles?

Do vehicles currently being tested have operational limitations to ensure safe operations? Examples of operational limitations might include time of day, weather conditions, types of roads, specific routes within an ODD, maximum allowable operational speed, markings showing that the vehicle is capable of highly automated operations, etc.

In moving forward what actions, if any, should FMCSA consider to ensure the safe operation of ADS-equipped CMV's in various ODDs?

How can FMCSA assess whether a CMV with ADS operating within its ODD can perform on certain maneuvers, such as emergency brake performance, crash avoidance maneuvers, etc.?

Should FMCSA consider approaching CMVs that carry persons or hazardous materials differently than other CMVs?

For State representatives, would you consider changing certain requirements (for example, higher versus lower levels of insurance) for an ADS-equipped CMV? If yes, based on what factors; and how would you implement such requirements?

Beyond Compliance Program

On April 23, 2015, FMCSA issued an initial **Federal Register** notice seeking comment on the impacts of a possible ''Beyond Compliance Program'' to consider a company's voluntary implementation of state-of-the-art best practices and technologies when evaluating a carrier's safety (80 FR 22770).

The Fixing America's Surface Transportation (FAST) Act mandated that the Agency provide recognition to motor carriers for voluntary use of advanced technologies or safety programs (Pub. L. 114–94, 129 Stat. 1312, Dec. 4, 2012). Per section 5222, FMCSA may authorize qualified entities to monitor motor carriers that receive ''Beyond Compliance'' recognition (129 Stat. 1540).

To what extent, if any, should the various levels of automation be considered as part of the Beyond Compliance Program?

Regulation of Manufacturing Versus Operation

The regulation of CMVs is a function shared by the National Highway Traffic Safety Administration (NHTSA) and FMCSA, with manufacturing regulated by NHTSA and operation regulated by FMCSA (and its State partners). Does this separation of functions create unique problems, or perhaps offer unique solutions, for operators of ADS-equipped CMVs?

Confidentiality of Shared Information

FMCSA acknowledges that companies may be reluctant to share certain proprietary data or information with the Agency, either as part of the waiver, exemption, or pilot program application process, or during the pendency of a regulatory relief period. The Agency notes that 49 CFR 389.3 provides protection for ''confidential business information'' which includes trade secrets or commercial or financial information that is privileged or confidential, as described in 5 U.S.C. 552(b)(4). Commercial or financial information is considered confidential if it is voluntarily submitted to the Agency and constitutes the type of information not customarily released to the general public. FMCSA has established standards and procedures by which the Agency will solicit, receive, and protect confidential information from public disclosure. The Agency is seeking information from interested parties on how it might further protect non-public information necessary to assess whether ADS-equipped CMVs meet performance standards and accurately document safety-related events during a waiver, temporary exemption, or pilot program.

What measures would original equipment manufacturers and developers expect of FMCSA before sharing confidential business information?

How might the Agency obtain information sufficient to assess the safety performance of CMVs with ADS without collecting confidential business information?

Do you have any additional comments regarding the confidentiality of shared information?

Issued under authority delegated in 49 CFR 1.87 on: March 16, 2018.

Raymond P. Martinez,

Administrator.

[FR Doc. 2018–05788 Filed 3–23–18; 8:45 am]

BILLING CODE 4910–EX–P

Notices

Federal Register

Vol. 83, No. 58

Monday, March 26, 2018

DEPARTMENT OF AGRICULTURE

Office of Advocacy and Outreach

Beginning Farmers and Ranchers Advisory Committee

AGENCY: Office of Advocacy and Outreach, USDA.

ACTION: Notice of public meeting.

SUMMARY: Pursuant to the Federal Advisory Committee Act (FACA), the Office of Advocacy and Outreach (OAO) is announcing a meeting of the Beginning Farmers and Ranchers Advisory Committee (BFRAC). USDA Secretary Perdue has outlined a bold agenda to help support farmers and ranchers that includes: Maximizing the ability of farmers and ranchers to produce and thrive as businesses, enhancing USDA's customer service, ensuring a food secure nation, and effectively stewarding our natural resources. Together, these principals will usher in empowerment among those in the rural agricultural communities, business growth and prosperity, and bright futures for the next generation for farmers and ranchers. The BFRAC will be pivotal in its liaison role that informs and advises the Secretary of actions that may be taken to further rural agriculture growth and support for our next generation of farmers and ranchers. The BFRAC will help ready the USDA to stay relevant for the next generation of customers and assist them with the challenges of today and those they will face in coming years.

During this public meeting, the BFRAC will deliberate upon matters focused on, including but not limited to, the following: (1) Marketplace; (2) Monitoring and Evaluation; (3) Partnerships; and (4) Veteran farmers and ranchers.

From these topics the BFRAC will deliberate and form its final set of recommendations for the current term. The BFRAC specifically seeks to engage and hear directly from a broad cross-section of beginning farmers, particularly from those farmers and ranchers in Florida (and neighboring states) on their experiences, pathways, and challenges as they entered into farming or ranching. We will want to hear about what was helpful, successful pathways, and barriers of entry or other challenges. We encourage all from the region to attend, including those from organizations who support farmers and ranchers—seeking a large cross-section of farm type or farm size, geographic and ethnic diversity, and supporting organizations.

DATES: The BFRAC meeting will begin on April 3, 2018 (half-day), from 1:00 p.m.–4:30 p.m. EST; and on April 4–5, 2018, from 8:30–5:00 p.m. This notice is less than the 15-day requirement due to unexpected procurement actions. A listen-only conference call line will be available for all who wish to listen in on the proceeding by phone at: (888) 455–1685 and passcode 7087935. There will be time allotted each day for comments from those attending. All persons wishing to make comments during this meeting must check-in each day at the registration table. If the number of registrants requesting to speak is greater than what can be reasonably accommodated during the scheduled open public hearing session timeframe, OAO may conduct a lottery to determine the speakers for the scheduled public comment session.

ADDRESSES: This meeting will be held at the Tampa Marriott Westshore, 1001 N Westshore Boulevard, Tampa, Florida 33607. You may reach the hotel directly on (813) 287–2555 or visit: *www.marriott.com/tpawe.* A listen-only conference call line will be available for all who wish to listen in on the proceeding by phone at: (888) 455–1685 and passcode 7087935.

FOR FURTHER INFORMATION CONTACT: Questions should be directed to Phyllis Morgan, Executive Assistant, OAO, 1400 Independence Ave. SW, Whitten Bldg., 520–A, Washington, DC 20250, (202) 720–6350, Fax: (202) 720–7704, or email: *Phyllis.Morgan@osec.usda.gov.*

Written comments for the Committee's consideration may be submitted, by or before COB March 29, 2018, to Mrs. Kenya Nicholas, Designated Federal Officer, USDA OAO, 1400 Independence Avenue, Room 520–A, Washington, DC 20250–0170; Telephone (202) 720–6350; Fax (202) 720–7704; Email: *kenya.nicholas@osec.usda.gov.*

SUPPLEMENTARY INFORMATION: The Committee was established pursuant to Section 5 of the Agricultural Credit Improvement Act of 1992. The Secretary of Agriculture selected a diverse group of members representing a broad spectrum of persons interested in providing solutions to the challenges of new farmers and ranchers. Please visit our website at: *http://www.outreach.usda.gov/smallbeginning/index.htm* for additional information on the advisory committee.

Register for the Meeting: The public is asked to pre-register for the meeting by March 29, 2018. Your pre-registration must state: The names of each person in your group; organization or interest represented; the number of people planning to give oral comments, if any; and whether anyone in your group requires special accommodations. Submit registrations to Kenya Nicholas via email at: *Kenya.Nicholas@osec.usda.gov* or via fax at (202) 720–7704 by March 29, 2018. Members of the public who request to give oral comments to the Committee, will be given their allotted time limit and turn at the check-in table. Please remember that the comments given will be added to the committee records and will not be an opportunity to interact with the committee members.

Public Comments: Written public comments may be mailed to Kenya Nicholas, DFO, MS–0601, 1400 Independence Avenue SW, Washington, DC 20250 or submitted via fax at (202) 720–7704 or email at *Kenya.nicholas@osec.usda.gov.* All written comments must arrive by March 29, 2018, and may be read into the record. To make public comments during the meeting, see instructions under 'Register for the Meeting' above.

Availability of Materials for the Meeting: All written public comments will be compiled and available for review at the meeting. Duplicate comments from multiple individuals will appear as one comment, with a notation that multiple copies of the comment were received. The final agenda will be available to the public via the OAO website at: *http://www.outreach.usda.gov/smallbeginning/index.htm.*

Meeting Accommodations: USDA is committed to ensuring that all are included in our work environment, programs and events. If you are a person with a disability and request reasonable accommodations to participate in this meeting, please note the request in your registration. All requests are managed on a case-by-case basis.

Issued at Washington, DC, on March 16, 2018.

Christian Obineme,

Acting Director, Office of Advocacy and Outreach.

[FR Doc. 2018–06037 Filed 3–23–18; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meetings of the Hawaii Advisory Committee

AGENCY: Commission on Civil Rights.

ACTION: Announcement of meetings.

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 Hawaii Advisory Committee to the Commission will convene by conference call at 11:00 a.m. (HDT) on: Wednesday, April 4, 2018. The purpose of the meeting is to discuss the pending committee report on Micronesian Immigration.

DATES: Wednesday April 4, 2018 at 11:00 a.m. HDT.

Public Call-in Information: Conference call-in number: 888–438–5535 and conference ID #6112298.

FOR FURTHER INFORMATION CONTACT: David Barreras, at *dbarreras@usccr.gov* or by phone at 312–353–8311.

SUPPLEMENTARY INFORMATION: Interested members of the public may listen to the discussion by calling the following toll-free conference call-in number: 1–888–438–5535 and conference ID #6112298. 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.

Members of the public are invited to make statements during the open comment period of the meetings 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 Western Regional Office, U.S. Commission on Civil Rights, 300 N Los Angeles Street, Suite 2010, Los Angeles, CA 90012, faxed to (213) 353–8324, or emailed to David Barreras at *dbarreras@usccr.gov.* Persons who desire additional information may contact the Western Regional Office at (213) 894–3437.

Records and documents discussed during the meeting will be available for public viewing as they become available at *https://www.facadatabase.gov/committee/committee.aspx?cid=244&aid=17;* click the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Western 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 website, *www.usccr.gov,* or to contact the Western Regional Office at the above phone numbers, email or street address.

Agenda: Wednesday, April 4

- Welcome—Roll Call
- Chair's Comments
- DFO update on Report
- Discussion on Report
- Open Comment
- Adjourn

Dated: March 21, 2018.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2018–06058 Filed 3–23–18; 8:45 am]

BILLING CODE P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Oregon Advisory Committee

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 (FACA) that a meeting of the Oregon Advisory Committee (Committee) to the Commission will be held at 1:00 p.m. (Pacific Time) Tuesday, March 27, 2018. The purpose of the meeting is for the Committee to continue planning to collect testimony focused on human trafficking in Oregon.

DATES: The meeting will be held on Tuesday, March 27, 2018, at 1:00 p.m. PT.

Public Call Information: Dial: 877–627–6544, Conference ID: 7293079.

FOR FURTHER INFORMATION CONTACT: Ana Victoria Fortes (DFO) at *afortes@usccr.gov* or (213) 894–3437.

SUPPLEMENTARY INFORMATION: This meeting is available to the public through the above toll-free call-in number. Any interested member of the public may call this number and listen to the meeting. 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 telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–877–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are entitled to make comments during the open period at the end of the meeting. Members of the public may also submit written comments; the comments must be received in the Regional Programs Unit within 30 days following the meeting. Written comments may be mailed to the Western Regional Office, U.S. Commission on Civil Rights, 300 North Los Angeles Street, Suite 2010, Los Angeles, CA 90012. They may be faxed to the Commission at (213) 894–0508, or emailed Ana Victoria Fortes at *afortes@usccr.gov.* Persons who desire additional information may contact the Regional Programs Unit at (213) 894–3437.

Records and documents discussed during the meeting will be available for public viewing prior to and after the meeting at *https://facadatabase.gov/committee/meetings.aspx?cid=270.* Please click on the ''Meeting Details'' and ''Documents'' links. Records generated from this meeting may also be inspected and reproduced at the Regional Programs Unit, as they become available, both before and after the meeting. Persons interested in the work of this Committee are directed to the Commission's website, *https://www.usccr.gov,* or may contact the Regional Programs Unit at the above email or street address.

Agenda

I. Welcome

II. Approve minutes from previous meeting

III. Committee Discussion: human trafficking
a. Vote on agenda of upcoming speakers
IV. Public Comment
V. Next Steps
VI. Adjournment

Exceptional Circumstance: Pursuant to 41 CFR 102–3.150, the notice for this meeting is given less than 15 calendar days prior to the meeting because of the exceptional circumstance of this Committee preparing for its upcoming public meeting to hear testimony.

Dated: March 21, 2018.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2018–06053 Filed 3–23–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket No. 180306249–8249–01]

National Cybersecurity Center of Excellence (NCCoE) Energy Sector Asset Management

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice.

SUMMARY: The National Institute of Standards and Technology (NIST) invites organizations to provide products and technical expertise to support and demonstrate security platforms for the Energy Sector Asset Management Project. This notice is the initial step for the National Cybersecurity Center of Excellence (NCCoE) in collaborating with technology companies to address cybersecurity challenges identified under the Energy Sector Asset Management use case. Participation in the use case is open to all interested organizations.

DATES: Interested parties must contact NIST to request a letter of interest template to be completed and submitted to NIST. Letters of interest will be accepted on a first come, first served basis. Collaborative activities will commence as soon as enough completed and signed letters of interest have been returned to address all the necessary components and capabilities, but no earlier than April 25, 2018. When the use case has been completed, NIST will post a notice on the NCCoE Energy Sector Asset Management use case website at: *https://nccoe.nist.gov/projects/use-cases/energy-sector/asset-management* announcing the completion of the use case and informing the public that it will no longer accept letters of interest for this use case.

ADDRESSES: The NCCoE is located at 9700 Great Seneca Highway, Rockville, MD 20850. Letters of interest must be submitted to *energy_nccoe@nist.gov* or via hardcopy to National Institute of Standards and Technology, NCCoE; 9700 Great Seneca Highway, Rockville, MD 20850. Organizations whose letters of interest are accepted in accordance with the process set forth in the **SUPPLEMENTARY INFORMATION** section of this notice will be asked to sign a consortium Cooperative Research and Development Agreement (CRADA) with NIST. An NCCoE consortium CRADA template can be found at: *http://nccoe.nist.gov/node/138.*

FOR FURTHER INFORMATION CONTACT: Jim McCarthy via email to *energy_nccoe@nist.gov;* by telephone 301–975–0228; or by mail to National Institute of Standards and Technology, NCCoE; 9700 Great Seneca Highway, Rockville, MD 20850. Additional details about the Energy Sector Asset Management use case are available at: *https://nccoe.nist.gov/projects/use-cases/energy-sector.*

SUPPLEMENTARY INFORMATION:

Background: The NCCoE, part of NIST, is a public-private collaboration for accelerating the widespread adoption of integrated cybersecurity tools and technologies. The NCCoE brings together experts from industry, government, and academia under one roof to develop practical, interoperable cybersecurity approaches that address the real-world needs of complex Information Technology (IT). By accelerating dissemination and use of these integrated tools and technologies for protecting IT assets, the NCCoE will enhance trust in U.S. IT communications, data, and storage systems; reduce risk for companies and individuals using IT systems; and encourage development of innovative, job-creating cybersecurity products and services.

Process: NIST is soliciting responses from all sources of relevant security capabilities (see below) to enter into a Cooperative Research and Development Agreement (CRADA) to provide products and technical expertise to support and demonstrate platforms for the Energy Sector Asset Management use case. The full use case can be viewed at: *https://nccoe.nist.gov/projects/use-cases/energy-sector/asset-management.*

Interested parties should contact NIST using the information provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice. NIST will then provide each interested party with a letter of interest template, which the party must complete, certify that it is accurate, and submit to NIST. NIST will contact interested parties if there are questions regarding the responsiveness of the letters of interest to the use case objective or requirements identified below. NIST will select participants who have submitted complete letters of interest on a first come, first served basis within each category of product components or capabilities listed below up to the number of participants in each category necessary to carry out this use case. However, there may be continuing opportunity to participate even after initial activity commences. Selected participants will be required to enter into a consortium CRADA with NIST (for reference, see **ADDRESSES** section above). NIST published a notice in the **Federal Register** on October 19, 2012 (77 FR 64314) inviting U.S. companies to enter into a National Cybersecurity Excellence Partnerships (NCEPs) in furtherance of the NCCoE. For this demonstration project, NCEP partners will not be given priority for participation.

Use case Objective: The objective of this use case is to provide guidance on how energy companies may enhance OT (Operational Technology)/ICS (Industrial Controls System) asset management by leveraging capabilities that may already exist in an operating environment or by implementing new ones. A detailed description of the Energy Sector Asset Management use case is available at: *https://nccoe.nist.gov/projects/use-cases/energy-sector/asset-management.*

Requirements: Each responding organization's letter of interest should identify which security platform component(s) or capability(ies) it is offering. Letters of interest should not include company proprietary information, all components and capabilities must be commercially available, and all products must be able to specifically address OT/ICS environments in order to be considered for collaboration on this project. Components are listed in section 3 of the Energy Sector Asset Management use case (for reference, please see the link in the PROCESS section above) and include, but are not limited to:

- OT/ICS-specific asset discovery and management tools
- Reliable/secure/encrypted communication devices
- Cybersecurity event/attack detection capability

- Alerting capability (*e.g.* Security Information and Event Management or SIEM)

Each responding organization's letter of interest should identify how their products address one or more of the following desired solution characteristics in section 3 of the Energy Sector Asset Management use case (for reference, please see the link in the PROCESS section above):

- OT/ICS asset inventory (to include devices using serial connections)
- high-speed communication mechanisms for remote asset management
- reliable/secure/encrypted communications
- continuous asset monitoring
- log analysis and correlation
- cybersecurity event/attack detection
- patch level information

Responding organizations need to understand and, in their letters of interest, commit to provide:

1. Access for all participants' project teams to component interfaces and the organization's experts necessary to make functional connections among security platform components.

2. Support for development and demonstration of the Energy Sector Asset Management use case in NCCoE facilities which will be conducted in a manner consistent with the following standards and guidance: NIST Special Publications 1800–5 (DRAFT); 1800–7 (DRAFT); 800–40; 800–53;800–82; 800–160; 800–52; NIST Cybersecurity Framework; NIST Cryptographic Standards and Guidelines; ISO/IEC 27001 Information security management; and NERC CIP 002–5–014–2.

Additional details about the Energy Sector Asset Management use case are available at: *https://nccoe.nist.gov/projects/use-cases/energy-sector/asset-management.*

NIST cannot guarantee that all of the products proposed by respondents will be used in the demonstration. Each prospective participant will be expected to work collaboratively with NIST staff and other project participants under the terms of the consortium CRADA in the development of the Energy Sector Asset Management use case. Prospective participants' contribution to the collaborative effort will include assistance in establishing the necessary interface functionality, connection and set-up capabilities and procedures, demonstration harnesses, environmental and safety conditions for use, integrated platform user instructions, and demonstration plans and scripts necessary to demonstrate the desired capabilities. Each participant will train NIST personnel, as necessary, to operate its product in capability demonstrations. Following successful demonstrations, NIST will publish a description of the security platform and its performance characteristics sufficient to permit other organizations to develop and deploy security platforms that meet the security objectives of the Energy Sector Asset Management use case. These descriptions will be public information.

Under the terms of the consortium CRADA, NIST will support development of interfaces among participants' products by providing IT infrastructure, laboratory facilities, office facilities, collaboration facilities, and staff support to component composition, security platform documentation, and demonstration activities.

The dates of the demonstration of the Energy Sector Asset Management use case capability will be announced on the NCCoE website at least two weeks in advance at *http://nccoe.nist.gov/.* The expected outcome of the demonstration is to improve security across the energy sector. Participating organizations will gain from the knowledge that their products are interoperable with other participants' offerings.

For additional information on the NCCoE governance, business processes, and NCCoE operational structure, visit the NCCoE website *http://nccoe.nist.gov/.*

Kevin Kimball,

NIST Chief of Staff.

[FR Doc. 2018–06024 Filed 3–23–18; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

NIST Smart Grid Advisory Committee Meeting

AGENCY: National Institute of Standards and Technology, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The National Institute of Standards and Technology (NIST) Smart Grid Advisory Committee (SGAC or Committee) will meet in open session on Tuesday, April 24, 2018 from 8:30 a.m. to 5:00 p.m. Eastern time and Wednesday, April 25, 2018 from 8:30 a.m. to 12:00 p.m. Eastern time. The primary purposes of this meeting are to provide updates on NIST Smart Grid activities and the intersections with Cyber-Physical Systems program activities, and discuss development and stakeholder engagement for the NIST Framework and Roadmap for Smart Grid Interoperability Standards, Release 4.0. The agenda may change to accommodate Committee business. The final agenda will be posted on the Smart Grid website at *http://www.nist.gov/smartgrid.*

DATES: The SGAC will meet on Tuesday, April 24, 2018 from 8:30 a.m. to 5:00 p.m. Eastern time and Wednesday, April 25, 2018 from 8:30 a.m. to 12:00 p.m. Eastern time.

ADDRESSES: The meeting will be held in Conference Room C103, Building 215 (Advanced Measurement Laboratory), National Institute of Standards and Technology, 100 Bureau Drive, Gaithersburg, Maryland 20899. Please note admittance instructions under the **SUPPLEMENTARY INFORMATION** section of this notice.

FOR FURTHER INFORMATION CONTACT: Mr. Cuong Nguyen, Smart Grid and Cyber-Physical Systems Program Office, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 8200, Gaithersburg, MD 20899–8200; telephone 301–975–2254, fax 301–948–5668; or via email at *cuong.nguyen@nist.gov.*

SUPPLEMENTARY INFORMATION: The Committee was established in accordance with the Federal Advisory Committee Act, as amended, 5 U.S.C. App. The Committee is composed of nine to fifteen members, appointed by the Director of NIST, who were selected on the basis of established records of distinguished service in their professional community and their knowledge of issues affecting Smart Grid deployment and operations. The Committee advises the Director of NIST in carrying out duties authorized by section 1305 of the Energy Independence and Security Act of 2007 (Pub. L. 110–140). The Committee provides input to NIST on Smart Grid standards, priorities, and gaps, on the overall direction, status, and health of the Smart Grid implementation by the Smart Grid industry, and on the direction of Smart Grid research and standards activities. Background information on the Committee is available at *http://www.nist.gov/smartgrid/.*

Pursuant to the Federal Advisory Committee Act, as amended, 5 U.S.C. App., notice is hereby given that the NIST Smart Grid Advisory Committee (SGAC or Committee) will meet in open session on Tuesday, April 24, 2018 from 8:30 a.m. to 5:00 p.m. Eastern time and Wednesday, April 25, 2018 from 8:30

a.m. to 12:00 p.m. Eastern time. The meeting will be held in Conference Room C103, Building 215 (Advanced Measurement Laboratory), National Institute of Standards and Technology, 100 Bureau Drive, Gaithersburg, Maryland 20899. The primary purposes of this meeting are to provide updates on NIST Smart Grid activities and the intersections with Cyber-Physical Systems program activities and to discuss development and stakeholder engagement for the NIST Framework and Roadmap for Smart Grid Interoperability Standards, Release 4.0. The agenda may change to accommodate Committee business. The final agenda will be posted on the Smart Grid website at *http://www.nist.gov/smartgrid*.

Individuals and representatives of organizations who would like to offer comments and suggestions related to the Committee's affairs are invited to request a place on the agenda by submitting their request to Cuong Nguyen at *cuong.nguyen@nist.gov* or (301) 975–2254 no later than 5:00 p.m. Eastern time, Tuesday, April 10, 2018. On Wednesday, April 25, 2018, approximately one-half hour will be reserved at the end of the meeting for public comments, and speaking times will be assigned on a first-come, first-serve basis. The amount of time per speaker will be determined by the number of requests received, but is likely to be about three minutes each. Questions from the public will not be considered during this period. Speakers who wish to expand upon their oral statements, those who had wished to speak but could not be accommodated on the agenda, and those who were unable to attend in person are invited to submit written statements to Mr. Cuong Nguyen, Smart Grid and Cyber-Physical Systems Program Office, National Institute of Standards and Technology, 100 Bureau Drive, Mail Stop 8200, Gaithersburg, MD 20899–8200; telephone 301–975–2254, fax 301–948–5668; or via email at *cuong.nguyen@nist.gov*.

All visitors to the NIST site are required to pre-register to be admitted. Anyone wishing to attend this meeting must register by 5:00 p.m. Eastern time, Tuesday, April 10, 2018, in order to attend. Please submit your full name, time of arrival, email address, and phone number to Cuong Nguyen. Non-U.S. citizens must submit additional information; please contact Mr. Nguyen. Mr. Nguyen's email address is *cuong.nguyen@nist.gov* and his phone number is (301) 975–2254. For participants attending in person, please note that federal agencies, including NIST, can only accept a state-issued driver's license or identification card for access to federal facilities if such license or identification card is issued by a state that is compliant with the REAL ID Act of 2005 (Pub. L. 109–13), or by a state that has an extension for REAL ID compliance. NIST currently accepts other forms of federal-issued identification in lieu of a state-issued driver's license. For detailed information, please contact Mr. Nguyen or visit: *http://www.nist.gov/public_affairs/visitor/*.

Kevin Kimball,

NIST Chief of Staff.

[FR Doc. 2018–06023 Filed 3–23–18; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF995

Initiation of 5-Year Review for the Endangered New York Bight, Chesapeake Bay, Carolina and South Atlantic Distinct Population Segments of Atlantic Sturgeon and the Threatened Gulf of Maine Distinct Population Segment of Atlantic Sturgeon; Correction

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

ACTION: Notice of initiation of 5-year review and request for information; correction.

SUMMARY: We, NMFS, published a notice in the **Federal Register** of March 16, 2018, announcing our intent to conduct a 5-year review for the threatened Gulf of Maine distinct population segment (DPS) of Atlantic sturgeon (*Acipenser oxyrinchus oxyrinchus*), the endangered New York Bight DPS of Atlantic sturgeon, the endangered Chesapeake Bay DPS of Atlantic sturgeon, the endangered Carolina DPS of Atlantic sturgeon and the endangered South Atlantic DPS of Atlantic sturgeon under the Endangered Species Act of 1973, as amended (ESA). The notice contained an incorrect link to the Federal e-Rulemaking Portal for submitting comments. This document corrects the link.

ADDRESSES: Submit your comments by including NOAA–NMFS–2018–0041, by either of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal e-Rulemaking Portal.

1. Go to *https://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2018-0041.*
2. Click the ''Comment Now!'' icon, complete the required fields.
3. Enter or attach your comments.

- *Mail:* Submit written comments to Lynn Lankshear, NMFS, Greater Atlantic Region Fisheries Office, 55 Great Republic Drive, Gloucester, MA 01930 or Andrew Herndon, NMFS, Southeast Regional Office, 263 13th Avenue South, Saint Petersburg, FL 33701.

Instructions: We may not consider comments if they are sent by any other method, to any other address or individual, or received after the end of the specified period. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. We will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Lynn Lankshear at the above address, by phone at 978–282–8473 or *Lynn.Lankshear@noaa.gov* or Andrew Herndon at the above address, by phone at 727–824–5312 or *Andrew.Herndon@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Need for Correction

In the **Federal Register** of March 16, 2018, in FR Doc. 2018–05306, on page 11731, in the third column, the **ADDRESSES** section contained an incorrect link to the Federal e-Rulemaking Portal and is corrected in this document.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: March 21, 2018.

Angela Somma,

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2018–06057 Filed 3–23–18; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XG100

Pacific Bluefin Tuna Management Strategy Evaluation National Marine Fisheries Service Listening Sessions; Meeting Announcement

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

ACTION: Notice of public meeting.

SUMMARY: NMFS is holding a listening session to provide information and receive stakeholder input regarding an upcoming Pacific bluefin tuna management strategy evaluation workshop. The listening session will be broadcast in two separate locations, and will include presentations and time for stakeholder input into the development of management objectives. The meeting topics are described under the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: The meeting will be held on April 18, 2018, from 12:30 p.m. to 4:30 p.m. PDT.

ADDRESSES: The meeting will be held concurrently in two locations: (1) In the Pacific Conference Room (Room 300) at NMFS, Southwest Fisheries Science Center, 8901 La Jolla Shores Drive, La Jolla, California 92037; (2) Room 3400 at the Long Beach Federal Building, 501 W Ocean Blvd., Long Beach, California 90802. Please notify Celia Barroso (see **FOR FURTHER INFORMATION CONTACT**) by April 11, 2018, if you plan to attend and whether you will be attending in person or remotely. The meetings will be accessible by webinar—instructions and background materials will be emailed to meeting participants.

FOR FURTHER INFORMATION CONTACT: Celia Barroso, West Coast Region, NMFS, at *Celia.Barroso@noaa.gov,* or at (562) 432–1850.

SUPPLEMENTARY INFORMATION: The International Scientific Committee for Tuna and Tuna-like Species in the North Pacific Ocean is hosting the first Pacific bluefin tuna management strategy evaluation (MSE) workshop May 30–31, 2018, in Yokohama, Japan. MSE is a simulation that allows stakeholders (*e.g.,* industry, managers, scientists) to assess how well different management strategies, such as harvest control rules, meet the objectives of the fishery. In accordance with the outcomes from the 2nd Joint Inter-American Tropical Tuna Commission—Western and Central Pacific Fisheries Commission Northern Committee Working Group meeting,[1] NMFS anticipates that at this first workshop, participants will begin to develop potential management objectives that might be used in the MSE for the Pacific bluefin tuna fishery.

For the listening session, NMFS will provide stakeholders with background on the status of the Pacific bluefin tuna stock and the MSE process. Additionally, NMFS is interested in learning from stakeholders about preferred management objectives. The manner of public comment will be at the discretion of the presenters and NMFS staff.

Pacific Bluefin Tuna MSE Listening Session Topics

The Pacific bluefin tuna MSE topics will include, but are not limited to, the following:

(1) An overview of MSE and
(2) Example management objectives for Pacific bluefin tuna.

Special Accommodations

The meeting location is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Celia Barroso (see **FOR FURTHER INFORMATION CONTACT**) by April 5, 2018.

Authority: 16 U.S.C. 951 *et seq.* and 16 U.S.C. 6901 *et seq.*

Dated: March 20, 2018.

Jennifer M. Wallace,

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

[FR Doc. 2018–06032 Filed 3–23–18; 8:45 am]

BILLING CODE 3510–22–P

[1] *https://www.wcpfc.int/meetings/nc13.*

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Deep Seabed Mining Exploration Licenses

AGENCY: National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before May 25, 2018.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW, Washington, DC 20230 (or via the internet at *pracomments@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Kerry Kehoe (301) 713–3155 extension 151, or *Kerry.Kehoe@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a currently approved information collection.

NOAA's regulations at 15 CFR 970 govern the issuing and monitoring of exploration licenses under the Deep Seabed Hard Mineral Resources Act. Any persons seeking a license must submit certain information that allows NOAA to ensure the applicant meets the standards of the Act. Persons with licenses are required to conduct monitoring and make reports, and they may request revisions, transfers, or extensions of licenses.

II. Method of Collection

Paper submissions are used; however, applicants are encouraged to submit supporting documentation electronically when feasible.

III. Data

OMB Control Number: 0648–0145.
Form Number(s): None.
Type of Review: Regular submission (extension of a currently approved information collection).
Affected Public: Business or other for-profit organizations.
Estimated Number of Respondents: 2.
Estimated Time per Response: Applications, 2,000–4,000 hours (no applications are expected); license renewals, 250 hours; reports, 20 hours.
Estimated Total Annual Burden Hours: 290.
Estimated Total Annual Cost to Public: $200 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 21, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–06045 Filed 3–23–18; 8:45 am]

BILLING CODE 3510–08–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; StormReady, TsunamiReady, StormReady/TsunamiReady, and StormReady Supporter Application Forms

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before May 25, 2018.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW, Washington, DC 20230 (or via the internet at *pracomments@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Rocky Lopes, (301) 427–9380 or *Rocky.Lopes@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for extension of a currently approved information collection.

NOAA's National Weather Service is extending its ''StormReady, TsunamiReady, StormReady/TsunamiReady, StormReady Supporter and TsunamiReady Supporter Application Forms''. StormReady and TsunamiReady are voluntary programs offered as a means of providing guidance and incentive to officials interested in improving their respective hazardous weather operations. The StormReady Application Form, Tsunami-Ready Application Form and TsunamiReady/StormReady Application Form will be used by localities to apply for initial StormReady or TsunamiReady and StormReady recognition and renewal of that recognition every six years. The government will use the information collected to determine whether a community has met all of the criteria to receive StormReady and/or TsunamiReady recognition. Businesses, schools, non profit organizations and other non-governmental entities often establish severe weather safety plans and actively promote severe weather safety awareness activities. Many of these entities do not have the resources necessary to fulfill all the eligibility requirements to achieve the full StormReady, StormReady/TsunamiReady or StormReady/Tsunami recognition. Therefore, the NWS established the StormReady and TsunamiReady Supporter programs to recognize entities that promote the principles and guidelines of the full programs, but do not meet the eligibility requirements for full recognition.

II. Method of Collection

Applications may be faxed, mailed or emailed.

III. Data

OMB Control Number: 0648–0419.

Form Number(s): None.

Type of Review: Regular submission (extension of a currently approved information collection).

Affected Public: Business or other for-profit organizations; not-for-profit institutions.

Estimated Number of Respondents: 305.

Estimated Time per Response: Initial applications, 2 hours; renewal applications, 1 hour.

Estimated Total Annual Burden Hours: 565.

Estimated Total Annual Cost to Public: $150 in recordkeeping/reporting costs.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: March 21, 2018.

Sarah Brabson,

NOAA PRA Clearance Officer.

[FR Doc. 2018–06044 Filed 3–23–18; 8:45 am]

BILLING CODE 3510–KE–P

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Commerce Spectrum Management Advisory Committee Meeting

AGENCY: National Telecommunications and Information Administration, U.S. Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a public meeting of the Commerce Spectrum Management Advisory Committee (Committee). The Committee provides advice to the Assistant Secretary of Commerce for Communications and Information and the National Telecommunications and Information Administration (NTIA) on spectrum management policy matters.

DATES: The meeting will be held on April 25, 2018, from 9:00 a.m. to 12:00 p.m., Eastern Daylight Time (EDT).

ADDRESSES: The meeting will be held at the Morgan, Lewis & Bockius, LLP, 1111 Pennsylvania Avenue NW, Suite 201, Washington, DC 20004. Public comments may be mailed to Commerce Spectrum Management Advisory Committee, National Telecommunications and Information Administration, 1401 Constitution Avenue NW, Room 4600, Washington, DC 20230 or emailed to *dreed@ntia.doc.gov.*

FOR FURTHER INFORMATION CONTACT: David J. Reed, Designated Federal Officer, at (202) 482–5955 or *dreed@ntia.doc.gov;* and/or visit NTIA's website at *https://www.ntia.doc.gov/category/csmac.*

SUPPLEMENTARY INFORMATION:

Background: The Committee provides advice to the Assistant Secretary of Commerce for Communications and Information on needed reforms to domestic spectrum policies and management in order to: License radio frequencies in a way that maximizes public benefits; keep wireless networks as open to innovation as possible; and make wireless services available to all Americans. *See* Charter at *https://www.ntia.doc.gov/files/ntia/publications/csmac_charter-2017.pdf.*

This Committee is subject to the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, and is consistent with the National Telecommunications and Information Administration Act, 47 U.S.C. 904(b). The Committee functions solely as an advisory body in compliance with the FACA. For more information about the Committee visit: *https://www.ntia.doc.gov/category/csmac.*

Matters To Be Considered: The Committee provides advice to the Assistant Secretary to assist in developing and maintaining spectrum management policies that enable the United States to maintain or strengthen its global leadership role in the introduction of communications technology, services, and innovation; thus expanding the economy, adding jobs, and increasing international trade, while at the same time providing for the expansion of existing technologies and supporting the country's homeland security, national defense, and other critical needs of government missions. NTIA will post a detailed agenda on its website, *https://www.ntia.doc.gov/category/csmac,* prior to the meeting. To the extent that the meeting time and agenda permit, any member of the public may speak to or otherwise address the Committee regarding the agenda items. *See Open Meeting and Public Participation Policy,* available at *https://www.ntia.doc.gov/category/csmac.*

Time and Date: The meeting will be held on April 25, 2018, from 9:00 a.m. to 12:00 p.m. EDT. The meeting time and the agenda topics are subject to change. The meeting will be available via two-way audio link and may be webcast. Please refer to NTIA's website, *https://www.ntia.doc.gov/category/csmac,* for the most up-to-date meeting agenda and access information.

Place: The meeting will be held at Morgan, Lewis & Bockius, LLP, 1111 Pennsylvania Avenue NW, Suite 201, Washington, DC 20004. The meeting will be open to the public and members of the press on a first-come, first-served basis as space is limited. The public meeting is physically accessible to people with disabilities. Individuals requiring accommodations, such as sign language interpretation or other auxiliary aids, are asked to notify Mr. Reed at (202) 482–5955 or *dreed@ntia.doc.gov* at least ten (10) business days before the meeting.

Status: Interested parties are invited to attend and to submit written comments to the Committee at any time before or after the meeting. Parties wishing to submit written comments for consideration by the Committee in advance of a meeting may send them via postal mail to Commerce Spectrum Management Advisory Committee, National Telecommunications and Information Administration, 1401 Constitution Avenue NW, Room 4600, Washington, DC 20230. It would be helpful if paper submissions also include a compact disc (CD) that contains the comments in Microsoft Word and/or PDF file formats. CDs should be labeled with the name and organizational affiliation of the filer. Alternatively, comments may be submitted via electronic mail to *dreed@ntia.doc.gov* and should also be in one or both of the file formats specified above. Comments must be received five (5) business days before the scheduled meeting date in order to provide sufficient time for review. Comments received after this date will be distributed to the Committee, but may not be reviewed prior to the meeting.

Records: NTIA maintains records of all Committee proceedings. Committee records are available for public inspection at NTIA's Washington, DC office at the address above. Documents including the Committee's charter, member list, agendas, minutes, and reports are available on NTIA's website at *https://www.ntia.doc.gov/category/csmac.*

Dated: March 20, 2018.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 2018–06035 Filed 3–23–18; 8:45 am]

BILLING CODE 3510–60–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2018–ICCD–0028]

Agency Information Collection Activities; Comment Request; Higher Education Hurricane and Wildfire Relief Program Application

AGENCY: Office of Postsecondary Education (OPE), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is requesting the Office of Management and Budget (OMB) to conduct an emergency review of a new information collection.

DATES: Approval by the OMB has been requested by before March 28, 2018. A regular clearance process is also hereby being initiated. Interested persons are invited to submit comments on or before March 28, 2018.

ADDRESSES: To access and review all the documents related to the information collection listed in this notice, please use *http://www.regulations.gov* by searching the Docket ID number ED–2018–ICCD–0028. Comments submitted in response to this notice should be submitted electronically through the Federal eRulemaking Portal at *http://www.regulations.gov* by selecting the Docket ID number or via postal mail, commercial delivery, or hand delivery. *Please note that comments submitted by fax or email and those submitted after the comment period will not be accepted.* Written requests for information or comments submitted by postal mail or delivery should be addressed to the Director of the Information Collection Clearance Division, U.S. Department of Education, 400 Maryland Avenue SW, LBJ, Room 216–34, Washington, DC 20202–4537.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Lauren Kennedy, 202–453–7957.

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Higher Education Hurricane and Wildfire Relief Program Application.

OMB Control Number: 1840—NEW.

Type of Review: A new information collection.

Respondents/Affected Public: Private Sector.

Total Estimated Number of Annual Responses: 550.

Total Estimated Number of Annual Burden Hours: 16,000.

Abstract: The Bipartisan Budget Act of 2018, signed into law by President Trump on February 9, 2018, included significant new funding to support disaster relief. The U.S. Department of Education (Department) will award up to $2.7 billion to assist K–12 schools and school districts and institutions of higher education (IHEs) in meeting the educational needs of students affected by Hurricanes Harvey, Irma and Maria and the 2017 California wildfires. This disaster assistance will help schools, school districts and IHEs return to their full capabilities as quickly and effectively as possible. Pursuant to 5 CFR 1320.13, the Department requests that OMB review this collection under its emergency procedures, based on harm to public due to an unanticipated/unforeseen natural disaster event that occurred beyond ED's control. There are two higher education funding opportunities that require emergency clearance under the Paperwork Reduction Act: Emergency Assistance to Institutions of Higher Education: Congress appropriated $100 million for this program; which will provide emergency assistance to IHEs and their students in areas directly affected by the covered disasters or emergencies. And the Defraying Costs of Enrolling Displaced Students in Higher Education: Congress appropriated $75 million for this program, which will provide payments to IHEs to help defray the unexpected expenses associated with enrolling displaced students from IHEs directly affected by a covered disaster or emergency, in accordance with criteria to be established and made publicly available.

Additional Information: An emergency clearance approval for the use of the system is described below due to the following conditions:

The Bipartisan Budget Act of 2018, signed into law by President Trump on February 9, 2018, included significant new funding to support disaster relief. The U.S. Department of Education (Department) will award up to $2.7 billion to assist K–12 schools and school districts and institutions of higher education (IHEs) in meeting the educational needs of students affected by Hurricanes Harvey, Irma and Maria and the 2017 California wildfires. This disaster assistance will help schools, school districts and IHEs return to their full capabilities as quickly and effectively as possible.

Pursuant to 5 CFR 1320.13, the Department requests that OMB review this collection under its emergency procedures, based on harm to public due to an unanticipated/unforeseen natural disaster event that occurred beyond ED's control.

There are two higher education funding opportunities that require emergency clearance under the Paperwork Reduction Act:

• *Emergency Assistance to Institutions of Higher Education:* Congress appropriated $100 million for this program; which will provide emergency assistance to IHEs and their students in areas directly affected by the covered disasters or emergencies.

• *Defraying Costs of Enrolling Displaced Students in Higher Education:* Congress appropriated $75 million for this program, which will provide payments to IHEs to help defray the unexpected expenses associated with enrolling displaced students from IHEs directly affected by a covered disaster or emergency, in accordance with criteria to be established and made publicly available.

Dated: March 20, 2018.

Kate Mullan,

Acting Director, Information Collection Clearance Division, Office of the Chief Privacy Officer, Office of Management.

[FR Doc. 2018–06028 Filed 3–23–18; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC18–72–000.

Applicants: Walleye Energy, LLC, FirstEnergy Generation, LLC.

Description: Joint Application for Authorization For Disposition and Consolidation of Jurisdictional Facilities and Acquisition of an Existing Generation Facility, et al.

Filed Date: 3/20/18.

Accession Number: 20180320–5198.

Comments Due: 5 p.m. ET 4/10/18.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG18–57–000.

Applicants: Imperial Valley Solar 2, LLC.

Description: Notice of Certification of Imperial Valley Solar 2, LLC.

Filed Date: 3/19/18.

Accession Number: 20180319–5206.

Comments Due: 5 p.m. ET 4/9/18.

Docket Numbers: EG18–58–000.

Applicants: Delta Solar Power I, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Delta Solar Power I, LLC.

Filed Date: 3/20/18.

Accession Number: 20180320–5151.

Comments Due: 5 p.m. ET 4/10/18.

Docket Numbers: EG18–59–000.

Applicants: Delta Solar Power II, LLC.

Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Delta Solar Power II, LLC.

Filed Date: 3/20/18.

Accession Number: 20180320–5154.

Comments Due: 5 p.m. ET 4/10/18.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1325–008; ER17–1968–000; ER17–1967–000; ER17–1970–000; ER17–1971–000; ER17–1964–000; ER17–1972–000; ER17–1973–000.

Applicants: CinCap V LLC, Duke Energy Beckjord, LLC, Duke Energy Carolinas, LLC, Duke Energy Commercial Enterprises, Inc., Duke Energy Florida, LLC, Duke Energy Progress, LLC, Duke Energy Renewable Services, LLC, Duke Energy SAM, LLC.

Description: Supplement to June 30, 2017 Updated Market Power Analysis for the Southeast Region of CinCap V, LLC, et al.

Filed Date: 3/20/18.
Accession Number: 20180320–5097.
Comments Due: 5 p.m. ET 4/10/18.
Docket Numbers: ER13–102–012.
Applicants: New York Independent System Operator, Inc.
Description: Compliance filing: Compliance with 2/15/18 Order directives re: Order No. 1000 to be effective 4/1/2016.
Filed Date: 3/19/18.
Accession Number: 20180319–5184.
Comments Due: 5 p.m. ET 4/9/18.

Docket Numbers: ER16–2095–003.
Applicants: Midwest Generation, LLC.
Description: Compliance filing: Reactive Service Tariff Compliance Filing to be effective 8/1/2016.
Filed Date: 3/20/18.
Accession Number: 20180320–5211.
Comments Due: 5 p.m. ET 4/10/18.

Docket Numbers: ER17–179–002.
Applicants: American Transmission Systems, Incorporated, PPL Electric Utilities Corporation, PJM Interconnection, L.L.C.
Description: Compliance filing: PJM Transmission Owners submit Compliance Filing re: 2/15/18 Order in ER17–179 to be effective 12/31/9998.
Filed Date: 3/19/18.
Accession Number: 20180319–5186.
Comments Due: 5 p.m. ET 4/9/18.

Docket Numbers: ER17–179–003.
Applicants: PJM Interconnection, L.L.C.
Description: Compliance filing: Compliance per February 15, 2018 order in Docket No. ER17–179 to be effective 12/31/9998.
Filed Date: 3/19/18.
Accession Number: 20180319–5189.
Comments Due: 5 p.m. ET 4/9/18.

Docket Numbers: ER18–661–000.
Applicants: Midcontinent Independent System Operator, Inc., Ameren Illinois Company.
Description: Report Filing: 2018–03–20_Refund Report for Ameren-Farmington 1st Rev WDS to be effective N/A.
Filed Date: 3/20/18.
Accession Number: 20180320–5025.
Comments Due: 5 p.m. ET 4/10/18.

Docket Numbers: ER18–1138–000.
Applicants: PPL Electric Utilities Corporation.
Description: Request for Waiver, et al. of PPL Electric Utilities Corporation.
Filed Date: 3/16/18.
Accession Number: 20180316–5220.
Comments Due: 5 p.m. ET 3/30/18.

Docket Numbers: ER18–1142–000.
Applicants: Imperial Valley Solar 2, LLC.
Description: Baseline eTariff Filing: Baseline new to be effective 12/13/9998.
Filed Date: 3/19/18.
Accession Number: 20180319–5174.
Comments Due: 5 p.m. ET 4/9/18.

Docket Numbers: ER18–1143–000.
Applicants: Duke Energy Indiana, LLC.
Description: § 205(d) Rate Filing: 2018 Annual Reconciliation Filing RS No. 253 to be effective 7/1/2017.
Filed Date: 3/20/18.
Accession Number: 20180320–5015.
Comments Due: 5 p.m. ET 4/10/18.

Docket Numbers: ER18–1148–000.
Applicants: PJM Interconnection, L.L.C.
Description: § 205(d) Rate Filing: Clean-up of Operating Agreement, Schedule 6, sec 1.3 and 1.5 to be effective 7/18/2016.
Filed Date: 3/20/18.
Accession Number: 20180320–5188.
Comments Due: 5 p.m. ET 4/10/18.

Docket Numbers: ER18–1149–000.
Applicants: Walleye Energy, LLC.
Description: Baseline eTariff Filing: Market Based Rate Tariff to be effective 5/21/2018.
Filed Date: 3/20/18.
Accession Number: 20180320–5213.
Comments Due: 5 p.m. ET 4/10/18.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RD18–4–000.
Applicants: North American Electric Reliability Corporation.
Description: Petition of the North American Electric Reliability Corporation for Approval of Proposed Reliability Standard PRC–025–2.
Filed Date: 3/16/18.
Accession Number: 20180316–5245.
Comments Due: 5 p.m. ET 4/19/18.

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: March 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–06038 Filed 3–23–18; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding, to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication, and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. The communications listed are grouped by docket numbers in ascending order. These filings are available for electronic review at the Commission in the Public Reference Room or may be viewed on the Commission's website at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202)502–8659.

Docket No.	File date	Presenter or requester
Prohibited:		
1. CP15–88–000.	3–9–2018	Bluegrass Area Development District.
2. CP17–494–000, CP17–495–000.	3–13–2018	Saint Michael & All Angels Episcopal Church.
3. CP15–558–000.	3–14–2018	Andrea B. Wallace.
Exempt:		
1. CP16–10–000, CP15–554–000.	3–6–2018	U.S. House Representative Donald S. Beyer Jr.
2. CP15–558–000.	3–6–2018	State of New Jersey Senate and General Assembly.[1]
3. CP15–88–000.	3–9–2018	Madison County, Kentucky.
4. CP15–88–000.	3–9–2018	Madison County Schools.

Dated: March 20, 2018.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2018–06039 Filed 3–23–18; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9975–54—Region 1]

2018 Spring Joint Meeting of the Ozone Transport Commission and the Mid-Atlantic Northeast Visibility Union

AGENCY: Environmental Protection Agency (EPA).

[1] Senators Shirley K. Turner and Christopher Bateman. Assemblymen Reed Gusciora, Andrew Zwicker, Roy Frieman, and Assemblywoman Verlina Reynolds-Jackson.

ACTION: Notice; meeting.

SUMMARY: The United States Environmental Protection Agency (EPA) is announcing the joint 2018 Spring Meeting of the Ozone Transport Commission (OTC) and the Mid-Atlantic Northeast Visibility Union (MANE–VU). The meeting agenda will include topics related to reducing ground-level ozone precursors and matters relative to Regional Haze and visibility improvement in Federal Class I areas in a multi-pollutant context.

DATES: The meeting will be held on June 7, 2018 starting at 9:15 a.m. and ending at 4:00 p.m.

ADDRESSES: *Location:* Hyatt Regency Baltimore, 300 Light Street, Baltimore, MD 21202; (410) 528–1234.

FOR FURTHER INFORMATION CONTACT:

For documents and press inquiries contact: Ozone Transport Commission, 444 North Capitol Street NW, Suite 322, Washington, DC 20001; (202) 508–3840; email: *ozone@otcair.org;* website: *http://www.otcair.org.*

SUPPLEMENTARY INFORMATION: The Clean Air Act Amendments of 1990 contain at Section 184 provisions for the Control of Interstate Ozone Air Pollution. Section 184(a) establishes an Ozone Transport Region (OTR) comprised of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, parts of Virginia and the District of Columbia. The purpose of the OTC is to deal with ground-level ozone formation, transport, and control within the OTR. The Mid-Atlantic/Northeast Visibility Union (MANE–VU) was formed at in 2001, in response to EPA's issuance of the Regional Haze rule. MANE–VU's members include: Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, the Penobscot Indian Nation, the St. Regis Mohawk Tribe along with EPA and Federal Land Managers.

Type of Meeting: Open.

Agenda: Copies of the final agenda will be available from the OTC office (202) 508–3840; by email: *ozone@otcair.org* or via the OTC website at *http://www.otcair.org.*

Dated: March 15, 2018.

Alexandra Dapolito Dunn,

Regional Administrator, EPA Region 1.

[FR Doc. 2018–06007 Filed 3–23–18; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Savings and Loan Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Home Owners' Loan Act (12 U.S.C. 1461 *et seq.*) (HOLA), Regulation LL (12 CFR part 238), and Regulation MM (12 CFR part 239), and all other applicable statutes and regulations to become a savings and loan holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a savings association and nonbanking companies owned by the savings and loan 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 application also will 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 HOLA (12 U.S.C. 1467a(e)). 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 10(c)(4)(B) of the HOLA (12 U.S.C. 1467a(c)(4)(B)). 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 April 23, 2018.

A. Federal Reserve Bank of Minneapolis (Mark A. Rauzi, Vice President), Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Meta Financial Group Inc., Sioux Falls, South Dakota;* to convert back to a savings and loan holding company after merging with Crestmark Bancorp, Troy Michigan and the merging of Crestmark Bank, Troy Michigan, into Meta Bank, Sioux Falls, South Dakota.

Meta Financial Group and Meta Bank will retain all of their current operations.

Board of Governors of the Federal Reserve System, March 20, 2018.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2018–05997 Filed 3–23–18; 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 April 23, 2018.

A. Federal Reserve Bank of Minneapolis (Mark A. Rauzi, Vice President), Assistant Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480–0291:

1. *Meta Financial Group, Inc., Sioux Falls, South Dakota;* to become a bank holding company by merging with Crestmark Bancorp, Inc., and thereby indirectly acquire Crestmark Bank, both of Troy, Michigan.

In connection with this application, Applicant will retain MetaBank, Sioux Falls, South Dakota, and thereby engage in operating a savings association pursuant to section 225.28(b)(4)(ii).

Meta Financial Group, Inc., through MetaBank, also proposes to purchase 80 percent of the shares of each of the following nonbank subsidiaries of Crestmark Bank; CM Sterling, LLC; and TFS LLC, all of Troy, Michigan, and thereby indirectly engage in lending and leasing real property activities, pursuant to sections 225.28 (b)(1) and (b)(3).

Board of Governors of the Federal Reserve System, March 20, 2018.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2018–05996 Filed 3–23–18; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than April 9, 2018.

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:*

1. *Kenneth Nelkin, individually and as trustee for Max Nelkin Revocable Trust and Elliette Nelkin Revocable Trust, and Max Nelkin, all of Morgan City, Louisiana; and Elliette Nelkin, New Orleans, Louisiana;* to retain shares of MC Bancshares, Inc. and thereby retain shares of MC Bank & Trust Company, both of Morgan City, Louisiana.

Board of Governors of the Federal Reserve System, March 20, 2018.

Ann E. Misback,

Secretary of the Board.

[FR Doc. 2018–05995 Filed 3–23–18; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0054; Docket No. 2018–0003; Sequence No. 4]

Information Collection; U.S.-Flag Air Carriers Statement

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division will be submitting to the Office of Management and Budget (OMB) a request to review and approve a previously approved information collection requirement concerning U.S.-Flag Air Carriers Statement.

DATES: Submit comments on or before May 25, 2018.

ADDRESSES: Submit comments identified by Information Collection 9000–0054, U.S.-Flag Air Carriers Statement by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB control number 9000–0054. Select the link ''Comment Now'' that corresponds with ''Information Collection ''Information Collection 9000–0054, U.S. Flag Air Carriers Statement''. Follow the instructions provided on the screen. Please include your name, company name (if any), and ''Information Collection 9000–0054, U.S.-Flag Air Carriers Statement'' on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405. ATTN: Ms. Mandell/IC 9000–0054, U.S.-Flag Air Carriers Statement.

Instructions: Please submit comments only and cite Information Collection 9000–0054, U.S.-Flag Air Carriers Statement, in all correspondence related to this collection. Comments received generally will be posted without change to *regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *regulations.gov,* approximately two-to-three business days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Curtis E. Glover, Sr. Procurement Analyst, Contract Policy Division, GSA, 202–501–1448, or via email at *curtis.glover@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 1517) (Fly America Act) requires that all Federal agencies and Government contractors and subcontractors at FAR 47.402, use U.S.-flag air carriers for U.S. Government-financed international air transportation of personnel (and their personal effects) or property, to the extent that service by those carriers is available. It requires the Comptroller General of the United States, in the absence of satisfactory proof of the necessity for foreign-flag air transportation, to disallow expenditures from funds, appropriated or otherwise established for the account of the United States, for international air transportation secured aboard a foreign-flag air carrier if a U.S.-flag air carrier is available to provide such services. In the event that the contractor selects a carrier other than a U.S.-flag air carrier for international air transportation during performance of the contract, the contractor shall include per FAR clause 52.247–64 a statement on vouchers involving such transportation. The contracting officer uses the information furnished in the statement to determine whether adequate justification exists for the contractor's use of other than a U.S.-flag air carrier.

B. Annual Reporting Burden

Respondents: 150.
Responses per Respondent: 2.
Annual Responses: 300.
Hours Per Response: .25.
Total Burden Hours: 75.

C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC, 20405, telephone 202–501–4755.

Please cite OMB Control No. 9000–0054, U.S.-Flag Air Carriers Statement, in all correspondence.

Dated: March 20, 2018.

Lorin S. Curit,

Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2018–06042 Filed 3–23–18; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0188; Docket No. 2018–0003; Sequence No. 1]

Information Collection; Combating Trafficking in Persons

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding a revision and extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat Division (MVCB) announces the proposed extension of a public information collection requirement and seeks public comment on the provisions thereof. The Office of Management and Budget (OMB) has approved this information collection requirement for use through April 30, 2018. OMB will be requested to extend its approval for three additional years.

DATES: Submit comments on or before May 25, 2018.

ADDRESSES: Submit comments identified by Information Collection 9000–0188, Combating Trafficking in Persons by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by searching the OMB control number 9000–0188. Select the link "Comment Now" that corresponds with "Information Collection 9000–0188, Combating Trafficking in Persons. Follow the instructions provided on the screen. Please include your name, company name (if any), and "Information Collection 9000–0188, Combating Trafficking in Persons, on your attached document.
- *Mail:* General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405. ATTN: Ms. Mandell/IC 9000–0188, Combating Trafficking in Persons.

Instructions: Please submit comments only and cite Information Collection 9000–0188, Combating Trafficking in Persons, in all correspondence related to this collection. Comments received generally will be posted without change to *regulations.gov,* including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check *regulations.gov,* approximately two-to-three business days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Cecelia L. Davis, Procurement Analyst, Acquistion Policy Division, via telephone 202–219–0202, or via email *cecelia.davis@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

This is a requirement for a revision and renewal of OMB control number 9000–0188, Combating Trafficking in Persons.

Executive Order (E.O.) 13627, entitled Strengthening Protections Against Trafficking in Persons in Federal Contracts, dated September 25, 2012 (77 FR 60029, October 2, 2012) and Title XVII of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239, enacted January 2, 2013) strengthen the long standing zero-tolerance policy of the United States regarding Government employees and contractor personnel engaging in any form of trafficking in persons.

Contractors are required to inform the contracting officer and the agency Inspector General of any credible information it receives from any source that alleges a contractor employee, subcontractor, or subcontractor employee, or their agent has engaged in conduct that violates the policy in paragraph (b) of the clause 52.222–50. This requirement flows down to all subcontractors.

Additional protections are required where the estimated value of the supplies (other than commercially available off-the-shelf (COTS) items) to be acquired outside the United States, or the services to be performed, outside the United States has an estimated value that exceeds $500,000. These protections include the following: (a) The contractor is required to implement and maintain a compliance plan during the performance of the contract that includes an awareness program, a process for employees to report activity inconsistent with the zero-tolerance policy, a recruitment and wage plan, a housing plan, and procedures to prevent subcontractors from engaging in trafficking in persons; and (b) The contractor is required to submit a certification to the contracting officer prior to receiving an award, and annually thereafter, asserting that it has the required compliance plan in place and that there have been no abuses, or that appropriate actions have been taken if abuses have been found. The compliance plan must be provided to the contracting officer upon request, and relevant portions of it must be posted at the workplace and on the contractor's website. Additionally, contractors are required to flow these requirements down to any subcontracts where the estimated value of the supplies acquired or the services required to be performed outside the United States exceeds $500,000.

B. Annual Reporting Burden

Title, Associated Form, and OMB Number: Ending Trafficking in Persons, FAR 22.1705 and FAR 52.222–50 and 52.222–56; OMB Control Number 9000–0188.

Adjustment: This information collection is revised to include appropriate burden hours for reporting that was initially published in FAR Case 2013–001 (78 FR 59317 and 80 FR 4967) for FAR clause 52.222–50, Combating Trafficking in Persons, and provision 52.222–56, Certification Regarding Trafficing in Persons Compliance Plan. The full burden associated with this FAR Case was inadvertently omitted in the Paperwork Reduction Act notice published on August 20, 2014 (78 FR 59317). The following represents current burdens associated with the FAR clause and provision that were published in the proposed and final rules.

Affected Public: Businesses and other for-profit entities.

Respondent's Obligation: Required to obtain or retain benefits.

Type of Request: Revision of a currently approved collection.

Reporting Frequency: On occasion.

Respondents: 5,909.

Responses per Respondent: 3.

Annual Responses: 17,727.

Hours per Response: 12.

Total Burden Hours: 212,724.

C. Public Comments

Public comments are particularly invited on: Whether this collection of information is necessary for the proper performance of functions of the FAR, and whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Obtaining Copies of Proposals: Requesters may obtain a copy of the information collection documents from the General Services Administration, Regulatory Secretariat Division (MVCB), 1800 F Street NW, Washington, DC 20405, telephone 202–501–4755.

Please cite OMB Control No. 9000–0188, Combating Trafficking in Persons, in all correspondence.

Dated: March 20, 2018.

Lorin S. Curit,

Director, Federal Acquisition Policy Division, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

[FR Doc. 2018–06043 Filed 3–23–18; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10249 and CMS–10261]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, HHS.

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by May 25, 2018.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number ___, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, you may make your request using one of following:

1. Access CMS' website address at *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.html.*

2. Email your request, including your address, phone number, OMB number, and CMS document identifier, to *Paperwork@cms.hhs.gov.*

3. Call the Reports Clearance Office at (410) 786–1326.

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10249 Administrative Requirements for Section 6071 of the Deficit Reduction Act
CMS–10261 Part C Medicare Advantage Reporting Requirements and Supporting Regulations in 42 CFR 422.516(a)

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. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Extension of a currently approved collection; *Title of Information Collection:* Administrative Requirements for Section 6071 of the Deficit Reduction Act; *Use:* State Operational Protocols should provide enough information such that: The CMS Project Officer and other federal officials may use it to understand the operation of the demonstration, prepare for potential site visits without needing additional information, or both; the State Project Director can use it as the manual for program implementation; and external stakeholders may use it to understand the operation of the demonstration. The financial information collection is used in our financial statements and shared with the auditors who validate CMS' financial position. The Money Follows the Person Rebalancing Demonstration (MFP) Finders File, MFP Program Participation Data file, and MFP Services File are used by the national evaluation contractor to assess program outcomes while we use the information to monitor program implementation. The MFP Quality of Life data is used by the national evaluation contractor to assess program outcomes. The evaluation is used to determine how participants' quality of life changes after transitioning to the community. The semi-annual progress report is used by the national evaluation contractor and CMS to monitor program implementation at the grantee level. *Form Number:* CMS–10249 (OMB control number: 0938–1053); *Frequency:* Yearly, quarterly, and semi-annually; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 45; *Total Annual Responses:* 28,590; *Total Annual Hours:* 14,225. (For policy questions regarding this collection contact Effie George at 410–786–8639.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title of Information Collection:* Part C Medicare Advantage Reporting Requirements and Supporting Regulations in 42 CFR 422.516(a); *Use:* Medicare Advantage Organizations (MAOs) must have an effective procedure to develop, compile, evaluate, and report to CMS, to its enrollees, and to the general public, at the times and in the manner that CMS requires, and while safeguarding the confidentiality of the doctor-patient relationship, statistics and other information with respect to: The cost of its operations; the patterns of service utilization; the availability, accessibility, and acceptability of its services; to the extent practical, developments in the health status of its enrollees; information demonstrating that the MAO has a fiscally sound operation; and other matters that CMS may require. CMS also has oversight authority over cost plans which includes establishment of reporting requirements. The changes for the 2019 reporting requirements under Organization Determinations and Reconsiderations (ODR) will add 18 new data elements to the reporting section. The new data elements will allow CMS to obtain more information about who is submitting requests for ODR and whether the service or claim is being provided by a contract or non-contract provider. The timeliness requirement for ODR will also be eliminated to be consistent with Part D reporting. In addition, the number of data reporting elements of grievances is reduced from 23 to 19. The reporting sections for Private Fee For Service (PFFS) Payment Dispute Resolution Process and Mid-Year Network Changes will also be suspended. *Form Number:* CMS–10261 (OMB control number: 0938–1054); *Frequency:* Yearly and semi-annually; *Affected Public:* Private sector (business or other for-profits); *Number of Respondents:* 432; *Total Annual Responses:* 3,024; *Total Annual Hours:* 127,329. (For policy questions regarding this collection contact Maria Sotirelis at 410–786–0552.)

Dated: March 21, 2018.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2018–06052 Filed 3–23–18; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–D–1067]

Evaluation of Bulk Drug Substances Nominated for Use in Compounding Under Section 503B of the Federal Food, Drug, and Cosmetic Act; Draft Guidance for Industry; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of availability.

SUMMARY: The Food and Drug Administration (FDA or the Agency) is announcing the availability of a draft guidance for industry entitled ''Evaluation of Bulk Drug Substances Nominated for Use in Compounding Under Section 503B of the Federal Food, Drug, and Cosmetic Act.'' This draft guidance describes policies that FDA proposes to use in evaluating bulk drug substances nominated for use in compounding under section 503B of the Federal Food, Drug, and Cosmetic Act (FD&C Act) for inclusion on the list of bulk drug substances that can be used in compounding under section 503B.

DATES: Submit either electronic or written comments on the draft guidance by May 25, 2018 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–2018–D–1067 for ''Evaluation of Bulk Drug Substances Nominated for Use in Compounding Under Section 503B of the Federal Food, Drug, and Cosmetic Act.'' 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)).

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: Sara Rothman, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, Rm. 5197, Silver Spring, MD 20903, 301–796–3110.

SUPPLEMENTARY INFORMATION:

I. Background

FDA is announcing the availability of a draft guidance for industry entitled ''Evaluation of Bulk Drug Substances Nominated for Use in Compounding Under Section 503B of the Federal Food, Drug, and Cosmetic Act.'' Section 503B (21 U.S.C. 353b), added to the FD&C Act by the Drug Quality and Security Act in 2013, describes the conditions that must be satisfied for human drug products compounded by an outsourcing facility to be exempt from the following three sections of the FD&C Act: section 505 (21 U.S.C. 355) (concerning the approval of drugs under new drug applications or abbreviated new drug applications); section 502(f)(1) (21 U.S.C. 352(f)(1)) (concerning the labeling of drugs with adequate directions for use); and section 582 (21 U.S.C. 360eee–1) (concerning drug supply chain security requirements). One of the conditions that must be met for a drug product compounded by an outsourcing facility to qualify for these exemptions is that the outsourcing facility does not compound drug products using a bulk drug substance unless either: (1) It appears on a list established by the Secretary of Health and Human Services identifying bulk drug substances for which there is a clinical need (see section 503B(a)(2)(A)(i) of the FD&C Act) (503B Bulks List) or (2) the drug compounded from such bulk drug substances appears on the drug shortage list in effect under section 506E of the FD&C Act (21 U.S.C. 356e) at the time of compounding, distribution, and dispensing (see section 503B(a)(2)(A)(ii) of the FD&C Act).

This draft guidance addresses FDA policies for developing the 503B Bulks List, including the Agency's interpretation of the phrase ''bulk drug substances for which there is a clinical need,'' as it is used in section 503B of the FD&C Act. The draft guidance also addresses the factors and processes by which the Agency intends to evaluate and list bulk drug substances.

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 ''Evaluation of Bulk Drug Substances Nominated for Use in Compounding Under Section 503B of the Federal Food, Drug, and Cosmetic Act.'' 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.

II. Electronic Access

Persons with access to the internet may obtain the draft guidance at either *https://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/default.htm,* or *https://www.regulations.gov.*

Dated: March 20, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–06046 Filed 3–23–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–0998]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Regulations for In Vivo Radiopharmaceuticals Used for Diagnosis and Monitoring

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Fax written comments on the collection of information by April 25, 2018.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: FDA Desk Officer, Fax: 202–395–7285, or emailed to *oira_submission@omb.eop.gov.* All comments should be identified with the OMB control number 0910–0409. Also include the FDA docket number found in brackets in the heading of this document.

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, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Regulations for In Vivo Radiopharmaceuticals Used for Diagnosis and Monitoring

OMB Control Number 0910–0409—Extension

This information collection supports FDA regulations found in part 315 (21 CFR part 315). These regulations require manufacturers of diagnostic radiopharmaceuticals to submit information that demonstrates the safety and effectiveness of a new diagnostic radiopharmaceutical or of a new indication for use of an approved diagnostic radiopharmaceutical. The regulations also describe the types of indications for diagnostic radiopharmaceuticals and some of the criteria the Agency uses to evaluate the safety and effectiveness of a diagnostic radiopharmaceutical under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355) (FD&C Act) and section 351 of the Public Health Service Act (42 U.S.C. 262) (the PHS Act). Information about the safety or effectiveness of a diagnostic radiopharmaceutical enables FDA to properly evaluate the safety and effectiveness profiles of a new diagnostic radiopharmaceutical or a new indication for use of an approved diagnostic radiopharmaceutical.

The regulations clarify existing FDA requirements for approval and evaluation of drug and biological products already in place under the authorities of the FD&C Act and the PHS Act. The information, which is usually submitted as part of a new drug application or biologics license application or as a supplement to an approved application, typically includes, but is not limited to, nonclinical and clinical data on the pharmacology, toxicology, adverse events, radiation safety assessments, and chemistry, manufacturing, and controls. The content and format of an application for approval of a new drug are set forth in § 314.50 (21 CFR 314.50), and approved under OMB control number 0910–0001. This information collection supports part 315, currently approved under OMB control number 0910–0409.

Based on past submissions (human drug applications and/or new indication supplements for diagnostic radiopharmaceuticals), we estimate two submissions will be received annually. We estimate the time needed to prepare a complete application for a diagnostic radiopharmaceutical to be approximately 10,000 hours, roughly one-fifth of which, or 2,000 hours, is estimated to be spent preparing the portions of the application that would be affected by these regulations. The regulations do not impose any additional reporting burden for safety and effectiveness information on diagnostic radiopharmaceuticals beyond the estimated burden of 2,000 hours because safety and effectiveness information is already required by § 314.50 (collection of information approved under OMB control number 0910–0001). In fact, clarification in these regulations of FDA's criteria for evaluation of diagnostic radiopharmaceuticals is intended to streamline overall information collection burdens, particularly for diagnostic radiopharmaceuticals that may have well-established, low-risk safety profiles, by enabling manufacturers to tailor information submissions and avoid unnecessary clinical studies.

In the **Federal Register** of November 2, 2017 (82 FR 50885), we published a notice requesting public comment on the proposed information collection. No comments were received. We therefore retain the following estimated burden for the information collection.

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Diagnostic Radiopharmaceuticals §§ 315.4, 315.5, and 315.6	2	1	2	2,000	4,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Table 1 contains estimates of the annual reporting burden for the preparation of the safety and effectiveness sections of an application that are imposed by the applicable regulations. This estimate does not include time needed to conduct studies and clinical trials or other research from which the reported information is obtained.

The burden estimate has not changed since prior OMB approval.

Dated: March 19, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–06041 Filed 3–23–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2018–N–1044]

Antimicrobial Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; establishment of a public docket; request for comments.

SUMMARY: The Food and Drug Administration (FDA) announces a forthcoming public advisory committee meeting of the Antimicrobial Drugs Advisory Committee. The general function of the committee is to provide advice and recommendations to FDA on regulatory issues. The meeting will be open to the public. FDA is establishing a docket for public comment on this document.

DATES: The meeting will be held on May 2, 2018, from 8:30 a.m. to 4 p.m.

ADDRESSES: DoubleTree by Hilton Hotel Bethesda—Washington, DC, Grand Ballroom, 8120 Wisconsin Ave., Bethesda, MD 20814–3624. The hotel and conference center's telephone number is 301–652–2000. Answers to commonly asked questions about FDA Advisory Committee meetings, including information regarding special accommodations due to a disability, visitor parking, and transportation, may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.* Information about the DoubleTree by Hilton Hotel Bethesda—Washington, DC Hotel and Conference Center can be accessed at: *http://doubletree3.hilton.com/en/hotels/maryland/doubletree-by-hilton-hotel-bethesda-washington-dc-WASBHDT/index.html.*

FDA is establishing a docket for public comment on this meeting. The docket number is FDA–2018–N–1044. The docket will close on April 30, 2018. Submit either electronic or written comments on this public meeting by April 30, 2018. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before April 30, 2018. The *https://www.regulations.gov* electronic filing system will accept comments until midnight Eastern Time at the end of April 30, 2018. 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.

Comments received on or before April 17, 2018, will be provided to the committee. Comments received after that date will be taken into consideration by FDA.

You may submit comments as follows:

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2018–N–1044 for ''Antimicrobial Drugs Advisory Committee; Notice of Meeting; Establishment of a Public Docket; Request for Comments.'' 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.'' FDA 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: Cindy Chee, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, Rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, Fax: 301–847–8533, email: *AMDAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the

FDA's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The committee will discuss new drug application (NDA) 210303 for plazomicin, sponsored by Achaogen, Inc., for the proposed indications for the treatment of complicated urinary tract infections and blood stream infections in adults.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's website after the meeting. Background material is available at *https://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee meeting link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before April 17, 2018. Oral presentations from the public will be scheduled between approximately 1:30 p.m. and 2:30 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before April 9, 2018. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by April 10, 2018.

Persons attending FDA's advisory committee meetings are advised that FDA is not responsible for providing access to electrical outlets.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require special accommodations due to a disability, please contact Cindy Chee (see **FOR FURTHER INFORMATION CONTACT**) at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: March 20, 2018.

Leslie Kux,

Associate Commissioner for Policy.

[FR Doc. 2018–06040 Filed 3–23–18; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice to Close Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Arthritis and Musculoskeletal and Skin Diseases Special Emphasis Panel; NIAMS Loan Repayment Review.

Date: April 13, 2018.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Health/NIAMS, 6701 Democracy Boulevard, Bethesda, MD 20892.

Contact Person: Kan Ma, Ph.D., Scientific Review Officer, National Institute Arthritis, Musculoskeletal, and Skin Diseases, NIH, 6701 Democracy Blvd., Suite 814, Bethesda, MD 20892, (301) 451–4838, *mak2@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis and Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: March 20, 2018.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–05991 Filed 3–23–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director; Notice of Charter Renewal

In accordance with Title 41 of the U.S. Code of Federal Regulations, Section 102–3.65(a), notice is hereby given that the Charter for the National Science Advisory Board for Biosecurity will be renewed for an additional two-year period on April 7, 2018.

It is determined that the National Science Advisory Board for Biosecurity is in the public interest in connection with the performance of duties imposed on the National Institutes of Health by law, and that these duties can best be performed through the advice and counsel of this group.

Inquiries may be directed to Claire Harris, Acting Director, Office of Federal Advisory Committee Policy, Office of the Director, National Institutes of Health, 6701 Democracy Boulevard, Suite 1000, Bethesda, Maryland 20892 (Mail code 4875), *harriscl@nih.gov* or Telephone (301) 496–2123.

Dated: March 20, 2018.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–05992 Filed 3–23–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Provocative Questions in Pediatric Cancer.

Date: April 24, 2018.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Rolf Jakobi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6187, MSC 7806, Bethesda, MD 20892, 301–495–1718, *jakobir@mail.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Tumor Microenvironment and Metastasis.

Date: April 25, 2018.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Amy L Rubinstein, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5152, MSC 7844, Bethesda, MD 20892, 301–408–9754, *rubinsteinal@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 20, 2018.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–05988 Filed 3–23–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Spinal Cord Injury, Epilepsy, TBI, and other Neurological Disorders.

Date: April 11, 2018.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Samuel C Edwards, Ph.D., Chief, Brain Disorders and Clinical Neuroscience, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5210, MSC 7846, Bethesda, MD 20892, (301) 435–1246, *edwardss@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research; 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 20, 2018.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–05985 Filed 3–23–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director, National Institutes of Health; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the Board of Scientific Counselors Chairs, National Institutes of Health (NIH).

The meeting will be open to the public, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. Individuals who plan to listen to the discussion by telephone must call using the information listed below.

Name of Committee: Board of Scientific Counselors Chairs, NIH.

Date: May 11, 2018.

Time: 10:00 a.m. to 2:00 p.m.

Agenda: Discussion of policies and procedures that apply to the regular review of NIH intramural scientists and their work.

Place: National Institutes of Health, 31 Center Drive, Building 31, C Wing, 6th Floor, Room 6, Bethesda, MD 20892.

Contact Person: Margaret McBurney, Program Specialist, Office of the Deputy Director for Intramural Research, National Institutes of Health, 1 Center Drive, Room 160, Bethesda, MD 20892, Phone: (301) 496–1921, Fax: (301) 402–4273, *mmburney@od.nih.gov.*

Conference Line: 888–233–9215—Participant Passcode: 31659.

Information is also available on the Office of Intramural Research home page: *http://sourcebook.od.nih.gov/,* where an agenda and any additional information for the meeting will be posted when available.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Dated: March 20, 2018.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–05984 Filed 3–23–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Amended Notice of Meetings

Notice is hereby given of a change in the meetings of the National Heart, Lung, and Blood Institute Special Emphasis Panel, The Strong Heart Study—Field Centers and the Strong Heart Study—Coordinating Center meetings, Hilton Garden Inn Bethesda, 7301 Waverly Street, Bethesda, MD, 20814 which was published in the **Federal Register** on March 19, 2018, 83FR12013.

This notice is amended to change the meeting times on April 11, 2018. The Strong Heart Study—Field Centers is amended to occur at 10:30 a.m. to 1:30 p.m. The Strong Heart Study—Coordinating Center is amended to occur at 8:30 a.m. to 10:30 a.m. The meetings are closed to the public.

Dated: March 20, 2018.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–05990 Filed 3–23–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: AIDS and AIDS Related Research.

Date: March 28, 2018.

Time: 8:00 a.m. to 11:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kenneth A. Roebuck, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, MSC 7852, Bethesda, MD 20892, (301) 435–1166, *roebuckk@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Altered Neuronal Circuits, Receptors and Networks in HIV-Induced Central Nervous System (CNS) Dysfunction.

Date: March 29, 2018.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Residence Inn Bethesda, 7335 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Dimitrios Nikolaos Vatakis, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, Rockledge Drive, Room 3190, Bethesda, MD 20892, 301–827–7480.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 20, 2018.

Sylvia L. Neal,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–05986 Filed 3–23–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: AIDS and AIDS Related Research.

Date: April 4, 2018.

Time: 8:00 a.m. to 11:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kenneth A. Roebuck, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5106, MSC 7852, Bethesda, MD 20892, (301) 435–1166, *roebuckk@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Host Defense, Inflammation and Vaccines.

Date: April 5, 2018.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6705 Rockledge Drive, Bethesda, MD 20817 (Virtual Meeting).

Contact Person: Alok Mulky, Ph.D., Scientific Review Officer, Center for Scientific Review (CSR), National Institutes of Health (NIH), 6701 Rockledge Dr., Room 4203, Bethesda, MD 20817, (301) 435–3566, *alok.mulky@nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846- 93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 20, 2018.

Sylvia L. Neal,

Program Analyst; Office of Federal Advisory Committee Policy.

[FR Doc. 2018–05987 Filed 3–23–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Fogarty International Center; 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 Fogarty International Center Advisory Board.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and/or contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications and/or contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Fogarty International Center Advisory Board.

Date: April 30, 2018.

Place: National Institutes of Health, Lawton L. Chiles International House (Stone House), Building 16, Conference Room, 16 Center Drive, Bethesda, MD 20892.

Closed Session: April 30, 2018, 1:00 p.m. to 5:00 p.m.

Agenda: Second level review of grant applications.

Date: May 1, 2018.

Place: Main Auditorium, Natcher Conference Center (Building 45), National Institutes of Health Campus, Bethesda, MD 20892.

Open Session: May 1, 2018, 8:30 a.m. to 5:30 p.m.

Agenda: Topic one: What has been accomplished and what is needed to advance infectious disease research and achieve the end of AIDS?

Topic two: Noncommunicable diseases: how can we leverage existing research and training platforms stem the tide of deaths and disability?

Topic three: Global Brain Disorders: we're on the agenda, where do we go from here? What are the priorities for advancing the global mental health research agenda?

Topic four: Multi-generational models of long-term capacity building: the trainees become the trainers.

Contact Person: Kristen Weymouth, Executive Secretary, Fogarty International Center, National Institutes of Health, 31 Center Drive, Room B2C02, Bethesda, MD 20892, (301) 496–1415, *weymouthk@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

Information is also available on the Institute's/Center's home page: *http://www.fic.nih.gov/About/Advisory/Pages/default.aspx,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.106, Minority International Research Training Grant in the Biomedical and Behavioral Sciences; 93.154, Special International Postdoctoral Research Program in Acquired Immunodeficiency Syndrome; 93.168, International Cooperative Biodiversity Groups Program; 93.934, Fogarty International Research Collaboration Award; 93.989, Senior International Fellowship Awards Program, National Institutes of Health, HHS)

Dated: March 20, 2018.

Natasha M. Copeland,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2018–05989 Filed 3–23–18; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–IA–2018–0001; FXIA16710900000–178–FF09A30000]

Endangered Species; Receipt of Permit Applications

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of receipt of permit applications.

SUMMARY: We, the U.S. Fish and Wildlife Service, invite the public to comment on applications to conduct certain activities with foreign endangered species. With some exceptions, the Endangered Species Act (ESA) prohibits activities with listed species unless Federal authorization is acquired that allows such activities. The ESA also requires that we invite public comment before issuing these permits.

DATES: We must receive comments by April 25, 2018.

ADDRESSES: *Document availability:* The applications, as well as any comments and other materials that we receive, will be available for public inspection online in Docket No. FWS–HQ–IA–2018–0001 at *http://www.regulations.gov.*

Submitting Comments: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments on Docket No. FWS–HQ–IA–2018–0001.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: Docket No. FWS–HQ–IA–2018–0001; U.S. Fish and Wildlife Service Headquarters, MS: BPHC; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

When submitting comments, please indicate the name of the applicant and the PRT# at the beginning of your comment. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see **SUPPLEMENTARY INFORMATION** for more information).

FOR FURTHER INFORMATION CONTACT: Joyce Russell, 703–358–2280.

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures

A. How do I comment on submitted applications?

You may submit your comments and materials by one of the methods listed under *Submitting Comments* in the **ADDRESSES** section. We will not consider comments sent by email or fax, or to an address not in the **ADDRESSES** section.

Please make your requests or comments as specific as possible, confine your comments to issues for which we seek comments in this notice, and explain the basis for your comments. Include sufficient information with your comments to allow us to authenticate any scientific or commercial data you include.

The comments and recommendations that will be most useful and likely to influence agency decisions are: (1) Those supported by quantitative information or studies; and (2) Those that include citations to, and analyses of, the applicable laws and regulations. We will not consider or include in our administrative record comments we receive after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above in **ADDRESSES**).

B. May I review comments submitted by others?

Comments, including names and street addresses of respondents, will be available for public review at the street address listed under **ADDRESSES**. The public may review documents and other information applicants have sent in support of the application unless our allowing viewing would violate the Privacy Act or Freedom of Information Act. 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.

C. Who will see my comments?

If you submit a comment via *http://www.regulations.gov,* your entire comment, including any personal identifying information, will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, such as your address, phone number, or email address, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

II. Background

To help us carry out our conservation responsibilities for affected species, and in consideration of section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), we invite public comment on these permit applications before final action is taken.

III. Permit Applications

We invite the public to comment on applications to conduct certain activities with endangered species. With some exceptions, the ESA prohibits activities with listed species unless Federal authorization is acquired that allows such activities.

Applicant: NOAA/Pacific Islands Regional Office, Honolulu, HI; PRT–022729

The applicant requests reissuance of their permit to import from the high seas samples and/or whole carcasses of short-tailed albatross (*Phoebastria albatrus*) for the purpose of enhancement of the species through scientific research. This notice covers activities conducted by the applicant over a 5-year period.

Applicant: Southwest Fisheries Science Center, La Jolla, CA; PRT–68677C (Previously PRT–844694)

The applicant requests reissuance of the permit to import biological samples collected from wild and captive-bred animals of Kemp's ridley sea turtle (*Lepidochelys kempii*), hawksbill sea turtle (*Eretmochelys imbricata*), leatherback sea turtle (*Dermochelys coriacea*), green sea turtle (*Chelonia mydas*), loggerhead sea turtle (*Caretta caretta*), and olive ridley sea turtle (*Lepidochelys olivacea*) for the purpose of scientific research. Samples are collected from live or salvaged specimens. This notification covers activities conducted by the applicant over a 5-year period.

Applicant: Zoological Society of San Diego; PRT–53381C

The applicant requests a permit to import one male and two female captive-born quokka (*Setonix brachyurus*) to enhance the propagation and survival of the species. This notification is for a single import.

Applicant: Zoological Society of Pittsburgh; PRT–69379C

The applicant requests a permit to import African elephant (*Loxodonta africana*) semen to enhance the propagation and survival of the species. This notification is for multiple imports.

Applicant: Charles Jordan, d/b/a NBJ Zoological Park, LTD., Spring Ranch, TX; PRT–751619

The applicant requests a captive-bred wildlife registration under 50 CFR 17.21(g) for the following species to enhance species propagation or survival: Arabian oryx (*Oryx leucoryx*), ring-tailed lemur (*Lemur catta*), black and white ruffed lemur (*Varecia variegata*), brown lemur (*Eulemur fulvus*), Diana monkey (*Cercopithicus diana*), and lar gibbon (*Hylobates lar*). This notification covers activities to be conducted by the applicant over a 5-year period.

Multiple Trophies

The following applicants each request a permit to import sport-hunted trophies of a male bontebok (*Damaliscus pygargus pygargus*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancing the propagation or survival of the species.

Applicant: Thomas McRae Sloan, Midland, TX; PRT–63058C

Applicant: Frazer Wadenstorer, Holly, MI: PRT–44772C

Applicant: Michael R. Sartorie, Billings, MT; PRT–66543C

Applicant: Scott A. Lamphere, Henderson, MI; PRT–69701C

Applicant: Timothy Ferrall, Riverside, CA; PRT–61303C

Applicant: James Toney, Baker, LA; PRT–61596C

Applicant: Robert Hennen, Isle, MN; PRT–61302C

IV. Next Steps

If the Service decides to issue permits to any of the applicants listed in this notice, we will publish a notice in the **Federal Register**. You may locate the **Federal Register** notice announcing the permit issuance date by searching in *www.regulations.gov* under the permit number listed in this document (*e.g.,* PRT–12345X).

VI. Authority

Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Joyce Russell,

Government Information Specialist, Branch of Permits, Division of Management Authority.

[FR Doc. 2018–06036 Filed 3–23–18; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–CR–NAGPRA–21578; PPWOCRADN0, PCU00RP14.R50000; OMB Control Number 1024–0144]

Agency Information Collection Activities: Native American Graves Protection and Repatriation Regulations

AGENCY: National Park Service, Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the National Park Service is proposing to renew an information collection.

DATES: Interested persons are invited to submit comments on or before May 25, 2018.

ADDRESSES: Send your comments on the information collection request (ICR) by mail to Tim Goddard, Information Collection Clearance Officer, National Park Service, 12201 Sunrise Valley Drive, MS–242, Reston, VA 20192; or by email to *tim_goddard@nps.gov.* Please reference OMB Control Number 1024–0144 in the subject line of your comments.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, contact Melanie O'Brien, Manager, National Native American Graves Protection and Repatriation Act (NAGPRA) Program, by email at *melanie_o'brien@nps.gov,* or by telephone at 202–354–2204.

SUPPLEMENTARY INFORMATION: We (National Park Service, NPS), in accordance with the Paperwork Reduction Act of 1995, provide the general public and other Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps us assess the impact of our information collection requirements and minimize the public's reporting burden. It also helps the public understand our information collection requirements and provide the requested data in the desired format.

We are soliciting comments on the proposed ICR that is described below. We are especially interested in public comment addressing the following issues: (1) Is the collection necessary for the proper functions of the NPS National Native American Graves Protection and Repatriation Act (NAGPRA) Program; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the NPS National NAGPRA Program enhance the quality, utility, and clarity of the information to be collected; and (5) how might the NPS National NAGPRA Program minimize the burden of this collection on the respondents, including through the use of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our response to OMB to approve this ICR. 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.

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.

Title of Collection: Native American Graves Protection and Repatriation Regulations, 43 CFR part 10.

OMB Control Number: 1024–0144.

Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: Any institution or State or local government agency (including any institution of higher learning) that receives Federal funds and has possession of, or control over, Native American human remains, funerary objects, sacred objects, or objects of cultural patrimony (''museum'').

Total Estimated Number of Annual Responses: 203.

Total Estimated Number of Annual Burden Hours: 4,597.

Total Number of Annual Respondents: 139.

Estimated Completion Time per Response: Varies.

Information collection	Total number of annual responses	Estimated completion time per response (hrs.)	Total number of annual burden hours	Total number of annual respondents
Summaries (initial)	6	100	600	6
Summaries (updated/amended)	14	10	140	14
Inventories (initial)	11	200	2,200	11
Inventories (updated/amended)	31	10	310	31
Notices of Inventory Completion	96	10	960	*45
Notices of Intent to Repatriate Cultural Items	38	10	380	*26
Correcting Previously Published Notices	7	1	7	*6
Totals	203		4,597	139

*Typically, a respondent will submit one response. However, some respondents submit multiple responses in one year.

Respondent's Obligation: Mandatory.

Frequency of Collection: On occasion.

Total Estimated Annual Non-hour Burden Cost: None.

Abstract: One of the purposes of the Native American Graves Protection and Repatriation Act (NAGPRA, the Act) is to provide for the repatriation of Native American human remains and funerary objects, sacred objects, and objects of cultural patrimony (''cultural items'') to lineal descendants, and affiliated Indian tribes and Native Hawaiian organizations. The Secretary of the Interior has several responsibilities under the Act, which include promulgating regulations to carry out the Act and publishing notices in the **Federal Register**.

Under NAGPRA and its implementing regulations, a museum must compile an inventory of Native American human remains and associated funerary objects under its control and, to the extent possible based on the information it possesses, identify the geographical and cultural affiliation of the human remains and funerary objects. Inventories must be completed in consultation with Indian tribal government and Native Hawaiian organization officials, and traditional religious leaders. The NPS National NAGPRA Program, on behalf of the Secretary, collects information pertinent for determining the cultural affiliation and geographical origin of the human remains and associated funerary objects, including descriptions, acquisition data, and consultation concerning the human remains and objects, and it makes this information publicly available. The NPS National NAGPRA Program also provides sample inventories to assist museums.

The Act and its implementing regulations require a museum to describe in a summary its holding or collection of Native American objects that might be unassociated funerary objects, sacred objects, or objects of cultural patrimony. The summary is followed by consultation on the identity and cultural affiliation of objects with Indian tribal government and Native Hawaiian organization officials, and traditional religious leaders. The NPS National NAGPRA Program, on behalf of the Secretary, collects information pertinent for determining the cultural affiliation and identity of objects (as cultural items), including descriptions, acquisition data, and parties invited to consult about the objects, and it makes this information publicly available. The NPS National NAGPRA Program also provides sample summaries to assist museums.

After the expiration of the statutory deadlines for completing an inventory and a summary, if a museum receives a new holding or discovers an unreported current holding, or has control of cultural items that are, or are likely to be, culturally affiliated with a newly federally recognized Indian tribe, the museum must update or amend its inventory or summary. The NPS National NAGPRA Program, on behalf of the Secretary, collects information pertinent for determining the cultural affiliation and geographical origin of the human remains and associated funerary objects (in the inventory update), or for determining the cultural affiliation and identity of objects as cultural items (in the summary update), and it makes this information publicly available.

If a museum determines the cultural affiliation of human remains and associated funerary objects in an inventory, the museum must draft and send a written notice of its determination to the affected Indian tribes or Native Hawaiian organizations, and copy the NPS National NAGPRA Program. The NPS National NAGPRA Program, in turn, publishes this notice of inventory completion in the **Federal Register** on behalf of the Secretary. Similarly, a museum must draft and send a notice of inventory completion to the NPS National NAGPRA Program for publication in the **Federal Register** where human remains determined by the museum to be culturally unidentifiable are claimed by an Indian tribe or Native Hawaiian organization having a geographical affiliation to the human remains. The information in a notice of inventory completion collected by the NPS National NAGPRA Program is based on the information in the museum's completed inventory. The

NPS National NAGPRA Program provides templates for notices of inventory completion to assist museums in drafting these notices.

After receiving a request from an Indian tribe or Native Hawaiian organization to repatriate an object described in a summary, if a museum determines that the object being requested is an unassociated funerary object, a sacred object, or an object of cultural patrimony, and is culturally affiliated with the requestor, the museum drafts and sends a notice of intent to repatriate cultural items to the NPS National NAGPRA Program, which publishes the notice in the **Federal Register**. The information in a notice of intent to repatriate cultural items collected by the NPS National NAGPRA Program is based on the information in the museum's summary, and is supplemented by information pertinent to the identity and cultural affiliation of the cultural item. The NPS National NAGPRA Program provides a template for a notice of intent to repatriate cultural items to assist museums in drafting this notice.

A museum that revises its decision in a way that changes the number or cultural affiliation of cultural items listed in a notice that was previously published in the **Federal Register** must draft and send a correction notice to the NPS National NAGPRA Program, which publishes the correction notice in the **Federal Register**. The NPS National NAGPRA Program provides a template for a correction notice to assist museums in drafting this notice.

The NPS National NAGPRA Program collects and makes publicly available the above described information in order to ensure the protection of the constitutional due process rights of lineal descendants, Indian tribes and Native Hawaiian organizations related to property. As evidence of a museum's compliance with the Act, the information collected by the NPS National NAGPRA Program serves the reporting museum because only where a museum repatriates a cultural item in good faith pursuant to the Act will it be immune from liability for claims by an aggrieved party or for claims of breach of fiduciary duty, public trust, or violations of state law that are inconsistent with the provisions of NAGPRA.

Authorities: The authorities for this action are the Native American Graves Protection and Repatriation Act (NAGPRA; 25 U.S.C. 3001 *et seq.*), NAGPRA Regulations (43 CFR part 10), and the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Tim Goddard,

Information Collection Clearance Officer, National Park Service.

[FR Doc. 2018–06056 Filed 3–23–18; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–1279 (Final) (Remand)]

Hydrofluorocarbon Blends and Components From China

AGENCY: United States International Trade Commission.

ACTION: Notice of remand proceedings.

SUMMARY: The U.S. International Trade Commission (''Commission'') hereby gives notice of the court-ordered remand of its final determination in the antidumping duty investigation of hydrofluorocarbon blends and components (''HFC'') from China. For further information concerning the conduct of these remand proceedings and rules of general application, consult the Commission's Rules of Practice and Procedure.

DATES: *Applicable Date:* March 16, 2018.

FOR FURTHER INFORMATION CONTACT: Joanna Lo (202–205–1888), Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record of Investigation No. 731–TA–1279 (Final) may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—In August 2016, the Commission issued its unanimous determination in *Hydrofluorocarbon Blends and Components from China,* Inv. No. 731–TA–1279 (Final), USITC Pub. 4629 (August 2016). Applying the five-factor finished/semi-finished product analysis, the Commission found that there were two domestic like products, and consequently two domestic industries, one comprised of domestic producers of HFC components and the other of domestic producers of HFC blends. The Commission then determined that the domestic industry producing HFC blends was materially injured by reason of subject imports of HFC blends, whereas the domestic industry producing HFC components was not materially injured or threatened with material injury by reason of subject imports of HFC components. Petitioners appealed the determination to the U.S. Court of International Trade (''CIT''), challenging the Commission's determination that there were two domestic like products consisting of HFC blends and HFC components. The CIT remanded two issues to the Commission and affirmed all other aspects of the Commission's like product determination. *Arkema, Inc.* v. *United States,* Court No. 16–00179, Slip. Op. 18–12 (Ct. Int'l Trade Feb. 16, 2018).

Participation in the proceeding.—Only those persons who were interested parties that participated in the investigations (*i.e.,* persons listed on the Commission Secretary's service list) and also parties to the appeal may participate in the remand proceedings. Such persons need not make any additional notice of appearances or applications with the Commission to participate in the remand proceedings, unless they are adding new individuals to the list of persons entitled to receive business proprietary information (''BPI'') under administrative protective order. BPI referred to during the remand proceedings will be governed, as appropriate, by the administrative protective order issued in the investigation. The Secretary will maintain a service list containing the names and addresses of all persons or their representatives who are parties to the remand proceedings, and the Secretary will maintain a separate list of those authorized to receive BPI under the administrative protective order during the remand proceedings.

Written Submissions.—The Commission is not reopening the record and will not accept the submission of new factual information for the record. The Commission will permit the parties to file comments concerning how the Commission could best comply with the Court's remand instructions.

The comments must be based solely on the information in the Commission's record. The Commission will reject submissions containing additional factual information or arguments pertaining to issues other than those on which the Court has remanded this matter. The deadline for filing comments is March 30, 2018. Comments shall be limited to no more than ten (10) double-spaced and single-sided pages of textual material.

Parties are advised to consult with the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207) for provisions of general applicability concerning written submissions to the Commission. All written submissions must conform to the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform to the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on E-Filing,* available on the Commission's website at *http://edis.usitc.gov,* elaborates upon the Commission's rules with respect to electronic filing.

Additional written submissions to the Commission, including requests pursuant to section 201.12 of the Commission's rules, will not be accepted unless good cause is shown for accepting such submissions or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

By order of the Commission.

Issued: March 20, 2018.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2018–05979 Filed 3–23–18; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Office of the Secretary

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Workforce Flexibility (Workflex) Plan Submission and Reporting Requirements

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, ''Workforce Flexibility (Workflex) Plan Submission and Reporting Requirements'' 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 April 25, 2018.

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* website at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=1205-0432* 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.*

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.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor-OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW, Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: 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.*

SUPPLEMENTARY INFORMATION: This ICR seeks approval under the PRA for revisions to the Workforce Flexibility (Workflex) Plan Submission and Reporting Requirements. The Workforce Innovation and Opportunity Act (WIOA), 29 U.S.C. 3101 *et seq.,* and regulations 20 CFR 679.630 provide that the Secretary may grant Workflex waiver authority for up to five years pursuant to a Workflex plan submitted by a state. Workflex authorizes governors to approve local area requests to waive certain statutory and regulatory provisions of WIOA Title I programs. States may also request waivers from the Secretary of certain Wagner-Peyser Act requirements, as well as certain provisions of the Older Americans Act of 1965 (OAA) for state agencies on aging with respect to activities carried under OAA funding. One of the underlying principles for granting Workflex waivers is that the waivers will result in improved performance outcomes for persons served and that waiver authority will be granted in consideration of improved performance. This information collection has been classified as a revision, because it incorporates WIOA statutory and regulatory authorities; however, it should be noted that the WIOA information collections are substantively the same as those previously approved under the Workforce Investment Act. WIOA section 190 authorizes this information collection. *See* 29 U.S.C. 3250.

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 1205–0432. 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 November 17, 2017 (82 FR 54414).

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 1205–0432. 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: Workforce Flexibility (Workflex) Plan Submission and Reporting Requirements.

OMB Control Number: 1205–0432.

Affected Public: State, Local, and Tribal Governments.

Total Estimated Number of Respondents: 5.

Total Estimated Number of Responses: 25.

Total Estimated Annual Time Burden: 210 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2018–05998 Filed 3–23–18; 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; General Provisions and Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment Standards

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting the Occupational Safety and Health Administration (OSHA) sponsored information collection request (ICR) titled, ''General Provisions and Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment Standards,'' 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 April 25, 2018.

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* website at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201711-1218-004* (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 by email at *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–OSHA, Office of Management and Budget, Room 10235, 725 17th Street NW, Washington, DC 20503; by Fax: 202–395–5806 (this is not a toll-free number); or by email: *OIRA_submission@omb.eop.gov.* Commenters are encouraged, but not required, to send a courtesy copy of any comments by mail or courier to the U.S. Department of Labor—OASAM, Office of the Chief Information Officer, Attn: Departmental Information Compliance Management Program, Room N1301, 200 Constitution Avenue NW, Washington, DC 20210; or by email: *DOL_PRA_PUBLIC@dol.gov.*

FOR FURTHER INFORMATION CONTACT: 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.*

SUPPLEMENTARY INFORMATION: This ICR seeks to extend PRA authority for the General Provisions and Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment Standards information collection requirements codified in regulations 29 CFR part 1915. Regulations implementing the Occupational Safety and Health Act (OSH Act) require an employer who is subject to the Standards: (1) To ensure a competent person conducts inspections and atmospheric testing prior to a worker entering a confined or enclosed space (§ 1915.12(a)–(c)); (2) to warn workers not to enter a hazardous space or other dangerous atmosphere (§§ 1915.12 (a)–(c), 1915.16); (3) to train a worker who will be entering a confined or enclosed space and certify such training has been provided (§ 1915.12(d)); (4) to establish and train shipyard rescue teams or arrange for outside rescue teams and provide them with information (§ 1915.12(e)); (5) to ensure one person on each rescue team maintains a current first aid training certificate (§ 1915.12(e)); (6) to exchange information regarding hazards, safety rules, and emergency procedures concerning these spaces and atmospheres with other employers whose workers may enter these spaces and atmospheres (§ 1915.12(f)); (7) to ensure testing of a space having contained a combustible or flammable liquid or gas or toxic, corrosive, or irritating substance, or other dangerous atmosphere, boundary or pipeline before cleaning or other cold work is started and, as necessary thereafter, while the operation is ongoing (§ 1915.13(b)(2) and (4)); (8) to post signs prohibiting ignition sources within or near a space that contains bulk quantities of a flammable or combustible liquid or gas (§ 1915.13(b)(10)); (9) to ensure a confined or enclosed space is tested before a worker performs hot work in the work area (§ 1915.14(a)); (10) to post warnings of testing conducted by a competent person and certificates of testing conducted by a Marine Chemist or Coast Guard authorized person in the immediate vicinity of the hot-work operation while the operation is in progress (§ 1915.14(a) and (b)); and (11) to retain the certificate of testing on file for at least three months after completing the operation (§ 1915.14(a)(2)). OSH Act sections 2(b), 6, and 8 authorize this information collection. *See* 29 U.S.C. 651(b), 655, and 657.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The DOL obtains OMB approval for this information collection under Control Number 1218–0011.

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 March 31, 2018. 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 October 16, 2017 (82 FR 48121).

Interested parties are encouraged to send comments to the OMB, Office of Information and Regulatory Affairs at the address shown in the **ADDRESSES** section within thirty (30) days of publication of this notice in the **Federal Register**. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1218–0011. The OMB is particularly interested in comments that:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Agency: DOL–OSHA.

Title of Collection: General Provisions and Confined and Enclosed Spaces and Other Dangerous Atmospheres in Shipyard Employment Standards.

OMB Control Number: 1218–0011.

Affected Public: Private Sector—businesses or other for-profits.

Total Estimated Number of Respondents: 4,871.

Total Estimated Number of Responses: 3,495,964.

Total Estimated Annual Time Burden: 586,064 hours.

Total Estimated Annual Other Costs Burden: $0.

Authority: 44 U.S.C. 3507(a)(1)(D).

Dated: March 19, 2018.

Michel Smyth,

Departmental Clearance Officer.

[FR Doc. 2018–06004 Filed 3–23–18; 8:45 am]

BILLING CODE 4510–26–P

POSTAL REGULATORY COMMISSION

[Docket No. CP2018–184; CP2018–185; CP2018–186; CP2018–187; CP2018–188]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning negotiated service agreements. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* March 28, 2018.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.40.

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* CP2018–184; *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:* March 20, 2018; *Filing Authority:* 39 CFR 3015.50; *Public Representative:* Gregory S. Stanton; *Comments Due:* March 28, 2018.

2. *Docket No(s).:* CP2018–185; *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:* March 20, 2018; *Filing Authority:* 39 CFR 3015.50; *Public Representative:* Gregory S. Stanton; *Comments Due:* March 28, 2018.

3. *Docket No(s).:* CP2018–186; *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:* March 20, 2018; *Filing Authority:* 39 CFR 3015.50; *Public Representative:* Gregory S. Stanton; *Comments Due:* March 28, 2018.

4. *Docket No(s).:* CP2018–187; *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:* March 20, 2018; *Filing Authority:* 39 CFR 3015.50; *Public Representative:* Curtis E. Kidd; *Comments Due:* March 28, 2018.

5. *Docket No(s).:* CP2018–188; *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:*

March 20, 2018; *Filing Authority:* 39 CFR 3015.50; *Public Representative:* Curtis E. Kidd; *Comments Due:* March 28, 2018.

This Notice will be published in the **Federal Register**.

Stacy L. Ruble,

Secretary.

[FR Doc. 2018–06055 Filed 3–23–18; 8:45 am]

BILLING CODE 7710–FW–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82911; File No. SR–ISE–2017–106]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Permit the Listing and Trading of NQX Index Options on a Pilot Basis

March 20, 2018.

I. Introduction

On December 6, 2017, Nasdaq ISE, LLC (''ISE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to permit the listing and trading of options based on ⅕ the value of the Nasdaq-100 Index (''Nasdaq-100'') on a pilot basis. The proposed rule change was published for comment in the **Federal Register** on December 26, 2017.[3] On January 31, 2018, the Exchange filed Amendment No. 1 to the proposed rule change.[4] On February 8, 2018, pursuant to Section 19(b)(2) of the Act,[5] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.[6] The Commission received no comment letters on the proposed rule change. The Commission is approving the proposed rule change, as modified by Amendment No. 1, subject to a pilot period set to end on the earlier of: (1) Twelve months following the date of the first listing of the options; or (2) June 30, 2019.

II. Description of the Proposal, as Modified by Amendment No. 1

The Exchange is proposing to amend its rules to permit the listing and trading, on a pilot basis, of index options on the Nasdaq 100 Reduced Value Index (''NQX'') with third Friday of the month expiration dates. The Exchange represents that the NQX options contract will be the same in all respects as the current Nasdaq-100 (''NDX'') options contract listed on the Exchange,[7] except that it will be based on ⅕ of the value of the Nasdaq-100, and will be P.M.-settled with an exercise settlement value based on the closing index value of the Nasdaq-100 on the day of expiration.[8] In particular, NQX options will be subject to the same rules that presently govern the trading of index options based on the Nasdaq-100, including sales practice rules, margin requirements, trading rules, and position and exercise limits. Similar to NDX options, NQX options will be European-style and cash-settled, and will have a contract multiplier of 100. NQX options will have a minimum trading increment of $0.05 for options below $3.00 and $0.10 for all other series. Strike price intervals will be set at $1 or greater, subject to conditions described in ISE Rule 2009(c)(5).[9] Consistent with the Exchange's existing rules for index options, the Exchange will allow up to six expiration months at any one time that may expire at three-month intervals or in consecutive months, as well as LEAPS.[10] The product will have European-style exercise and will not be subject to position limits, although the Exchange proposes to amend ISE Rule 2004(c) to more accurately describe how positions in reduced-value options would be aggregated with full-value options.[11]

As proposed, NQX would become subject to a pilot for a period that would end on the earlier of: (i) Twelve months following the date of the first listing of the options; or (ii) June 30, 2019 (''Pilot Program''). If the Exchange were to propose an extension of the Pilot Program or should the Exchange propose to make the Pilot Program permanent, then the Exchange would submit a filing proposing such amendments to the Pilot Program. The Exchange notes that any positions established under the pilot would not be impacted by the expiration of the pilot. For example, a position in an NQX options series that expires beyond the conclusion of the pilot period could be established during the pilot. If the Pilot Program were not extended, then the position could continue to exist. However, the Exchange notes that any further trading in the series would be restricted to transactions where at least one side of the trade is a closing transaction.

The Exchange proposes to submit a Pilot Program report to Commission at least two months prior to the expiration date of the Pilot Program (the ''annual report''). The annual report would contain an analysis of volume, open interest, and trading patterns. The analysis would examine trading in the

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 82362 (December 19, 2017), 82 FR 61090 (''Notice'').

[4] In Amendment No. 1, the Exchange revised its proposal to: (1) Add that raw percentage price change data as well as percentage price change data normalized for prevailing market volatility, as measured by an appropriate index as agreed by the Commission and the Exchange, would be provided as part of the pilot data; and (2) revise the proposed duration of the pilot program such that the pilot would terminate on the earlier of: (i) Twelve months following the date of the first listing of the options; or (ii) June 30, 2019. When the Exchange filed Amendment No. 1 with the Commission, it also submitted Amendment No. 1 to the public comment file for SR–ISE–2017–106 (available at: *https://www.sec.gov/comments/sr-ise-2017–106/ise2017106.htm*). Because Amendment No. 1 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, it is not subject to notice and comment.

[5] 15 U.S.C. 78s(b)(2).

[6] *See* Securities Exchange Act Release No. 82666, 83 FR 6626 (February 14, 2018). The Commission designated March 26, 2018 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[7] *See* Securities Exchange Act Release No. 51121 (February 1, 2005), 70 FR 6476 (February 7, 2005) (SR–ISE–2005–01).

[8] The Exchange notes that similar features are available with other index options contracts listed on the Exchange and other options exchanges, including options contracts based on 1/10 the value of the Nasdaq-100 (''MNX'') and P.M.-settled options on the full value of the Nasdaq-100 (''NDXPM''). *See* Notice, *supra* note 3, at 61091.

[9] Generally, pursuant to ISE Rule 2009(c)(1), index options listed on the Exchange are subject to strike price intervals of no less than $5, provided that certain classes of index options (including NDX and MNX) have strike price intervals of no less than $2.50 if the strike price is less than $200. The Exchange proposes to amend ISE Rule 2009(c)(1) to add NQX options to the list of classes where strike price intervals of no less than $2.50 are generally permitted if the strike price is less than $200. In addition, ISE Rule 2009(c)(5) provides finer strike price intervals for MNX options as these contracts are based on a reduced value of the Nasdaq-100. Specifically, ISE Rule 2009(c)(5) provides that notwithstanding ISE Rule 2009(c)(1), the interval between strike prices of series of MNX options will be $1 or greater, subject to certain conditions. The Exchange proposes to adopt the same strike price intervals for NQX options as currently approved for MNX options. The Exchange will not list LEAPS on NQX options at intervals less than $5. If the Exchange determines to add NQX options to the Weeklies or Quarterlies programs, such options will be listed with the expirations and strike prices described in Supplementary Material .01 or .02 to ISE Rule 2009. The Exchange notes that it expects to add NQX options to the Weeklies program. *See id.* at 61092 n.15.

[10] *See id.* at 61092 & n.13. The Exchange states that it intends to file a separate proposed rule change to modify the expiration months permitted for index option contracts consistent with Nasdaq PHLX LLC (''Phlx'') Rule 1101A(b). *See id.* at 61092 n.13.

[11] For a more detailed description of the proposed NQX contract, see Notice, *supra* note 3.

proposed option product as well as trading in the securities that comprise the Nasdaq-100. In addition, for series that exceed certain minimum open interest parameters, the annual report would provide analysis of index price volatility and share trading activity. In addition to the annual report, the Exchange would provide the Commission with periodic interim reports while the Pilot Program is in effect that would contain some, but not all, of the information contained in the annual report. The annual report would be provided to the Commission on a confidential basis. The annual report would contain the following volume and open interest data:

(1) Monthly volume aggregated for all trades;

(2) monthly volume aggregated by expiration date;

(3) monthly volume for each individual series;

(4) month-end open interest aggregated for all series;

(5) month-end open interest for all series aggregated by expiration date; and

(6) month-end open interest for each individual series.

In addition to the annual report, the Exchange would provide the Commission with interim reports of the information listed in Items (1) through (6) above periodically as required by the Commission while the Pilot Program is in effect. These interim reports would also be provided on a confidential basis.

Finally, the annual report would contain the following analysis of trading patterns in Expiration Friday, P.M.-settled NQX option series in the Pilot Program: (1) A time series analysis of open interest; and (2) an analysis of the distribution of trade sizes. Also, for series that exceed certain minimum parameters, the annual report would contain the following analysis related to index price changes and underlying share trading volume at the close on Expiration Fridays: A comparison of index price changes at the close of trading on a given Expiration Friday with comparable price changes from a control sample. The data would include a calculation of percentage price changes for various time intervals and compare that information to the respective control sample. Raw percentage price change data as well as percentage price change data normalized for prevailing market volatility, as measured by an appropriate index as agreed by the Commission and the Exchange, would be provided. The Exchange would provide a calculation of share volume for a sample set of the component securities representing an upper limit on share trading that could be attributable to expiring in-the-money series. The data would include a comparison of the calculated share volume for securities in the sample set to the average daily trading volumes of those securities over a sample period. The minimum open interest parameters, control sample, time intervals, method for randomly selecting the component securities, and sample periods would be determined by the Exchange and the Commission.[12]

III. Discussion and Commission Findings

After careful consideration of the proposal, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange,[13] and, in particular, the requirements of Section 6 of the Act.[14] Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[15] which requires that an exchange have rules designed to remove impediments to and perfect the mechanism of a free and open market and to protect investors and the public interest, to allow ISE to conduct a limited, and carefully monitored, pilot as proposed.

The Commission notes that it has previously approved the listing and trading of options based on a reduced value of the Nasdaq-100.[16] However, this proposed rule change would permit P.M. settlement for such options and, as noted in the Commission's order approving the listing and trading of NDXPM on Phlx on a pilot program basis, the Commission has had concerns about the potential adverse effects and impact of P.M. settlement upon market volatility and the operation of fair and orderly markets on the underlying cash market at or near the close of trading, including for cash-settled derivatives contracts based on a broad-based index.[17] The potential impact today remains unclear, given the significant changes in the closing procedures of the primary markets in recent decades. The Commission is mindful of the historical experience with the impact of P.M. settlement of cash-settled index derivatives on the underlying cash markets, but recognizes that these risks may be mitigated today by the enhanced closing procedures that are now in use at the primary equity markets.

Additionally, for the reasons described below, the Commission believes that ISE's proposed NQX Pilot Program is designed to mitigate concerns regarding P.M. settlement and will provide additional trading opportunities for investors while providing the Commission with data to monitor the effects of NQX options and the impact of P.M. settlement on the markets. To assist the Commission in assessing any potential impact of a P.M.-settled NQX option on the options markets as well as the underlying cash equities markets, ISE will be required to submit data to the Commission in connection with the Pilot Program. The Commission believes that ISE's proposed Pilot Program, together with the data and analysis that ISE will provide to the Commission, will allow ISE and the Commission to monitor for and assess any potential for adverse market effects of allowing P.M. settlement for NQX options, including on the underlying component stocks. In particular, the data collected from ISE's NQX Pilot Program will help inform the Commission's consideration of whether the Pilot Program should be modified, discontinued, extended, or permanently approved. Furthermore, the Exchange's ongoing analysis of the Pilot Program should help it monitor any potential risks from large P.M.-settled positions and take appropriate action on a timely basis if warranted.

The Exchange represents that it has adequate surveillance procedures to monitor trading in these options thereby helping to ensure the maintenance of a fair and orderly market, and has represented that it has sufficient capacity to handle additional traffic associated with this new listing.[18]

[12] *See id.* at 61092–93 and Amendment No. 1. The proposed Pilot Program for NQX options is similar to the pilot program approved for the listing and trading of NDXPM options on Phlx. *See* Securities Exchange Act Release No. 81293 (Aug. 2, 2017), 82 FR 37138 (Aug. 8, 2017) (''NDXPM Order'').

[13] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78f.

[15] 15 U.S.C. 78f(b)(5).

[16] *See, e.g.,* Securities Exchange Act Release Nos. 57654 (April 11, 2008), 73 FR 21003 (April 17, 2008); 51121 (February 1, 2005), 70 FR 6476 (February 7, 2005).

[17] *See* NDXPM Order, *supra* note 12. *See also* Securities Exchange Act Release Nos. 64599 (June 3, 2011), 76 FR 33798, 33801–02 (June 9, 2011) (order instituting proceedings to determine whether to approve or disapprove a proposed rule change to allow the listing and trading of SPXPM options); 65256 (September 2, 2011), 76 FR 55969, 55970–76 (September 9, 2011) (order approving proposed rule change to establish a pilot program to list and trade SPXPM options); and 68888 (February 8, 2013), 78 FR 10668, 10669 (February 14, 2013) (order approving the listing and trading of SPXPM on CBOE).

[18] *See* Notice, *supra* note 3, at 61092. In addition, the Commission notes that ISE would have access

Continued

For the reasons discussed above, the Commission finds that ISE's proposal is consistent with the Act, including Section 6(b)(5) thereof, in that it is designed to remove impediments to and perfect the mechanism of a free and open market, and, in general, to protect investors and the public interest. In light of the enhanced closing procedures at the underlying markets and the potential benefits to investors discussed by the Exchange in the Notice,[19] the Commission finds that it is appropriate and consistent with the Act to approve ISE's proposal on a pilot basis. The collection of data during the Pilot Program and ISE's active monitoring of any effects of NQX options on the markets will help ISE and the Commission assess any impact of P.M. settlement in today's market.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[20] that the proposed rule change (SR–ISE–2017–106), as modified by Amendment No. 1, be, and hereby is, approved, subject to a pilot period set to expire on the earlier of: (1) Twelve months following the date of the first listing of the options; or (2) June 30, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06017 Filed 3–23–18; 8:45 am]

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to information through its membership in the Intermarket Surveillance Group with respect to the trading of the securities underlying the NQX, as well as tools such as large options positions reports to assist its surveillance of NQX options. In approving the proposed rule change, the Commission also has relied upon the Exchange's representation that it has the necessary systems capacity to support new options series that will result from this proposal. *See id.*

[19] *See id.*

[20] 15 U.S.C. 78s(b)(2).

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82910; File No. SR–NSCC–2017–018]

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend the Loss Allocation Rules and Make Other Changes

March 20, 2018.

I. Introduction

On December 18, 2017, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] proposed rule change SR–NSCC–2017–018 to amend the loss allocation rules and make other changes (''Proposed Rule Change'').[3] The Proposed Rule Change was published for comment in the **Federal Register** on January 8, 2018.[4] The Commission did not receive any comments on the Proposed Rule Change. On February 8, 2018, pursuant to Section 19(b)(2)(A)(ii)(I) of the Act,[5] the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.[6] This order institutes proceedings, pursuant to Section 19(b)(2)(B) of the Act,[7] to determine whether to approve or disapprove the Proposed Rule Change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On December 18, 2017, NSCC filed this proposal as an advance notice (SR–NSCC–2017–806) with the Commission pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') and Rule 19b–4(n)(1)(i) of the Act (''Advance Notice''). On January 24, 2018, the Commission extended the review period of the Advance Notice for an additional 60 days pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act. *See* 12 U.S.C. 5465(e)(1); 17 CFR 240.19b–4(n)(1)(i); 12 U.S.C. 5465(e)(1)(H); and Securities Exchange Act Release No. 82584 (January 24, 2018), 83 FR 4377 (January 30, 2018) (SR–NSCC–2017–806).

[4] Securities Exchange Act Release No. 82428 (January 2, 2018), 83 FR 897 (January 8, 2018) (SR–NSCC–2017–018) (''Notice'').

[5] 15 U.S.C. 78s(b)(2)(A)(ii)(I).

[6] Securities Exchange Act Release No. 82670 (February 8, 2018), 83 FR 6626 (February 14, 2018) (SR–DTC–2017–022; SR–FICC–2017–022; SR–NSCC–2017–018).

[7] 15 U.S.C. 78s(b)(2)(B).

II. Summary of the Proposed Rule Change [8]

As described in the Notice,[9] NSCC proposes to revise its Rules and Procedures to primarily change (i) the loss allocation process,[10] (ii) the loss allocation governance for Declared Non-Default Loss Events,[11] and (iii) the retention time for the Actual Deposit of former members.[12]

A. Loss Allocation Process

NSCC states that it would retain the current core loss allocation process.[13] However, NSCC proposes to revise certain elements and introduce certain new loss allocation concepts, by making five key changes to its loss allocation process.

First, NSCC proposes to replace the calculation of its corporate contribution from no less than 25 percent of its retained earnings or such higher amount as the Board of Directors shall determine to a defined Corporate Contribution.[14] The proposed Corporate Contribution would be defined as an amount equal to 50 percent of NSCC's General Business Risk Capital Requirement.[15] NSCC's General Business Risk Capital Requirement is, at a minimum, equal to the regulatory capital that NSCC is required to maintain in compliance with Rule 17Ad–22(e)(15) under the Act.[16] In addition, NSCC proposes to mandatorily apply Corporate Contribution (i) prior to a loss allocation among Members, and (ii) to losses arising from both Defaulting Member Events and Declared Non-Default Loss Events.[17]

Second, NSCC proposes to introduce an Event Period to address the allocation of losses and liabilities that may arise from or relate to multiple

[8] The Commission notes that the Summary of the Proposed Rule Change section does not describe the Proposed Rule Change in its entirety. Other changes include, but are not limited to, the clarification of defined terms, various aspects of the Clearing Fund application, and detailed procedures of the loss allocation. The complete Proposed Rule Change can be found in the Notice. *See* Notice, *supra* note 4. In addition, the text of the Proposed Rule Change is *available at http://www.dtcc.com/legal/rules-and-procedures.aspx.*

[9] The description of the Proposed Rule Change herein is based on the statements prepared by NSCC in the Notice. *See* Notice, *supra* note 4. Each capitalized term not otherwise defined herein has its respective meaning either (i) as set forth in the Rules and Procedures of NSCC, *available at http://www.dtcc.com/legal/rules-and-procedures.aspx,* or (ii) as set forth in the Notice.

[10] *See* Notice, *supra* note 4, at 898–901.

[11] *See id.* at 901.

[12] *See id.* at 901–02.

[13] *Id.* at 898.

[14] *Id.*

[15] *Id.*

[16] *Id.;* 17 CFR 240.17Ad–22(e)(15).

[17] Notice, *supra* note 4, at 898.

Defaulting Member Events, Declared Non-Default Loss Events, or both that arise in quick succession.[18] The proposal would group together Defaulting Member Events and Declared Non-Default Loss Events occurring in a period of 10 business days for purposes of allocating losses to Members in one or more rounds, subject to the limitations of loss allocation in the Proposed Rule Change.[19]

Third, NSCC proposes to introduce a loss allocation ''round,'' which would mean ''a series of loss allocations relating to an Event Period, the aggregate amount of which is limited by the sum of the Loss Allocation Caps of affected Members.'' [20] NSCC would notify Members subject to a loss allocation of the amounts being allocated to them.[21] Each Member would have five business days from the issuance of such first Loss Allocation Notice for the round to notify NSCC of its election to withdraw from membership with NSCC, and thereby benefit from its Loss Allocation Cap.[22]

Fourth, NSCC proposes to implement a ''look-back'' period to calculate a Member's loss allocation pro rata share and its Loss Allocation Cap.[23] NSCC proposes to calculate each Member's pro rata share of losses and liabilities in any round to be equal to (i) the average of a Member's Required Fund Deposit for 70 business days prior to the first day of the applicable Event Period (''Average RFD'') divided by (ii) the sum of Average RFD amounts for all Members that are subject to a loss allocation in such round.[24] Additionally, NSCC proposes that each Member's Loss Allocation Cap would be equal to the greater of (i) its Required Fund Deposit on the first day of the applicable Event Period or (ii) its Average RFD.[25]

Fifth, NSCC proposes to revise the cap on a loss allocation and the withdrawal process followed by the loss allocation. As proposed, if a Member provides notice of its withdrawal from membership, the Member's maximum amount of losses with respect to any loss allocation round would be its Loss Allocation Cap.[26] NSCC further proposes that Members would have two business days after NSCC issues a first round Loss Allocation Notice to pay the amount specified in such notice.[27] Members would have five business days from the issuance of the first Loss Allocation Notice in any round to decide whether to terminate its membership, provided that the Member complies with the requirements of the proposed withdrawal process.[28]

B. Loss Allocation Governance for Declared Non-Default Loss Events

NSCC proposes to enhance the governance around Declared Non-Default Loss Events that would trigger a loss allocation by specifying that the Board of Directors would have to determine that there is a non-default loss that (i) may present a significant and substantial loss or liability, so as to materially impair the ability of NSCC to provide clearance and settlement services in an orderly manner, and (ii) will potentially generate losses to be mutualized among Members in order to ensure that NSCC may continue to offer clearance and settlement services in an orderly manner.[29] NSCC would then be required to promptly notify Members of this determination.[30]

C. Retention Time for the Actual Deposit of a Former Participant

NSCC proposes that if a Member gives notice to NSCC of its election to withdraw from membership, NSCC would return the Member's Actual Deposit in the form of cash or securities within 30 calendar days and Eligible Letters of Credit within 90 calendar days.[31] The return would be made after all of the Member's transactions have settled, and all matured and contingent obligations to NSCC for which the Member was responsible while a Member have been satisfied, except NSCC may retain for up to two years the Actual Deposits from Members who have sponsored Accounts at DTC.[32] This proposed rule would reduce the period in which NSCC may retain a Member's Actual Deposit pursuant to the current rule.[33]

III. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [34] to determine whether the Proposed Rule Change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the Proposed Rule Change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to comment on the Proposed Rule Change, and provide the Commission with arguments to support the Commission's analysis as to whether to approve or disapprove the Proposed Rule Change.

Pursuant to Section 19(b)(2)(B) of the Act,[35] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the Proposed Rule Change's consistency with Section 17A of the Act,[36] and the rules thereunder, including the following provisions:

- Section 17A(b)(3)(F) of the Act,[37] which requires, among other things, that the rules of a clearing agency, such as NSCC, must be designed to promote the prompt and accurate clearance and settlement of securities transactions, to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, and to protect investors and the public interest;
- Rule 17Ad–22(e)(13) under the Act,[38] which requires, in general, a covered clearing agency, such as NSCC, to establish, implement, maintain and enforce written policies and procedures reasonably designed to ensure the covered clearing agency has the authority and operational capacity to take timely action to contain losses and liquidity demands and continue to meet its obligations.
- Rule 17Ad–22(e)(23)(i) under the Act,[39] which requires a covered clearing agency, such as NSCC, to establish, implement, maintain and enforce written policies and procedures reasonably designed to publicly disclose all relevant rules and material procedures, including key aspects of its default rules and procedures.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and

[18] *Id.* at 899.
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.* at 900.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 900 and 905.
[28] *Id.* at 900.
[29] *Id.* at 901.
[30] *Id.*
[31] *Id.* at 901–902.
[32] *Id.*
[33] *Id.* at 907.
[34] 15 U.S.C. 78s(b)(2)(B).
[35] *Id.*
[36] 15 U.S.C. 78q–1.
[37] 15 U.S.C. 78q–1(b)(3)(F).
[38] 17 CFR 240.17Ad–22(e)(13).
[39] 17 CFR 240.17Ad–22(e)(23)(i).

arguments with respect to the issues identified above, as well as any other concerns they may have with the Proposed Rule Change. In particular, the Commission invites the written views of interested persons concerning whether the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act,[40] Rule 17Ad–22(e)(13) under the Act,[41] Rule 17Ad–22(e)(23)(i) under the Act,[42] or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4(g) under the Act,[43] any request for an opportunity to make an oral presentation.[44]

Interested persons are invited to submit written data, views, and arguments regarding whether the Proposed Rule Change should be approved or disapproved by April 16, 2018. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by April 30, 2018.

The Commission asks that commenters address the sufficiency of NSCC's statements in support of the Proposed Rule Change, which are set forth in the Notice,[45] in addition to any other comments they may wish to submit about the Proposed Rule Change.

Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSCC–2017–018 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–NSCC–2017–018. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the Proposed Rule Change that are filed with the Commission, and all written communications relating to the Proposed Rule Change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on The Depository Trust & Clearing Corporation's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–NSCC–2017–018 and should be submitted on or before April 16, 2018. Rebuttal comments should be submitted by April 30, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[46]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06016 Filed 3–23–18; 8:45 am]

BILLING CODE 8011–01–P

[40] 15 U.S.C. 78q–1(b)(3)(F).

[41] 17 CFR 240.17Ad–22(e)(13).

[42] 17 CFR 240.17Ad–22(e)(23)(i).

[43] 17 CFR 240.19b–4(g).

[44] Section 19(b)(2) of the Act grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[45] *See* Notice, *supra* note 4.

[46] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82915; File No. SR–DTC–2018–001]

Self-Regulatory Organizations; The Depository Trust Company; Order Approving Proposed Rule Change To Amend the By-Laws

March 20, 2018.

On February 2, 2018, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–DTC–2018–001, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on February 14, 2018.[3] The Commission did not receive any comment letters on the proposed rule change. For the reasons discussed below, the Commission approves the proposed rule change.

I. Description of the Proposed Rule Change

The proposed rule change would amend the DTC By-Laws (''By-Laws'') [4] to (1) revise DTC's governance procedures, (2) change certain DTC Board of Directors (''Board'') titles, officer titles, and offices (and their respective powers and duties), (3) update the compensation section for officers, and (4) make technical changes and corrections, each discussed more fully below.

A. Changes to DTC's Governance Procedures

Under the proposed rule change, DTC would revise certain governance procedures of the By-Laws. Specifically, DTC proposes to (1) change the required frequency of the Board's and the Executive Committee's meetings, (2) remove the word ''monthly'' from the phrase ''regular monthly meetings'' when describing Board meetings, and (3) permit the Board to act by unanimous written consent.[5]

DTC proposes to reduce the required frequency of its Board meetings and Executive Committee meetings, as provided for in Section 2.6 (Meetings) of the By-Laws,[6] to better align the frequency of the Board meetings with those of the Fixed Income Clearing Corporation (''FICC'') and the National Securities Clearing Corporation (''NSCC'').[7] Specifically, the proposal would reduce the minimum required number of Board meetings from ten meetings per year (with at least two

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 82671 (February 8, 2018), 83 FR 6639 (February 14, 2018) (SR–DTC–2018–001) (''Notice'').

[4] The By-Laws are included in the Rules, By-Laws and Organization Certificate of DTC (''Rules''), *available at http://www.dtcc.com/legal/rules-and-procedures.*

[5] Notice, 83 FR at 6640.

[6] Hereinafter, section references will always be to the By-Laws unless otherwise stated.

[7] Notice, 83 FR at 6640. DTC, FICC, and NSCC are subsidiaries of the Depository Trust and Clearing Corporation (''DTCC''), each having the same Board of Directors as DTCC. *See* Securities Exchange Act Release No. 74142 (January 27, 2015), 80 FR 5188 (January 30, 2015) (SR–FICC–2014–810, SR–NSCC–2014–811, SR–DTC–2014–812).

meetings during any three-month period) to six meetings per year (with at least one meeting during any three-month period).[8] The proposal would also delete the provision in current Section 2.6 (Meetings) requiring the Executive Committee to meet during each 30-day period in which the Board does not meet.[9]

Due to the proposed changes to the frequency of Board meetings and Executive Committee meetings, DTC proposes to remove the word ''monthly'' from Section 2.6 (Meetings).[10] The proposal would also permit the Board to fix times and places for its regular meetings and not require the Board to provide notice of such regular meetings.[11]

Finally, DTC proposes to add proposed Section 2.9 (Action by Unanimous Written Consent).[12] This section would permit the Board to take all actions that may be taken at a Board meeting by unanimous written consent, in lieu of an actual meeting.[13] The provision would require that any written consent (1) identify the action to be taken, (2) be signed by all directors, and (3) be filed with the minutes of the proceedings of the Board.[14]

B. Changes to Certain Titles, Offices, and Related Powers and Duties

DTC also proposes changes to the titles, offices, and related powers and duties of certain Board and officer personnel, as further described below.

1. Non-Executive Chairman of the Board

DTC proposes to replace the title of ''Chairman of the Board'' with the title of ''Non-Executive Chairman of the Board.'' [15] DTC proposes to change its By-Laws to reflect that this position is held by a non-executive.[16] Therefore, DTC would change relevant references in the By-Laws from ''Chairman'' and ''Chairman of the Board'' to ''Non-Executive Chairman of the Board.'' [17] DTC also would delete certain references in the By-Laws to the Non-Executive Chairman of the Board as a member of DTC management because the position is no longer in management.[18]

In the proposed Section 2.8 (Non-Executive Chairman of the Board), DTC would identify the powers and duties of the Non-Executive Chairman of the Board, including (1) general responsibility for carrying out the policies of the Board, (2) general supervision of the Board and its activities and general leadership of the Board, (3) presiding over stockholders' meetings (when present), and (4) such other powers and duties as the Board may designate.[19] Proposed Section 2.8 (Non-Executive Chairman of the Board) also would include a provision stating that a presiding director (as elected by the Board) shall preside at all stockholders and Board meetings when the Non-Executive Chairman of the Board is absent.[20] Additionally, Proposed Section 2.8 (Non-Executive Chairman of the Board) would provide that the Non-Executive Chairman of the Board's performance of any enumerated duty shall be conclusive evidence of his power to act.[21]

The proposal also identifies the individuals to whom the Non-Executive Chairman may assign duties. In proposed Section 3.2 (Powers and Duties of the President and Chief Executive Officer), the Non-Executive Chairman of the Board would have the authority to designate powers and duties to the President and Chief Executive Officer (''CEO'').[22] In proposed Section 3.2 (Powers and Duties of Managing Directors), DTC also would add the Non-Executive Chairman of the Board to the list of individuals who have the ability to assign powers and duties to Managing Directors.[23] Finally, in proposed Section 3.4 (Powers and Duties of the Secretary), the Non-Executive Chairman of the Board (*i.e.,* not the President and CEO) would have the authority to assign additional powers and duties to the Secretary.[24]

2. Office of the CEO

DTC proposes to revise the By-Laws to reflect that one individual holds the office of the President and CEO. As such, the proposal would change the By-Laws to add the office of the CEO and combine the office of the President and the office of the CEO into one office (President and CEO).[25] While current Section 3.3 (Powers and Duties of the President) provides that the President shall be the CEO, current Section 3.1 (General Provisions) does not include CEO in the list of designated officer positions, though President is currently included in this list.[26] Therefore, DTC proposes to revise the relevant references in the By-Laws from President to President and CEO.[27]

Additionally, DTC proposes to make several By-Laws revisions to reflect the responsibilities for the consolidated role of President and CEO.[28] First, DTC would delete and replace current Section 3.3 (Powers and Duties of the President) with proposed Section 3.2 (Powers and Duties of the President and CEO).[29] Proposed Section 3.2 (Powers and Duties of the President and CEO) would clarify the powers and duties associated with the role of President and CEO.[30] For example, in proposed Section 3.2 (Powers and Duties of the President and CEO) the President and CEO would have general supervision over the overall business strategy, business operations, systems, customer outreach, as well as risk management, control, and staff functions, subject to the direction of the Board and the Non-Executive Chairman of the Board.[31] In addition, because the office of the Chief Operating Officer (''COO'') would be eliminated (as described further below), the current COO responsibility of general supervision over DTC's operations in current Section 3.4 (Powers and Duties of the Chief Operating Officer) would be assigned to the President and CEO.[32] Proposed Section 3.2 (Powers and Duties of the President and CEO) would also delineate the authority that the Non-Executive Chairman of the Board has over the President and CEO by stating that the latter would have such other powers and perform such other duties

[8] Notice, 83 FR at 6640.

[9] *Id.*

[10] *Id.*

[11] *Id.* Although the proposal would not require the Board to provide notice of its regular meetings, the proposal would not affect other existing notice requirements in the By-Laws, such as the requirement in Section 1.4 (Notice of Meetings) to provide notice of meetings in which stockholders are required or permitted to take action and Section 2.6 (Meetings) regarding special meetings of the Board. Rules, *supra* note 4.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Notice, 83 FR at 6641.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* This provision is designed to correct an inaccuracy in current By-Laws Section 3.3 (Powers and Duties of the President), which gives presiding authority over stockholder meetings to the President when the Chairman of the Board is absent. Proposed Section 2.8 (Non-Executive Chairman of the Board) would be consistent with the Mission Statement and Charter of DTC, FICC, NSCC, and DTCC, which gives presiding authority over stockholder meetings to a presiding director when the Non-Executive Chairman of the Board is absent.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Notice, 83 FR at 6642.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

as the Board or the Non-Executive Chairman of the Board may designate.[33]

DTC also proposes to reassign or reclassify several responsibilities currently assigned to the President.[34] Specifically, the responsibility for executing the Board's policies would be assigned to the Non-Executive Chairman of the Board rather than to the President and CEO.[35] Additionally, DTC would remove the statement ''performance of any such duty by the President shall be conclusive evidence of his power to act'' in current Section 3.3 (Powers and Duties of the President).[36]

As mentioned above, DTC would delete language from the By-Laws stating that, in the absence of the Chairman of the Board, the President shall preside at all meetings of shareholders and all Board meetings (when present).[37] Similarly, DTC would delete language from the By-Laws stating that the President and Board currently have the authority to assign powers and duties to the Comptroller in current Section 3.8 (Powers and Duties of the Comptroller), as discussed below.[38] In proposed Section 3.5 (Powers and Duties of the Chief Financial Officer) the President and CEO and Board would have the authority to assign duties to the Chief Financial Officer (''CFO'').[39]

The proposal also removes certain responsibilities from the President. In proposed Section 3.4 (Powers and Duties of the Secretary), the power to assign additional powers and duties to the Secretary would be removed from the President and granted to the Non-Executive Chairman of the Board.[40]

3. Office of the CFO; Office of the Comptroller

The proposal would add the office of the CFO and assign to the CFO general supervision of the financial operations of DTC.[41] References in the By-Laws to the Comptroller would be deleted because DTC states that it neither has a Comptroller nor plans to appoint one.[42] In proposed Section 3.5 (Powers and Duties of the Chief Financial Officer) the CFO would be granted overall supervision authority over the financial operations of DTC, and upon request, the CFO would counsel and advise other officers of DTC and perform other duties as agreed with the President and CEO (or as determined by the Board).[43] The proposal also provides that the CFO would report directly to the President and CEO.[44] Furthermore, because the Treasurer would directly report to the CFO, proposed Section 3.6 (Powers and Duties of the Treasurer) would provide that the Treasurer would have all such powers and duties as generally are incident to the position of Treasurer or as the CFO (in addition to the President and CEO and the Board) may assign.[45]

4. Office of the COO

In this proposal, DTC would delete references in the By-Laws to the COO because DTC states that it no longer has a COO and has no plans to appoint one.[46]

5. Executive Director; Vice President

In this proposal, DTC would change the title of Vice President to Executive Director, and update the Executive Director position's related powers and duties to reflect the position's seniority level.[47] In DTC's organizational structure, Executive Directors report to Managing Directors.[48] Due to this level of seniority, DTC proposes to remove provisions in the By-Laws that previously allowed Vice Presidents (now, Executive Directors) to call special meetings of shareholders, or to preside over shareholder meetings unless specifically designated to do so by the Board.[49]

6. Other Changes to the Powers and Duties of the Board and Certain Other Designated Officers

In proposed Section 3.1 (General Provisions), DTC proposes to add a parenthetical phrase to clarify that the Board's power to appoint other officers includes, but is not limited to, the power to appoint a Vice Chairman of the Corporation and one or more Executive Directors.[50] Additionally, in current Section 3.1 (General Provisions), DTC proposes to clarify that neither the Secretary nor any Assistant Secretary can hold the following offices (1) Vice Chairman of the Corporation or (2) President and CEO.[51]

The proposal also enumerates the responsibilities of DTC's Managing Directors.[52] In proposed Section 1.2 (Special Meetings), Managing Directors would be added to the list of officers authorized to call special meetings of the stockholders.[53] Similarly, in proposed Section 2.6 (Meetings), Managing Directors would be added to the list of officers authorized to call special meetings of the Board.[54] Further, in current Section 6.1 (Certificates for Shares), Managing Directors would be removed from the list of officers authorized to sign certificates for shares, enabling DTC to limit the authorized signatories of certificates for shares of DTC to a smaller number of individuals within senior management.[55]

DTC also proposes to amend the By-Laws to remove specific powers from the Treasurer and Assistant Treasurer.[56] In current Section 6.1 (Certificates of Shares), DTC proposes to delete the reference to Treasurer and Assistant Treasurer from the list of authorized signatories because DTC expects the Secretary or Assistant Secretary (who are each currently listed as authorized signatories) to sign any share certificates.[57]

C. Compensation of the President and CEO

Proposed Section 3.10 (Compensation of the President and CEO) would reflect DTC's current compensation-setting practices. Current Section 3.12 (Compensation of Officers) states that (1) the compensation, if any, of the Chairman of the Board, and the President shall be fixed by a majority (which shall not include the Chairman of the Board or the President) of the entire Board of Directors, and (2) salaries of all other officers shall be fixed by the President with the approval of the Board and no officer shall be precluded from receiving a salary because he is also a director.[58] DTC proposes to state that the Compensation Committee of the Corporation will recommend the compensation for the President and CEO to the Board of Directors for approval.[59] In addition, DTC also proposes to delete the language stating that (1) salaries of all other officers shall be fixed by the President with approval of the Board, and (2) no officer shall be precluded

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* As stated above, that power resides with the presiding director who is elected annually by the Board. *See supra* note 20.

[38] Notice, 83 FR at 6642.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] Notice, 83 FR at 6643.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] Notice, 83 FR at 6643–44. DTC states that it proposes this change for consistency with the DTCC/DTC/FICC/NSCC Compensation and Human Resources Committee Charter. *Id.*

from receiving a salary because he is also a director.[60] DTC proposes to delete compensation-related references to the Chairman of the Board because the Non-Executive Chairman of the Board does not receive compensation.[61] Finally, DTC proposes to change the title of proposed Section 3.10 from ''Compensation of Officers'' to ''Compensation of the President and Chief Executive Officer'' because this section would no longer address the compensation of officers other than the President and CEO.[62]

D. Technical Changes and Corrections

DTC proposes technical changes and/or corrections to the By-Laws for clarity and readability, as described below.[63]

1. Statutory References and Requirements

DTC would delete direct statutory references from the By-Laws.[64] DTC states that it would make this change to have the By-Laws remain consistent and accurate despite any changes to a specifically cited statute.[65]

2. Audit Committee

DTC proposes to revise proposed Section 2.11 (Audit Committee) to have the description of its Audit Committee conform to the description of the Audit Committee in the by-laws of FICC.[66]

3. Other Technical Changes and Corrections

DTC proposes to make additional technical and grammatical changes to address (1) typographical errors, (2) section numbering, (3) grammatical errors, (4) heading consistency, and (5) gender references.[67]

II. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization.[68] The Commission believes the proposal is consistent with Act, specifically Section 17A(b)(3)(F) of the Act and Rules 17Ad–22(e)(1) and, in part, (2) under the Act.[69]

A. Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a clearing agency, such as DTC, be designed to protect the public interest.[70] As discussed above, the proposed rule change would make a number of updates to the By-Laws.

First, the proposed changes to the By-Laws would provide specific requirements for, and remove ambiguous language around, the Board's required meeting frequency. Specifically, the proposal would align the frequency of Board meetings with the frequency of the related FICC and NSCC meetings, reducing the number of Board meetings to six annually. The proposal also would state that the Board may act through unanimous written consent, clarifying that the Board can make important decisions without having to conduct a formal Board meeting. Further, the proposal would eliminate the word ''monthly'' from the By-Laws' description of the Board's meeting frequency, removing ambiguity around whether the Board must meet monthly (given the required number of meetings is six). Altogether, these proposed governance changes would help enable DTC and its stakeholders to better understand when, and specifically, how often, the Board must conduct meetings.

Second, DTC proposes to revise DTC's description of the titles and responsibilities of its Board and senior management to match DTC's current corporate structure. These changes would help the Board, as well as DTC's management, employees, and participants, understand which officer or office is responsible for each of DTC's executive-level functions.

Third, the proposal would update the compensation-setting section of the By-Laws to reflect the Compensation Committee Charter practice, as well as to reflect that the Non-Executive Chairman of the Board would not receive compensation. The proposal's increased clarity around compensation-setting would better inform DTC stakeholders and the general public about how DTC sets the level of compensation for its highest-level executive (the President and CEO) and that the Non-Executive Chairman does not draw a salary.

Finally, DTC's proposed technical changes and corrections to its By-Laws would enhance the clarity, transparency, and readability of DTC's organizational documents. In this way, the proposal would better enable the Board, as well as DTC's management, employees, and participants, to understand their respective authorities, rights, and obligations regarding DTC's clearance and settlement of securities transactions.

Governance arrangements are critical to the sound operation of clearing agencies.[71] Specifically, clear and transparent governance documents promote accountability and reliability in the decisions, rules, and procedures of a clearing agency.[72] Clear and transparent governance documents also provide interested parties, including owners, participants, and general members of the public, with information about how a clearing agency's decisions are made and what the rules and procedures are designed to accomplish.[73] Further, the decisions, rules, and procedures of a clearing agency are important, as they can have widespread impact, affecting multiple market participants, financial institutions, markets, and jurisdictions.[74]

As stated above, the proposed rule change would provide DTC stakeholders with a better understanding of how DTC makes decisions that could ultimately affect the financial system. Such transparency helps ensure that DTC reliably makes decisions and follows clearly articulated policies and procedures. Accordingly, the Commission finds that the proposed rule change is designed to enhance the clarity and transparency of DTC's organizational documents, which would help protect the public interest, consistent with Section 17A(b)(3)(F) of the Act.[75]

B. Rule 17Ad–22(e)(1) Under the Act

Rule 17Ad–22(e)(1) under the Act requires a covered clearing agency [76] to

[60] *Id.*

[61] *Id.*

[62] Notice, 83 FR at 6644.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Notice, 83 FR at 6644–45.

[68] 15 U.S.C. 78s(b)(2)(C).

[69] 15 U.S.C. 78q–1(b)(3)(F); 17 CFR 240.17Ad–22(e)(1) and (2).

[70] 15 U.S.C. 78q–1(b)(3)(F).

[71] Securities Exchange Act Release No. 71699 (May 21, 2014), 79 FR 29508 (May 22, 2014) (''Covered Clearing Agency Standards Proposing Release'') at 29521.

[72] Securities Exchange Act Release No. 64017 (March 3, 2011), 76 FR 14472 (March 16, 2011) at 14488.

[73] *Id.*

[74] Covered Clearing Agency Standards Proposing Release, 79 FR at 29521.

[75] 15 U.S.C. 78q–1(b)(3)(F).

[76] A ''covered clearing agency'' means, among other things, a clearing agency registered with the Commission under Section 17A of the Exchange Act (15 U.S.C. 78q–1 *et seq.*) that is designated systemically important by the Financial Stability Oversight Counsel (''FSOC'') pursuant to the Payment, Clearing, and Settlement Supervision Act of 2010 (12 U.S.C. 5461 *et seq.*). *See* 17 CFR 240.17Ad–22(a)(5)–(6). On July 18, 2012, FSOC designated DTC as systemically important. U.S. Department of the Treasury, ''FSOC Makes First Designations in Effort to Protect Against Future Financial Crises,'' *available at https://*

Continued

establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for a well-founded, transparent, and enforceable legal basis for each aspect of its activities in all relevant jurisdictions.[77]

As discussed above, the proposed rule change would update the By-Laws by (1) providing specific requirements for, and removing ambiguous language around, the Board's required meeting frequency, (2) updating DTC's description of the titles and responsibilities of its Board and senior management to match DTC's current corporate structure, (3) documenting DTC's current compensation-setting process, and (4) enacting technical corrections to increase readability.

Each of the proposed changes is designed to help ensure that the By-Laws better reflect DTC's governance practices in a clear, transparent, and consistent manner. This increased transparency would help convey to DTC's stakeholders, and the public generally, a key legal basis for the activities of the highest levels of DTC's leadership described in the By-Laws. Therefore, the Commission finds that the proposed rule change is designed to help ensure that DTC's organizational documents remain well-founded, transparent, and legally enforceable in all relevant jurisdictions, consistent with Rule 17Ad–22(e)(1) under the Act.[78]

C. Rule 17Ad–22(e)(2)(i) and (v) Under the Act

Rule 17Ad–22(e)(2)(i) and (v) under the Act requires that DTC establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for governance arrangements that, among other things, (1) are clear and transparent and (2) specify clear and direct lines of responsibility.[79]

As described above, DTC proposes a number of changes to its By-Laws that would provide clarity and transparency by setting specific standards for DTC (in the case of Board meeting frequency), and revising By-Laws provisions that were outdated or incorrect (in the case of responsibilities and titles of its Board members and senior management, compensation-setting practices, and technical edits). Specifically, the new Board meeting requirements would set clear numerical parameters around the specific frequency of such meetings, while also providing consistency with similar meetings at FICC and NSCC. The proposal also would provide clarity that the Board does not have to meet monthly (as is currently stated) by removing the qualifier ''monthly.'' The proposed change allowing the Board to act by unanimous written consent, in lieu of a meeting, also would help provide transparency by clearly indicating how the Board may act without conducting a formal meeting. Similarly, the proposed changes to the titles and offices (and their related powers and duties) would provide clarity and transparency because they would clearly set forth DTC's current organizational structure, including the lines of responsibility of various officers and the Board. The proposed changes relating to compensation-setting would also give clarity and transparency by (1) accurately reflecting the process that is followed pursuant to the Compensation Committee Charter, and (2) clarifying that the Non-Executive Chairman of the Board does not receive compensation. Finally, the proposed technical changes and corrections would raise the clarity and transparency of the By-Laws by removing grammatical and typographical errors.

For these reasons, the Commission finds that the proposed rule change is designed to enhance clarity and transparency in DTC's governance arrangements, as well as to specify clear and direct lines of responsibility for various officer positions and the Board within DTC's organizational structure, consistent with Rule 17Ad–22(e)(2)(i) and (v) under the Act.[80]

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act, in particular the requirements of Section 17A of the Act[81] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that proposed rule change SR–DTC–2018–001 be, and hereby is, APPROVED.[82]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[83]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06021 Filed 3–23–18; 8:45 am]

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www.treasury.gov/press-center/press-releases/Pages/tg1645.asp. Therefore, DTC is a covered clearing agency.

[77] 17 CFR 240.17Ad–22(e)(1).

[78] *Id.*

[79] 17 CFR 240.17Ad–22(e)(2)(i) and (v).

[80] *Id.*

[81] 15 U.S.C. 78q–1.

[82] In approving the proposed rule change, the Commission considered the proposals' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[83] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82916; File No. SR–NSCC–2018–001]

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving Proposed Rule Change To Amend the By-Laws

March 20, 2018.

On February 2, 2018, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–NSCC–2018–001, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on February 14, 2018.[3] The Commission did not receive any comment letters on the proposed rule change. For the reasons discussed below, the Commission approves the proposed rule change.

I. Description of the Proposed Rule Change

The proposed rule change would amend the NSCC By-Laws (''By-Laws'')[4] to (1) change certain NSCC Board of Directors (''Board'') titles, officer titles, and offices (and their respective powers and duties), (2) update the compensation section for officers, and (3) make technical changes and corrections, each discussed more fully below. The proposed rule change would amend the Rules to incorporate, by reference, the By-Laws and the Certificate of Incorporation.

A. Changes to Certain Titles, Offices, and Related Powers and Duties

NSCC proposes changes to the titles, offices, and related powers and duties of

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 82674 (February 8, 2018), 83 FR 6633 (February 14, 2018) (SR–NSCC–2018–001) (''Notice'').

[4] As discussed below, the By-Laws and NSCC's Certificate of Incorporation (''Certificate of Incorporation'') would each be incorporated by reference into NSCC's Rules and Procedures (''Rules''), *available at http://www.dtcc.com/legal/rules-and-procedures.*

certain Board and officer personnel, as further described below.

1. Non-Executive Chairman of the Board

NSCC proposes to replace the title of ''Chairman of the Board'' with the title of ''Non-Executive Chairman of the Board.'' [5] NSCC proposes to change its By-Laws to reflect that this position is held by a non-executive.[6] Therefore, NSCC would change relevant references in the By-Laws from ''Chairman'' and ''Chairman of the Board'' to ''Non-Executive Chairman of the Board.'' [7] NSCC also would delete certain references in the By-Laws to the Non-Executive Chairman of the Board as a member of NSCC management because the position is no longer in management.[8]

In the proposed Section 2.8 (Non-Executive Chairman of the Board), NSCC would identify the powers and duties of the Non-Executive Chairman of the Board, including (1) general responsibility for carrying out the policies of the Board, (2) general supervision of the Board and its activities and general leadership of the Board, (3) presiding over stockholders' meetings (when present), and (4) such other powers and duties as the Board may designate.[9] Proposed Section 2.8 (Non-Executive Chairman of the Board) also would include a provision stating that a presiding director (as elected by the Board) shall preside at all stockholders and Board meetings when the Non-Executive Chairman of the Board is absent.[10] Additionally, Proposed Section 2.8 (Non-Executive Chairman of the Board) would provide that the Non-Executive Chairman of the Board's performance of any enumerated duty shall be conclusive evidence of his power to act.[11]

The proposal also identifies the individuals to whom the Non-Executive Chairman may assign duties. In proposed Section 3.2 (Powers and Duties of the President and Chief Executive Officer), the Non-Executive Chairman of the Board would have the authority to designate powers and duties to the President and Chief Executive Officer (''CEO'').[12] In proposed Section 3.2 (Powers and Duties of Managing Directors), NSCC also would add the Non-Executive Chairman of the Board to the list of individuals who have the ability to assign powers and duties to Managing Directors.[13] Finally, in proposed Section 3.4 (Powers and Duties of the Secretary), the Non-Executive Chairman of the Board (*i.e.,* not the President and CEO) would have the authority to assign additional powers and duties to the Secretary.[14]

2. Office of the CEO

NSCC proposes to revise the By-Laws to reflect that one individual holds the office of the President and CEO. As such, the proposal would change the By-Laws to add the office of the CEO and combine the office of the President and the office of the CEO into one office (President and CEO).[15] While current Section 3.3 (Powers and Duties of the President) provides that the President shall be the CEO, current Section 3.1 (General Provisions) does not include CEO in the list of designated officer positions, though President is currently included in this list.[16] Therefore, NSCC proposes to revise the relevant references in the By-Laws from President to President and CEO.[17]

Additionally, NSCC proposes to make several By-Laws revisions to reflect the responsibilities for the consolidated role of President and CEO.[18] First, NSCC would delete and replace current Section 3.3 (Powers and Duties of the President) with proposed Section 3.2 (Powers and Duties of the President and CEO).[19] Proposed Section 3.2 (Powers and Duties of the President and CEO) would clarify the powers and duties associated with the role of President and CEO.[20] For example, in proposed Section 3.2 (Powers and Duties of the President and CEO) the President and CEO would have general supervision over the overall business strategy, business operations, systems, customer outreach, as well as risk management, control, and staff functions, subject to the direction of the Board and the Non-Executive Chairman of the Board.[21] In addition, because the office of the Chief Operating Officer (''COO'') would be eliminated (as described further below), the current COO responsibility of general supervision over NSCC's operations in current Section 3.4 (Powers and Duties of the Chief Operating Officer) would be assigned to the President and CEO.[22] Proposed Section 3.2 (Powers and Duties of the President and CEO) would also delineate the authority that the Non-Executive Chairman of the Board has over the President and CEO by stating that the latter would have such other powers and perform such other duties as the Board or the Non-Executive Chairman of the Board may designate.[23]

NSCC also proposes to reassign or reclassify several responsibilities currently assigned to the President.[24] Specifically, the responsibility for executing the Board's policies would be assigned to the Non-Executive Chairman of the Board rather than to the President and CEO.[25] Additionally, NSCC would remove the statement ''performance of any such duty by the President shall be conclusive evidence of his power to act'' in current Section 3.3 (Powers and Duties of the President).[26]

As mentioned above, NSCC would delete language from the By-Laws stating that, in the absence of the Chairman of the Board, the President shall preside at all meetings of shareholders and all Board meetings (when present).[27] Similarly, NSCC would delete language from the By-Laws stating that the President and Board currently have the authority to assign powers and duties to the Comptroller in current Section 3.8 (Powers and Duties of the Comptroller), as discussed below.[28] In proposed Section 3.5 (Powers and Duties of the Chief Financial Officer) the President and CEO and Board would have the authority to assign duties to the Chief Financial Officer (''CFO'').[29]

The proposal also removes certain responsibilities from the President. In proposed Section 3.4 (Powers and

[5] Notice, 83 FR at 6634.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* This provision is designed to correct an inaccuracy in current By-Laws Section 3.3 (Powers and Duties of the President), which gives presiding authority over stockholder meetings to the President when the Chairman of the Board is absent. Proposed Section 2.8 (Non-Executive Chairman of the Board) would be consistent with the Mission Statement and Charter of the Depository Trust Corporation (''DTC''), Fixed Income Clearing Corporation (''FICC''), NSCC, and the Depository Trust and Clearing Corporation (''DTCC''), which gives presiding authority over stockholder meetings to a presiding director when the Non-Executive Chairman of the Board is absent. DTC, FICC, and NSCC are subsidiaries of DTCC, each having the same Board of Directors as DTCC. *See* Securities Exchange Act Release No. 74142 (January 27, 2015), 80 FR 5188 (January 30, 2015) (SR–FICC–2014–810, SR–NSCC–2014–811, SR–DTC–2014–812).

[11] Notice, 83 FR at 6634.

[12] Notice, 83 FR at 6635.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* As stated above, that power resides with the presiding director who is elected annually by the Board. *See supra* note 20.

[28] Notice, 83 FR at 6642.

[29] *Id.*

Duties of the Secretary), the power to assign additional powers and duties to the Secretary would be removed from the President and granted to the Non-Executive Chairman of the Board.[30]

3. Office of the CFO; Office of the Comptroller

The proposal would add the office of the CFO and assign to the CFO general supervision of the financial operations of NSCC.[31] References in the By-Laws to the Comptroller would be deleted because NSCC states that it neither has a Comptroller nor plans to appoint one.[32] In proposed Section 3.5 (Powers and Duties of the Chief Financial Officer) the CFO would be granted overall supervision authority over the financial operations of NSCC, and upon request, the CFO would counsel and advise other officers of NSCC and perform other duties as agreed with the President and CEO (or as determined by the Board).[33] The proposal also provides that the CFO would report directly to the President and CEO.[34] Furthermore, because the Treasurer would directly report to the CFO, proposed Section 3.6 (Powers and Duties of the Treasurer) would provide that the Treasurer would have all such powers and duties as generally are incident to the position of Treasurer or as the CFO (in addition to the President and CEO and the Board) may assign.[35]

4. Office of the COO

In this proposal, NSCC would delete references in the By-Laws to the COO because NSCC states that it no longer has a COO and has no plans to appoint one.[36]

5. Executive Director; Vice President

In this proposal, NSCC would change the title of Vice President to Executive Director, and update the Executive Director position's related powers and duties to reflect the position's seniority level.[37] In NSCC's organizational structure, Executive Directors report to Managing Directors.[38] Due to this level of seniority, NSCC proposes to remove provisions in the By-Laws that previously allowed Vice Presidents (now, Executive Directors) to call special meetings of shareholders, to sign share certificates, or to preside over shareholder meetings unless specifically designated to do so by the Board.[39]

6. Other Changes to the Powers and Duties of the Board and Certain Other Designated Officers

In proposed Section 3.1 (General Provisions), NSCC proposes to add a parenthetical phrase to clarify that the Board's power to appoint other officers includes, but is not limited to, the power to appoint a Vice Chairman of the Corporation and one or more Executive Directors.[40] Additionally, in current Section 3.1 (General Provisions), NSCC proposes to clarify that neither the Secretary nor any Assistant Secretary can hold the following offices (1) Vice Chairman of the Corporation or (2) President and CEO.[41]

The proposal also enumerates the responsibilities of NSCC's Managing Directors.[42] In proposed Section 1.8 (Presiding Officer and Secretary), Managing Directors would be removed from the list of officers authorized to preside over a stockholders' meeting unless specifically authorized by the Board.[43] Similarly, in proposed Section 2.6 (Meetings), Managing Directors would be added to the list of officers authorized to call special meetings of the Board.[44]

NSCC also proposes to amend the By-Laws to remove specific powers from the Treasurer and Assistant Treasurer.[45] In current Section 5.1 (Certificates of Shares), NSCC proposes to delete the reference to Treasurer and Assistant Treasurer from the list of authorized signatories because NSCC expects the Secretary or Assistant Secretary (who are each currently listed as authorized signatories) to sign any share certificates.[46]

B. Compensation of the President and CEO

Proposed Section 3.10 (Compensation of the President and CEO) would reflect NSCC's current compensation-setting practices. Current Section 3.12 (Compensation of Officers) states that (1) the compensation, if any, of the Chairman of the Board, and the President shall be fixed by a majority (which shall not include the Chairman of the Board or the President) of the entire Board of Directors, and (2) salaries of all other officers shall be fixed by the President with the approval of the Board and no officer shall be precluded from receiving a salary because he is also a director.[47] NSCC proposes to state that the Compensation Committee of the Corporation will recommend the compensation for the President and CEO to the Board of Directors for approval.[48] In addition, NSCC also proposes to delete the language stating that (1) salaries of all other officers shall be fixed by the President with approval of the Board, and (2) no officer shall be precluded from receiving a salary because he is also a director.[49] NSCC proposes to delete compensation-related references to the Chairman of the Board because the Non-Executive Chairman of the Board does not receive compensation.[50] Finally, NSCC proposes to change the title of proposed Section 3.10 from ''Compensation of Officers'' to ''Compensation of the President and Chief Executive Officer'' because this section would no longer address the compensation of officers other than the President and CEO.[51]

C. Technical Changes and Corrections

NSCC proposes technical changes and/or corrections to the By-Laws for clarity and readability, as described below.[52]

1. Statutory References and Requirements

NSCC would delete direct statutory references from the By-Laws.[53] NSCC states that it would make this change to have the By-Laws remain consistent and accurate despite any changes to a specifically cited statute.[54]

2. Audit Committee

NSCC proposes to revise proposed Section 2.11 (Audit Committee) to have the description of its Audit Committee conform to the description of the Audit Committee in the by-laws of FICC.[55]

3. Other Technical Changes and Corrections

NSCC proposes to make additional technical and grammatical changes to address (1) typographical errors, (2) section numbering, (3) grammatical

[30] *Id.*

[31] Notice, 83 FR at 6636.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] Notice, 83 FR at 6637.

[46] *Id.*

[47] *Id.*

[48] Notice, 83 FR at 6637. NSCC states that it proposes this change for consistency with the DTCC/DTC/FICC/NSCC Compensation and Human Resources Committee Charter. *Id.*

[49] *Id.*

[50] *Id.*

[51] Notice, 83 FR at 6644.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

errors, (4) heading consistency, and (5) gender references.[56]

D. Proposed Changes to the Rules

NSCC proposes to add an addendum (''Addendum V'') to the Rules.[57] NSCC proposes that Addendum V would be entitled ''By-Laws and Restated Certificate of Incorporation'' and would indicate that the By-Laws and Certificate of Incorporation are incorporated into the Rules by reference.[58]

II. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization.[59] The Commission believes the proposal is consistent with Act, specifically Section 17A(b)(3)(F) of the Act and Rules 17Ad–22(e)(1) and, in part, (2) under the Act.[60]

A. Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a clearing agency, such as NSCC, be designed to protect the public interest.[61] As discussed above, the proposed rule change would make a number of updates to the By-Laws.

First, NSCC proposes to revise NSCC's description of the titles and responsibilities of its Board and senior management to match NSCC's current corporate structure. These changes would help the Board, as well as NSCC's management, employees, and members, understand which officer or office is responsible for each of NSCC's executive-level functions.

Second, the proposal would update the compensation-setting section of the By-Laws to reflect the Compensation Committee Charter practice, as well as to reflect that the Non-Executive Chairman of the Board would not receive compensation. The proposal's increased clarity around compensation-setting would better inform NSCC stakeholders and the general public about how NSCC sets the level of compensation for its highest-level executive (the President and CEO) and that the Non-Executive Chairman does not draw a salary.

Third, NSCC's proposed technical changes and corrections to its By-Laws would enhance the clarity, transparency, and readability of NSCC's organizational documents. In this way, the proposal would better enable the Board, as well as NSCC's management, employees, and members, to understand their respective authorities, rights, and obligations regarding NSCC's clearance and settlement of securities transactions.

Finally, NSCC's proposed addendum would incorporate the By-Laws and Certificate of Incorporation into the Rules. This change would increase the clarity and transparency of NSCC's organizational documents by integrating the By-Laws and the Certificate of Incorporation into the Rules, to which all NSCC members are subject and have access.

Governance arrangements are critical to the sound operation of clearing agencies.[62] Specifically, clear and transparent governance documents promote accountability and reliability in the decisions, rules, and procedures of a clearing agency.[63] Clear and transparent governance documents also provide interested parties, including owners, members, and general members of the public, with information about how a clearing agency's decisions are made and what the rules and procedures are designed to accomplish.[64] Further, the decisions, rules, and procedures of a clearing agency are important, as they can have widespread impact, affecting multiple market members, financial institutions, markets, and jurisdictions.[65]

As stated above, the proposed rule change would provide NSCC stakeholders with a better understanding of how NSCC makes decisions that could ultimately affect the financial system. Such transparency helps ensure that NSCC reliably makes decisions and follows clearly articulated policies and procedures. Accordingly, the Commission finds that the proposed rule change is designed to enhance the clarity and transparency of NSCC's organizational documents, which would help protect the public interest, consistent with Section 17A(b)(3)(F) of the Act.[66]

B. Rule 17Ad–22(e)(1) Under the Act

Rule 17Ad–22(e)(1) under the Act requires a covered clearing agency[67] to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for a well-founded, transparent, and enforceable legal basis for each aspect of its activities in all relevant jurisdictions.[68]

As discussed above, the proposed rule change would update the By-Laws by (1) updating NSCC's description of the titles and responsibilities of its Board and senior management to match NSCC's current corporate structure, (2) documenting NSCC's current compensation-setting process, and (3) enacting technical corrections to increase readability. The proposed rule change would also add an addendum to the Rules to incorporate the By-Laws and the Certificate of Incorporation by reference.

The proposed changes are designed to help ensure that the By-Laws better reflect NSCC's governance practices, as well as to organize NSCC's organizational documents, in a clear, transparent, and consistent manner. This increased transparency would help convey to NSCC's stakeholders, and the public generally, a key legal basis for the activities of the highest levels of NSCC's leadership described in the By-Laws. Therefore, the Commission finds that the proposed rule change is designed to help ensure that NSCC's organizational documents remain well-founded, transparent, and legally enforceable in all relevant jurisdictions, consistent with Rule 17Ad–22(e)(1) under the Act.[69]

C. Rule 17Ad–22(e)(2)(i) and (v) Under the Act

Rule 17Ad–22(e)(2)(i) and (v) under the Act requires that NSCC establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for governance arrangements that, among other things, (1) are clear and

[56] Notice, 83 FR at 6637–38.

[57] Notice, 83 FR at 6638.

[58] *Id.*

[59] 15 U.S.C. 78s(b)(2)(C).

[60] 15 U.S.C. 78q–1(b)(3)(F); 17 CFR 240.17Ad–22(e)(1) and (2).

[61] 15 U.S.C. 78q–1(b)(3)(F).

[62] Securities Exchange Act Release No. 71699 (May 21, 2014), 79 FR 29508 (May 22, 2014) (''Covered Clearing Agency Standards Proposing Release'') at 29521.

[63] Securities Exchange Act Release No. 64017 (March 3, 2011), 76 FR 14472 (March 16, 2011) at 14488.

[64] *Id.*

[65] Covered Clearing Agency Standards Proposing Release, 79 FR at 29521.

[66] 15 U.S.C. 78q–1(b)(3)(F).

[67] A ''covered clearing agency'' means, among other things, a clearing agency registered with the Commission under Section 17A of the Exchange Act (15 U.S.C. 78q–1 *et seq.*) that is designated systemically important by the Financial Stability Oversight Counsel (''FSOC'') pursuant to the Payment, Clearing, and Settlement Supervision Act of 2010 (12 U.S.C. 5461 *et seq.*). *See* 17 CFR 240.17Ad–22(a)(5)–(6). On July 18, 2012, FSOC designated NSCC as systemically important. U.S. Department of the Treasury, ''FSOC Makes First Designations in Effort to Protect Against Future Financial Crises,'' *available at https://www.treasury.gov/press-center/press-releases/Pages/tg1645.asp.* Therefore, NSCC is a covered clearing agency.

[68] 17 CFR 240.17Ad–22(e)(1).

[69] *Id.*

transparent and (2) specify clear and direct lines of responsibility.[70]

As described above, NSCC proposes a number of changes that would provide clarity and transparency. NSCC proposes to revise By-Laws provisions that were outdated or incorrect. Specifically, the proposed changes to the titles and offices (and their related powers and duties) would provide clarity and transparency because they would clearly set forth NSCC's current organizational structure, including the lines of responsibility of various officers and the Board. The proposed changes relating to compensation-setting would also give clarity and transparency by (1) accurately reflecting the process that is followed pursuant to the Compensation Committee Charter, and (2) clarifying that the Non-Executive Chairman of the Board does not receive compensation. Finally, the proposed technical changes and corrections would raise the clarity and transparency of the By-Laws by removing grammatical and typographical errors. Additionally, NSCC also proposes changes to its Rules to provide clarity and transparency. Specifically, the proposed changes would create clarity and transparency by integrating the By-Laws and the Certificate of Incorporation into one document, the Rules (to which all NSCC members are subject and have access).

For these reasons, the Commission finds that the proposed rule change is designed to enhance clarity and transparency in NSCC's governance arrangements, as well as to specify clear and direct lines of responsibility for various officer positions and the Board within NSCC's organizational structure, consistent with Rule 17Ad–22(e)(2)(i) and (v) under the Act.[71]

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act, in particular the requirements of Section 17A of the Act[72] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that proposed rule change SR–NSCC–2018–001 be, and hereby is, *approved*.[73]

[70] 17 CFR 240.17Ad–22(e)(2)(i) and (v).

[71] *Id.*

[72] 15 U.S.C. 78q–1.

[73] In approving the proposed rule change, the Commission considered the proposals' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[74]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06030 Filed 3–23–18; 8:45 am]

BILLING CODE 8011–01–P

[74] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82914; File No. SR–DTC–2017–022]

Self-Regulatory Organizations; The Depository Trust Company; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend the Loss Allocation Rules and Make Other Changes

March 20, 2018.

I. Introduction

On December 18, 2017, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] proposed rule change SR–DTC–2017–022 to amend the loss allocation rules and make other changes (''Proposed Rule Change'').[3] The Proposed Rule Change was published for comment in the **Federal Register** on January 8, 2018.[4] The Commission did not receive any comments on the Proposed Rule Change. On February 8, 2018, pursuant to Section 19(b)(2)(A)(ii)(I) of the Act,[5] the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.[6] This order institutes proceedings, pursuant to Section 19(b)(2)(B) of the Act,[7] to determine whether to approve or disapprove the Proposed Rule Change.

II. Summary of the Proposed Rule Change[8]

As described in the Notice,[9] DTC proposes to revise Rule 4 (Participants Fund and Participants Investment) to primarily change (i) the application of the Participants Fund in a Participant Default and for settlement,[10] (ii) the loss allocation process,[11] (iii) the loss allocation governance for Non-Default Events,[12] and (iv) the retention time for the Actual Participants Fund Deposit of former participants.[13] Furthermore, the Proposed Rule change would revise Rule 1 (Definitions; Governing Law) to add cross-references to terms that would be defined in proposed Rule 4.[14]

A. Application of the Participants Fund in a Participant Default and for Settlement

DTC proposes to revise Rule 4, Section 4 (Application of Participants Fund Deposits of Non-Defaulting Participants) to address the situation where the application of the Actual Participants Fund Deposit of a Participant that has failed to settle is insufficient to complete settlement among non-defaulting Participants on any Business Day.[15] In such a situation, proposed Section 4 would state that the Participants Fund shall constitute a liquidity resource which may be applied by DTC in such amounts as DTC shall determine, in its sole discretion, to fund settlement among non-defaulting Participants.[16]

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On December 18, 2017, DTC filed this proposal as an advance notice (SR–DTC–2017–804) with the Commission pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') and Rule 19b–4(n)(1)(i) of the Act (''Advance Notice''). On January 24, 2018, the Commission extended the review period of the Advance Notice for an additional 60 days pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act. *See* 12 U.S.C. 5465(e)(1); 17 CFR 240.19b–4(n)(1)(i); 12 U.S.C. 5465(e)(1)(H); and Securities Exchange Act Release No. 82582 (January 24, 2018), 83 FR 4297 (January 30, 2018) (SR–DTC–2017–804).

[4] Securities Exchange Act Release No. 82426 (January 2, 2018), 83 FR 913 (January 8, 2018) (SR–DTC–2017–022) (''Notice'').

[5] 15 U.S.C. 78s(b)(2)(A)(ii)(I).

[6] Securities Exchange Act Release No. 82670 (February 8, 2018), 83 FR 6626 (February 14, 2018) (SR–DTC–2017–022; SR–FICC–2017–022; SR–NSCC–2017–018).

[7] 15 U.S.C. 78s(b)(2)(B).

[8] The Commission notes that the Summary of the Proposed Rule Change section does not describe the Proposed Rule Change in its entirety. Other changes include, but are not limited to, the clarification of defined terms, various aspects of the settlement charges, and detailed procedures of the loss allocation. The complete Proposed Rule Change can be found in the Notice. *See* Notice, *supra* note 4. In addition, the text of the Proposed Rule Change is *available at http://www.dtcc.com/legal/rules-and-procedures.aspx.*

[9] The description of the Proposed Rule Change herein is based on the statements prepared by DTC in the Notice. *See* Notice, *supra* note 4. Each capitalized term not otherwise defined herein has its respective meaning either (i) as set forth in the Rules, By-Laws and Organization Certificate of DTC, *available at http://www.dtcc.com/legal/rules-and-procedures.aspx,* or (ii) as set forth in the Notice.

[10] *See* Notice, *supra* note 4, at 914–15.

[11] *See id.* at 915–18.

[12] *See id.* at 918.

[13] *See id.* at 918–19.

[14] *See id.* at 919.

[15] *Id.* at 915.

[16] *Id.* at 919.

B. Loss Allocation Process

DTC proposes to revise Rule 4, Section 5 (Loss Allocation Waterfall) to address the loss allocation of losses and liabilities relating to or arising out of a Default Loss Event or a Declared Non-Default Loss Event.[17] DTC proposes four key changes to its loss allocation process.

First, DTC proposes to replace the current discretionary application of an unspecified amount of retained earnings and undivided profits with a mandatory, defined Corporate Contribution.[18] The proposed Corporate Contribution would be defined as an amount equal to 50 percent of DTC's General Business Risk Capital Requirement as of the end of the calendar quarter immediately preceding the Event Period.[19] DTC's General Business Risk Capital Requirement is, at a minimum, equal to the regulatory capital that DTC is required to maintain in compliance with Rule 17Ad–22(e)(15) under the Act.[20]

Second, DTC proposes to introduce an Event Period to address the allocation of losses and liabilities (i) relating to or arising out of a Participant Default, where DTC has ceased to act for such Participant, and/or (ii) otherwise incident to the business of DTC, as determined in proposed Rule 4.[21] DTC proposes to group together Default Loss Events and Declared Non-Default Loss Events occurring in a period of 10 Business Days for purposes of allocating losses to Participants.[22]

Third, DTC proposes to introduce a loss allocation ''round,'' which would mean ''a series of loss allocations relating to an Event Period, the aggregate amount of which is limited by the sum of the Loss Allocation Caps of affected Participants.'' [23] DTC would notify Participants subject to a loss allocation of the amounts being allocated to them.[24] Participants would be required to pay the requisite amount no later than the second Business Day following the issuance of such notice.[25]

Fourth, the Proposed Rule Change would continue to provide Participants the opportunity to limit their loss allocation exposure by offering a termination option, but the associated withdrawal process would be modified.[26] As proposed, if a Participant provides notice of its election to terminate its business with DTC as provided, in general, its maximum payment obligation with respect to any loss allocation round would be the amount of its Aggregate Requirement Deposit and Investment, as fixed on the first day of the Event Period, plus 100 percent of the amount thereof.[27] Participants would have five Business Days from the issuance of the first Loss Allocation Notice in any round to decide whether to terminate its participation with DTC, and thereby benefit from its Loss Allocation Cap.[28]

C. Loss Allocation Governance for Non-Default Events

DTC proposes to clarify the governance around Non-Default Loss Event that would trigger loss allocation to Participants. Specifically, DTC proposes to require its Board of Directors to determine that there is a non-default loss that (i) may present a significant and substantial loss or liability, so as to materially impair the ability to DTC to provide clearance and settlement services in an orderly manner, and (ii) will potentially generate losses to be mutualized among the Participants in order to ensure that DTC may continue to offer clearance and settlement services in an orderly manner.[29]

D. Retention Time for the Actual Participants Fund Deposit of a Former Participant

DTC proposes to reduce its retention time for the Actual Participants Fund Deposit of a Former Participant in certain situations from four years to two years.[30] Currently Rule 4 provides that, in general, after three months from when a Person has ceased to be Participant, DTC shall return to such Person the amount of the Actual Participants Fund Deposit of the former Participant of such payment provided that DTC receives such indemnities and guarantees as DTC deems satisfactory with respect to the matured and contingent obligations of the former Participant to DTC.[31] Otherwise, within four years after a Person has ceased to be a Participant, DTC shall return to such Person the amount of the Actual Participants Fund Deposit of the former Participant.[32] DTC proposes to reduce the four year retention period to two years, and preserve all other requirements relating to the return of the Actual Participants Fund Deposit.[33]

III. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [34] to determine whether the Proposed Rule Change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the Proposed Rule Change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to comment on the Proposed Rule Change, and provide the Commission with arguments to support the Commission's analysis as to whether to approve or disapprove the Proposed Rule Change.

Pursuant to Section 19(b)(2)(B) of the Act,[35] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the Proposed Rule Change's consistency with Section 17A of the Act,[36] and the rules thereunder, including the following provisions:

- Section 17A(b)(3)(F) of the Act,[37] which requires, among other things, that the rules of a clearing agency, such as DTC, must be designed to promote the prompt and accurate clearance and settlement of securities transactions, to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, and to protect investors and the public interest;
- Rule 17Ad–22(e)(7)(i) under the Act,[38] which requires a covered clearing agency, such as DTC, to establish, implement, maintain and enforce written policies and procedures reasonably designed to, among other things, effectively measure, monitor, and manage the liquidity risk that arises in or is borne by the covered clearing agency, including measuring, monitoring, and managing its settlement and funding flows on an ongoing and timely basis, and its use of intraday

[17] *Id.* at 920–21.
[18] Id. at 916.
[19] *Id.*
[20] *Id.;* 17 CFR 240.17Ad–22(e)(15).
[21] Notice, *supra* note 4, at 916.
[22] *Id.*
[23] *Id.* at 917.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 917–18.
[27] *Id.* at 917.
[28] *Id.* at 918.
[29] *Id.* at 918.
[30] *Id.* at 918–19.
[31] *Id.* at 918.
[32] *Id.*
[33] *Id.*
[34] 15 U.S.C. 78s(b)(2)(B).
[35] *Id.*
[36] 15 U.S.C. 78q–1.
[37] 15 U.S.C. 78q–1(b)(3)(F).
[38] 17 CFR 240.17Ad-22(e)(1).

liquidity by, at a minimum, maintaining sufficient liquid resources to effect same-day and, where appropriate, intraday and multiday settlement of payment obligations with a high degree of confidence under a wide range of foreseeable stress scenarios that includes, but is not limited to, the default of the participant family that would generate the largest aggregate payment obligation for the covered clearing agency in extreme but plausible market conditions;

• Rule 17Ad–22(e)(13) under the Act, which requires, in general, a covered clearing agency, such as DTC, to establish, implement, maintain and enforce written policies and procedures reasonably designed to ensure the covered clearing agency has the authority and operational capacity to take timely action to contain losses and liquidity demands and continue to meet its obligations.

• Rule 17Ad–22(e)(23)(i) under the Act,[39] which requires a covered clearing agency, such as DTC, to establish, implement, maintain and enforce written policies and procedures reasonably designed to publicly disclose all relevant rules and material procedures, including key aspects of its default rules and procedures.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the Proposed Rule Change. In particular, the Commission invites the written views of interested persons concerning whether the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act,[40] Rule 17Ad–22(e)(7)(i) under the Act,[41] Rule 17Ad–22(e)(13) under the Act,[42] Rule 17Ad–22(e)(23)(i) under the Act,[43] or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4(g) under the Act,[44] any request for an opportunity to make an oral presentation.[45]

Interested persons are invited to submit written data, views, and arguments regarding whether the Proposed Rule Change should be approved or disapproved by April 16, 2018. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by April 30, 2018.

The Commission asks that commenters address the sufficiency of DTC's statements in support of the Proposed Rule Change, which are set forth in the Notice,[46] in addition to any other comments they may wish to submit about the Proposed Rule Change.

Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–DTC–2017–022 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–DTC–2017–022. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the Proposed Rule Change that are filed with the Commission, and all written communications relating to the Proposed Rule Change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on The Depository Trust & Clearing Corporation's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–DTC–2017–022 and should be submitted on or before April 16, 2018. Rebuttal comments should be submitted by April 30, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[47]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06020 Filed 3–23–18; 8:45 am]

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[39] 17 CFR 240.17Ad–22(e)(23)(i).

[40] 15 U.S.C. 78q–1(b)(3)(F).

[41] 17 CFR 240.17Ad–22(e)(7)(i).

[42] 17 CFR 240.17Ad–22(e)(13).

[43] 17 CFR 240.17Ad–22(e)(23)(i).

[44] 17 CFR 240.19b–4(g).

[45] Section 19(b)(2) of the Act grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[46] *See* Notice, *supra* note 4.

[47] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82907; File No. SR–NYSEArca–2018–08]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change To Amend NYSE Arca Rule 1.1(ll) To Establish How the Official Closing Price Would Be Determined for an Exchange-Listed Security That Is a Derivative Securities Product if the Exchange Does Not Conduct a Closing Auction or if a Closing Auction Trade Is Less Than a Round Lot

March 20, 2018.

I. Introduction

On January 19, 2018, NYSE Arca, Inc. (''Exchange'' or ''NYSE Arca'') filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Arca Rule 1.1(ll) to establish how the Official Closing Price [3] would be determined for an Exchange-listed security that is a Derivative Securities Product [4] if the

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* NYSE Arca Rule 1.1(ll) for a definition of Official Closing Price.

[4] With respect to equities traded on the Exchange, the term ''Derivative Securities Product'' means a security that meets the definition of ''derivative securities product'' in Rule 19b–4(e) under the Act. *See* NYSE Arca Rule 1.1(k). For purposes of Rule 19b–4(e), a ''derivative securities product'' means any type of option, warrant, hybrid securities

Exchange does not conduct a Closing Auction [5] or if a Closing Auction trade is less than a round lot. The proposed rule change was published for comment in the **Federal Register** on February 6, 2018.[6] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

Current NYSE Arca Rule 1.1(ll)(1) provides how the Exchange establishes the ''Official Closing Price'' for Auction-Eligible Securities,[7] which is used for purposes of NYSE Arca Rule 7–E.[8] Specifically, the Official Closing Price for Auction-Eligible Securities is the price established in a Closing Auction of one round lot or more on a trading day.[9] If there is no Closing Auction or if a Closing Auction trade is less than a round lot on a trading day, the Official Closing Price is the most recent consolidated last-sale eligible trade during Core Trading Hours [10] on that trading day. If there were no consolidated last-sale eligible trades during Core Trading Hours on that trading day, the Official Closing Price will be the prior trading day's Official Closing Price.[11] For a security that has transferred listing to NYSE Arca and does not have any consolidated last-sale eligible trades on its first trading day, the Official Closing Price will be the prior day's closing price disseminated by the former primary listing market.[12] For a security that is a new listing and does not have any consolidated last-sale eligible trades on its first trading day, the Official Closing Price will be based on a derived last-sale associated with the price of such security before it begins trading on the Exchange.[13]

The Exchange proposes to amend how the Official Closing Price for an Exchange-listed security that is a Derivative Securities Product would be determined if the Exchange does not conduct a Closing Auction or if a Closing Auction trade is less than a round lot.[14] The Exchange proposes that the Official Closing Price for such securities would be comprised of both a time-weighted average price (''TWAP'') of the midpoint of the NBBO [15] over the last five minutes of trading before the end of Core Trading Hours and any last-sale eligible trades during that period.

Specifically, if the Official Closing Price for an Exchange-listed security that is a Derivative Securities Product cannot be determined under proposed NYSE Arca Rule 1.1(ll)(1)(A) (*i.e.,* if the Exchange does not conduct a Closing Auction or if a Closing Auction trade is less than a round lot), the Official Closing Price for such security would be derived by adding a percentage of the TWAP of the NBBO midpoint measured over the last five minutes before the end of Core Trading Hours and a percentage of the last consolidated last-sale eligible trade before the end of Core Trading Hours on that trading day, and the percentages assigned to each would depend on when the last consolidated last-sale eligible trade occurred.[16]

The Exchange proposes that, if the last consolidated last-sale eligible trade occurred:

(i) Prior to 5 minutes before the end of Core Trading Hours, the TWAP would be given 100% weighting;

(ii) between 5 minutes and 4 minutes before the end of Core Trading Hours, the TWAP will be given 40% weighting and the consolidated last-sale eligible trade would be given 60% weighting;

(iii) between 4 minutes and 3 minutes before the end of Core Trading Hours, the TWAP will be given 30% weighting and the consolidated last-sale eligible trade would be given 70% weighting;

(iv) between 3 minutes and 2 minutes before the end of Core Trading Hours, the TWAP will be given 20% weighting and the consolidated last-sale eligible trade would be given 80% weighting;

(v) between 2 minutes and 1 minute before the end of Core Trading Hours, the TWAP will be given 10% weighting and the consolidated last-sale eligible trade would be given 90% weighting; and

(vi) during the last 1 minute before the end of Core Trading Hours, the TWAP will be given 0% weighting and the consolidated last-sale eligible trade would be given 100% weighting.

If the Official Closing Price cannot be determined under proposed NYSE Arca Rule 1.1(ll)(1)(A) or (B), as described above, the most recent consolidated last-sale eligible trade during Core Trading Hours on that trading day would be the Official Closing Price.[17] If there are no consolidated last-sale eligible trades during Core Trading Hours on that trading day, the Official Closing Price will be the prior trading day's Official Closing Price, as under the current rule.[18]

The Exchange states that it will implement the proposed rule change no later than 120 days after this approval of the proposed rule change and will announce the implementation date via Trader Update.[19]

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[20] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[21] which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

product or any other security, other than a single equity option or a security futures product, whose value is based, in whole or in part, upon the performance of, or interest, in, an underlying instrument. 17 CFR 240.19b–4(e).

[5] See NYSE Arca Rule 7.35–E(d) for further information on how the Closing Auctions would function on the Exchange.

[6] *See* Securities Exchange Act Release No. 82608 (January 31, 2018), 83 FR 5284 (''Notice'').

[7] For purposes of the Closing Auction, an ''Auction-Eligible Security'' is defined to mean all securities for which the Exchange is the primary listing market and UTP Securities designated by the Exchange. *See* NYSE Arca Rule 7.35–E(a)(1).

[8] In NYSE Arca Rule 7–E, the Exchange uses the Official Closing Price for three purposes: (1) to determine the Auction Reference Price for a security, as provided for in NYSE Arca Rule 7.35–E(a)(8)(A); (2) to determine the Trading Collar for a security if there is no consolidated last-sale price on the same trading day, as provided for in NYSE Arca Rule 7.31–E(a)(1)(B)(i); and (3) for securities listed on the Exchange only, for purposes of determining whether to trigger a Short Sale Price Test, as defined under NYSE Arca Rule 7.16–E(f)(2).

[9] *See* NYSE Arca Rule 1.1(ll)(1).

[10] The term ''Core Trading Hours'' means the hours of 9:30 a.m. Eastern Time through 4:00 p.m. Eastern Time or such other hours as may be determined by the Exchange from time to time. *See* NYSE Arca Rule 1.1(j).

[11] *See* NYSE Arca Rule 1.1(ll)(1)(A).

[12] *See* NYSE Arca Rule 1.1(ll)(1)(B).

[13] *See* NYSE Arca Rule 1.1(ll)(1)(C).

[14] According to the Exchange, if a security is thinly traded or generally illiquid, the Official Closing Price for such security will currently be based on a last-sale trade that may be hours, days, or months old and may not be indicative of the true and current value of the security. *See* Notice, *supra* note 6, at 5285.

[15] The term ''NBBO'' means the national best bid or offer. *See* NYSE Arca Rule 1.1(dd).

[16] *See* proposed NYSE Arca Rule 1.1(ll)(1)(B).

[17] *See* proposed NYSE Arca Rule 1.1(ll)(1)(C).

[18] *See* proposed NYSE Arca Rule 1.1(ll)(1)(D). Current NYSE Arca Rule 1.1(ll)(1)(B) and (C) will similarly continue to apply as renumbered proposed Arca Rule 1.1(ll)(1)(E) and (F).

[19] *See* Notice, *supra* note 6, at 5285.

[20] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[21] 15 U.S.C. 78f(b)(5).

The Commission also finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,[22] which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The proposal would set forth the procedures governing how the Exchange would determine the Official Closing Price in Exchange-listed securities that are Derivative Securities Products when the Exchange does not conduct a Closing Auction or if a Closing Auction trade is less than a round lot. The Commission notes that the primary listing market's closing price for a security is relied upon by market participants for a variety of reasons, including, but not limited to, calculation of index values, calculation of the net asset value of mutual funds and exchange-traded products, the price of derivatives that are based on the security, and certain types of trading benchmarks such as volume weighted average price strategies. As the Exchange notes, the proposed calculation for the Official Closing Price is designed to utilize more recent and reliable market information to provide a closing price that more accurately reflects the true and current value of a security that may be thinly traded or generally illiquid and when the Official Closing Price for such security may otherwise be based on a potentially stale last-sale trade.[23] The Commission further notes that this objective calculation would take into account more recent firm quotations over less recent trades, which trades may provide less information about the value of a security, and would assign less weight to the last consolidated last-sale eligible trade the farther away it occurred from the end of Core Trading Hours. The Commission therefore believes that the Exchange's proposal is reasonably designed to achieve the Act's objectives to protect investors and the public interest. Accordingly, the Commission finds that the proposed rule change is consistent with the requirements of the Act.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change (SR–NYSEArca–2018–08) be, and hereby is, approved.

[22] 15 U.S.C. 78f(b)(8).

[23] *See* Notice, *supra* note 6, at 5285–86.

[24] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06014 Filed 3–23–18; 8:45 am]

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[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82917; File No. SR–FICC–2018–002]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Approving Proposed Rule Change To Amend the By-Laws

March 20, 2018.

On February 2, 2018, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') proposed rule change SR–FICC–2018–002, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder.[2] The proposed rule change was published for comment in the **Federal Register** on February 14, 2018.[3] The Commission did not receive any comment letters on the proposed rule change. For the reasons discussed below, the Commission approves the proposed rule change.

I. Description of the Proposed Rule Change

The proposed rule change would amend the FICC By-Laws (''By-Laws'') [4] to (1) change certain FICC Board of Directors (''Board'') titles, officer titles, and offices (and their respective powers and duties), (2) update the compensation section for officers, and (3) make technical changes and corrections, each discussed more fully below. The proposed rule change would also amend the GSD Rules and the MBSD Rules to incorporate, by reference, the By-Laws and the Certificate of Incorporation. Finally, the proposed rule change would restate the Certificate of Incorporation to streamline the document.

A. Changes to Certain Titles, Offices, and Related Powers and Duties

FICC proposes changes to the titles, offices, and related powers and duties of certain Board and officer personnel, as further described below.

1. Non-Executive Chairman of the Board

FICC proposes to replace the title of ''Chairman of the Board'' with the title of ''Non-Executive Chairman of the Board.'' [5] FICC proposes to change its By-Laws to reflect that this position is held by a non-executive.[6] Therefore, FICC would change relevant references in the By-Laws from ''Chairman'' and ''Chairman of the Board'' to ''Non-Executive Chairman of the Board.'' [7] FICC also would delete certain references in the By-Laws to the Non-Executive Chairman of the Board as a member of FICC management because the position is no longer in management.[8]

In the proposed Section 2.8 (Non-Executive Chairman of the Board), FICC would identify the powers and duties of the Non-Executive Chairman of the Board, including (1) general responsibility for carrying out the policies of the Board, (2) general supervision of the Board and its activities and general leadership of the Board, (3) presiding over stockholders' meetings (when present), and (4) such other powers and duties as the Board may designate.[9] Proposed Section 2.8 (Non-Executive Chairman of the Board) also would include a provision stating that a presiding director (as elected by the Board) shall preside at all stockholders and Board meetings when the Non-Executive Chairman of the Board is absent.[10] Additionally,

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 82672 (February 8, 2018), 83 FR 6654 (February 14, 2018) (SR–FICC–2018–002) (''Notice'').

[4] As discussed below, FICC's By-Laws and FICC's Certificate of Incorporation (''Certificate of Incorporation'') would each be incorporated by reference into FICC's Government Securities Division (''GSD'') Rulebook (''GSD Rules'') and Mortgage-Backed Securities Division (''MBSD'') Rulebook (''MBSD Rules''), *available at http://www.dtcc.com/legal/rules-and-procedures.*

[5] Notice, 83 FR at 6654.

[6] *Id.*

[7] *Id.*

[8] Notice, 83 FR at 6655.

[9] *Id.*

[10] *Id.* This provision is designed to correct an inaccuracy in current By-Laws Section 3.3 (Powers and Duties of the President), which gives presiding authority over stockholder meetings to the President when the Chairman of the Board is absent. Proposed Section 2.8 (Non-Executive Chairman of the Board) would be consistent with the Mission Statement and Charter of the Depository Trust Corporation (''DTC''), FICC, National Securities Clearing Corporation (''NSCC''), and the Depository Trust and Clearing Corporation (''DTCC''), which gives presiding authority over stockholder meetings to a presiding director when the Non-Executive Chairman of the Board is absent. DTC, FICC, and NSCC are subsidiaries of DTCC, each having the same Board of Directors as DTCC. *See* Securities Exchange Act Release No. 74142 (January 27, 2015), 80 FR 5188 (January 30, 2015) (SR–FICC–2014–810, SR–NSCC–2014–811, SR–DTC–2014–812).

Proposed Section 2.8 (Non-Executive Chairman of the Board) would provide that the Non-Executive Chairman of the Board's performance of any enumerated duty shall be conclusive evidence of his power to act.[11]

The proposal also identifies the individuals to whom the Non-Executive Chairman may assign duties. In proposed Section 3.2 (Powers and Duties of the President and Chief Executive Officer), the Non-Executive Chairman of the Board would have the authority to designate powers and duties to the President and Chief Executive Officer (''CEO'').[12] In proposed Section 3.2 (Powers and Duties of Managing Directors), FICC also would add the Non-Executive Chairman of the Board to the list of individuals who have the ability to assign powers and duties to Managing Directors.[13] Finally, in proposed Section 3.4 (Powers and Duties of the Secretary), the Non-Executive Chairman of the Board (*i.e.,* not the President and CEO) would have the authority to assign additional powers and duties to the Secretary.[14]

2. Office of the CEO

FICC proposes to revise the By-Laws to reflect that one individual holds the office of the President and CEO. As such, the proposal would change the By-Laws to add the office of the CEO and combine the office of the President and the office of the CEO into one office (President and CEO).[15] While current Section 3.3 (Powers and Duties of the President) provides that the President shall be the CEO, current Section 3.1 (General Provisions) does not include CEO in the list of designated officer positions, though President is currently included in this list.[16] Therefore, FICC proposes to revise the relevant references in the By-Laws from President to President and CEO.[17]

Additionally, FICC proposes to make several By-Laws revisions to reflect the responsibilities for the consolidated role of President and CEO.[18] First, FICC would delete and replace current Section 3.3 (Powers and Duties of the President) with proposed Section 3.2 (Powers and Duties of the President and CEO).[19] Proposed Section 3.2 (Powers and Duties of the President and CEO) would clarify the powers and duties associated with the role of President and CEO.[20] For example, in proposed Section 3.2 (Powers and Duties of the President and CEO) the President and CEO would have general supervision over the overall business strategy, business operations, systems, customer outreach, as well as risk management, control, and staff functions, subject to the direction of the Board and the Non-Executive Chairman of the Board.[21] In addition, because the office of the Chief Operating Officer (''COO'') would be eliminated (as described further below), the current COO responsibility of general supervision over FICC's operations in current Section 3.4 (Powers and Duties of the Chief Operating Officer) would be assigned to the President and CEO.[22] Proposed Section 3.2 (Powers and Duties of the President and CEO) would also delineate the authority that the Non-Executive Chairman of the Board has over the President and CEO by stating that the latter would have such other powers and perform such other duties as the Board or the Non-Executive Chairman of the Board may designate.[23]

FICC also proposes to reassign or reclassify several responsibilities currently assigned to the President.[24] Specifically, the responsibility for executing the Board's policies would be assigned to the Non-Executive Chairman of the Board rather than to the President and CEO.[25] Additionally, FICC would remove the statement ''performance of any such duty by the President shall be conclusive evidence of his power to act'' in current Section 3.3 (Powers and Duties of the President).[26]

As mentioned above, FICC would delete language from the By-Laws stating that, in the absence of the Chairman of the Board, the President shall preside at all meetings of shareholders and all Board meetings (when present).[27] Similarly, FICC would delete language from the By-Laws stating that the President and Board currently have the authority to assign powers and duties to the Comptroller in current Section 3.8 (Powers and Duties of the Comptroller), as discussed below.[28] In proposed Section 3.5 (Powers and Duties of the Chief Financial Officer) the President and CEO and Board would have the authority to assign duties to the Chief Financial Officer (''CFO'').[29]

The proposal also removes certain responsibilities from the President. In proposed Section 3.4 (Powers and Duties of the Secretary), the power to assign additional powers and duties to the Secretary would be removed from the President and granted to the Non-Executive Chairman of the Board.[30]

3. Office of the CFO; Office of the Comptroller

The proposal would add the office of the CFO and assign to the CFO general supervision of the financial operations of FICC.[31] References in the By-Laws to the Comptroller would be deleted because FICC states that it neither has a Comptroller nor plans to appoint one.[32] In proposed Section 3.5 (Powers and Duties of the Chief Financial Officer) the CFO would be granted overall supervision authority over the financial operations of FICC, and upon request, the CFO would counsel and advise other officers of FICC and perform other duties as agreed with the President and CEO (or as determined by the Board).[33] The proposal also provides that the CFO would report directly to the President and CEO.[34] Furthermore, because the Treasurer would directly report to the CFO, proposed Section 3.6 (Powers and Duties of the Treasurer) would provide that the Treasurer would have all such powers and duties as generally are incident to the position of Treasurer or as the CFO (in addition to the President and CEO and the Board) may assign.[35]

4. Office of the COO

In this proposal, FICC would delete references in the By-Laws to the COO because FICC states that it no longer has a COO and has no plans to appoint one.[36]

5. Executive Director; Vice President

In this proposal, FICC would change the title of Vice President to Executive Director, and update the Executive Director position's related powers and duties to reflect the position's seniority level.[37] In FICC's organizational structure, Executive Directors report to Managing Directors.[38] Due to this level

[11] Notice, 83 FR at 6655.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Notice, 83 FR at 6656.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* As stated above, that power resides with the presiding director who is elected annually by the Board. *See supra* note 20.
[28] Notice, 83 FR at 6656.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Notice, 83 FR at 6657.
[37] *Id.*
[38] *Id.*

of seniority, FICC proposes to remove provisions in the By-Laws that previously allowed Vice Presidents (now, Executive Directors) to call special meetings of shareholders, to sign share certificates, or to preside over shareholder meetings unless specifically designated to do so by the Board.[39]

6. Other Changes to the Powers and Duties of the Board and Certain Other Designated Officers

In proposed Section 3.1 (General Provisions), FICC proposes to add a parenthetical phrase to clarify that the Board's power to appoint other officers includes, but is not limited to, the power to appoint a Vice Chairman of the Corporation and one or more Executive Directors.[40] Additionally, in current Section 3.1 (General Provisions), FICC proposes to clarify that neither the Secretary nor any Assistant Secretary can hold the following offices (1) Vice Chairman of the Corporation or (2) President and CEO.[41]

The proposal also enumerates the responsibilities of FICC's Managing Directors.[42] In proposed Section 1.8 (Presiding Officer and Secretary), Managing Directors would be removed from the list of officers authorized to preside over a stockholders' meeting unless specifically authorized by the Board.[43] Similarly, in proposed Section 2.6 (Meetings), Managing Directors would be added to the list of officers authorized to call special meetings of the Board.[44]

FICC also proposes to amend the By-Laws to remove specific powers from the Treasurer and Assistant Treasurer.[45] In current Section 5.1 (Certificates of Shares), FICC proposes to delete the reference to Treasurer and Assistant Treasurer from the list of authorized signatories because FICC expects the Secretary or Assistant Secretary (who are each currently listed as authorized signatories) to sign any share certificates.[46]

B. Compensation of the President and CEO

Proposed Section 3.10 (Compensation of the President and CEO) would reflect FICC's current compensation-setting practices. Current Section 3.12 (Compensation of Officers) states that (1) the compensation, if any, of the Chairman of the Board, and the President shall be fixed by a majority (which shall not include the Chairman of the Board or the President) of the entire Board of Directors, and (2) salaries of all other officers shall be fixed by the President with the approval of the Board and no officer shall be precluded from receiving a salary because he is also a director.[47] FICC proposes to state that the Compensation Committee of the Corporation will recommend the compensation for the President and CEO to the Board of Directors for approval.[48] In addition, FICC also proposes to delete the language stating that (1) salaries of all other officers shall be fixed by the President with approval of the Board, and (2) no officer shall be precluded from receiving a salary because he is also a director.[49] FICC proposes to delete compensation-related references to the Chairman of the Board because the Non-Executive Chairman of the Board does not receive compensation.[50] Finally, FICC proposes to change the title of proposed Section 3.10 from ''Compensation of Officers'' to ''Compensation of the President and Chief Executive Officer'' because this section would no longer address the compensation of officers other than the President and CEO.[51]

C. Technical Changes and Corrections

FICC proposes technical changes and/or corrections to the By-Laws for clarity and readability, as described below.[52]

1. Statutory References and Requirements

FICC would delete direct statutory references from the By-Laws.[53] FICC states that it would make this change to have the By-Laws remain consistent and accurate despite any changes to a specifically cited statute.[54]

2. Other Technical Changes and Corrections

FICC proposes to make additional technical and grammatical changes to address (1) typographical errors, (2) section numbering, (3) grammatical errors, (4) heading consistency, and (5) gender references.[55]

D. Proposed Changes to the Rules

FICC proposes to add a section entitled ''By-Laws and Restated Certificate of Incorporation'' to both the GSD Rules and the MBSD Rules.[56] FICC proposes that this section would state that the By-Laws and Restated Certificate of Incorporation are incorporated by reference.[57]

E. Proposed Changes to the Certificate of Incorporation

FICC proposes to restate the Certificate of Incorporation into one document.[58] Specifically, FICC proposes to update the Certificate of Incorporation by including all of its amendments into one updated Certificate of Incorporation.[59]

II. Discussion and Commission Findings

Section 19(b)(2)(C) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and rules and regulations thereunder applicable to such organization.[60] The Commission believes the proposal is consistent with the Act, specifically Section 17A(b)(3)(F) of the Act and Rules 17Ad–22(e)(1) and, in part, (2) under the Act.[61]

A. Section 17A(b)(3)(F) of the Act

Section 17A(b)(3)(F) of the Act requires, in part, that the rules of a clearing agency, such as FICC, be designed to protect the public interest.[62] As discussed above, the proposed rule change would make a number of updates to the By-Laws.

First, FICC proposes to revise FICC's description of the titles and responsibilities of its Board and senior management to match FICC's current corporate structure. These changes would help the Board, as well as FICC's management, employees, and members, understand which officer or office is responsible for each of FICC's executive-level functions.

Second, the proposal would update the compensation-setting section of the By-Laws to reflect the Compensation Committee Charter practice, as well as to reflect that the Non-Executive Chairman of the Board would not receive compensation. The proposal's

[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] Notice, 83 FR at 6657–58. FICC states that it proposes this change for consistency with the DTCC/DTC/FICC/NSCC Compensation and Human Resources Committee Charter. *Id.* at 6658.
[49] Notice, 83 FR at 6658.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] 15 U.S.C. 78s(b)(2)(C).
[61] 15 U.S.C. 78q–1(b)(3)(F); 17 CFR 240.17Ad–22(e)(1) and (2).
[62] 15 U.S.C. 78q–1(b)(3)(F).

increased clarity around compensation-setting would better inform FICC stakeholders and the general public about how FICC sets the level of compensation for its highest-level executive (the President and CEO) and that the Non-Executive Chairman does not draw a salary.

Third, FICC's proposed technical changes and corrections to its By-Laws would enhance the clarity, transparency, and readability of FICC's organizational documents. In this way, the proposal would better enable the Board, as well as FICC's management, employees, and members, to understand their respective authorities, rights, and obligations regarding FICC's clearance and settlement of securities transactions.

Fourth, FICC's proposed addendum would incorporate the By-Laws and Certificate of Incorporation into the Rules. This change would increase the clarity and transparency of FICC's organizational documents by integrating the By-Laws and the Certificate of Incorporation into the Rules, to which all FICC members are subject and have access.

Finally, FICC's proposed restatement of the Certificate of Incorporation would revise the Certificate of Incorporation to include all of its amendments in one updated document. This change would increase the clarity and transparency of FICC's constitutional document by consolidating all of its amendment into a single document, increasing its accessibility and readability for FICC's members.

Governance arrangements are critical to the sound operation of clearing agencies.[63] Specifically, clear and transparent governance documents promote accountability and reliability in the decisions, rules, and procedures of a clearing agency.[64] Clear and transparent governance documents also provide interested parties, including owners, members, and general members of the public, with information about how a clearing agency's decisions are made and what the rules and procedures are designed to accomplish.[65] Further, the decisions, rules, and procedures of a clearing agency are important, as they can have widespread impact, affecting multiple market members, financial institutions, markets, and jurisdictions.[66]

As stated above, the proposed rule change would provide FICC stakeholders with a better understanding of how FICC makes decisions that could ultimately affect the financial system. Such transparency helps ensure that FICC reliably makes decisions and follows clearly articulated policies and procedures. Accordingly, the Commission finds that the proposed rule change is designed to enhance the clarity and transparency of FICC's organizational documents, which would help protect the public interest, consistent with Section 17A(b)(3)(F) of the Act.[67]

B. Rule 17Ad–22(e)(1) Under the Act

Rule 17Ad–22(e)(1) under the Act requires a covered clearing agency[68] to establish, implement, maintain, and enforce written policies and procedures reasonably designed to provide for a well-founded, transparent, and enforceable legal basis for each aspect of its activities in all relevant jurisdictions.[69]

As discussed above, the proposed rule change would update the By-Laws by (1) updating FICC's description of the titles and responsibilities of its Board and senior management to match FICC's current corporate structure, (2) documenting FICC's current compensation-setting process, and (3) enacting technical corrections to increase readability. The proposed rule change would also add an addendum to the Rules to incorporate the By-Laws and the Certificate of Incorporation by reference, as well as to restate the Certificate of Incorporation to include all of its amendments in one updated document.

The proposed changes are designed to help ensure that the By-Laws better reflect FICC's governance practices, as well as to organize FICC's constitutional documents, in a clear, transparent, and consistent manner. This increased transparency would help convey to FICC's stakeholders, and the public generally, a key legal basis for the activities of the highest levels of FICC's leadership described in the By-Laws. Therefore, the Commission finds that the proposed rule change is designed to help ensure that FICC's organizational documents remain well-founded, transparent, and legally enforceable in all relevant jurisdictions, consistent with Rule 17Ad–22(e)(1) under the Act.[70]

C. Rule 17Ad–22(e)(2)(i) and (v) under the Act

Rule 17Ad–22(e)(2)(i) and (v) under the Act requires that FICC establish, implement, maintain and enforce written policies and procedures reasonably designed to provide for governance arrangements that, among other things, (1) are clear and transparent and (2) specify clear and direct lines of responsibility.[71]

As described above, FICC proposes a number of changes to its By-Laws that would provide clarity and transparency. FICC proposes to revise By-Laws provisions that were outdated or incorrect. Specifically, the proposed changes to the titles and offices (and their related powers and duties) would provide clarity and transparency because they would clearly set forth FICC's current organizational structure, including the lines of responsibility of various officers and the Board. The proposed changes relating to compensation-setting would also give clarity and transparency by (1) accurately reflecting the process that is followed pursuant to the Compensation Committee Charter, and (2) clarifying that the Non-Executive Chairman of the Board does not receive compensation. Meanwhile, the proposed technical changes and corrections would raise the clarity and transparency of the By-Laws by removing grammatical and typographical errors. Additionally, FICC proposes changes to provide clarity and transparency by including an addendum to its Rules (to incorporate the By-Laws and Certificate of Incorporation by reference), and by restating its Certificate of Incorporation (to include all of its amendment in one updated document). Both proposed changes would create clarity and transparency by integrating FICC's organizational documents in a manner that is more accessible to FICC's members.

For these reasons, the Commission finds that the proposed rule change is

[63] Securities Exchange Act Release No. 71699 (May 21, 2014), 79 FR 29508 (May 22, 2014) (''Covered Clearing Agency Standards Proposing Release'') at 29521.

[64] Securities Exchange Act Release No. 64017 (March 3, 2011), 76 FR 14472 (March 16, 2011) at 14488.

[65] *Id.*

[66] Covered Clearing Agency Standards Proposing Release, 79 FR at 29521.

[67] 15 U.S.C. 78q–1(b)(3)(F).

[68] A ''covered clearing agency'' means, among other things, a clearing agency registered with the Commission under Section 17A of the Exchange Act (15 U.S.C. 78q–1 *et seq.*) that is designated systemically important by the Financial Stability Oversight Counsel (''FSOC'') pursuant to the Payment, Clearing, and Settlement Supervision Act of 2010 (12 U.S.C. 5461 *et seq.*). *See* 17 CFR 240.17Ad–22(a)(5)–(6). On July 18, 2012, FSOC designated FICC as systemically important. U.S. Department of the Treasury, ''FSOC Makes First Designations in Effort to Protect Against Future Financial Crises,'' *available at https://www.treasury.gov/press-center/press-releases/Pages/tg1645.asp.* Therefore, FICC is a covered clearing agency.

[69] 17 CFR 240.17Ad–22(e)(1).

[70] *Id.*

[71] 17 CFR 240.17Ad–22(e)(2)(i) and (v).

designed to enhance clarity and transparency in FICC's governance arrangements, as well as to specify clear and direct lines of responsibility for various officer positions and the Board within FICC's organizational structure, consistent with Rule 17Ad–22(e)(2)(i) and (v) under the Act.[72]

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act, in particular the requirements of Section 17A of the Act [73] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that proposed rule change SR–FICC–2018–002 be, and hereby is, APPROVED.[74]

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[75]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06031 Filed 3–23–18; 8:45 am]

BILLING CODE 8011–01–P

[72] *Id.*

[73] 15 U.S.C. 78q-1.

[74] In approving the proposed rule change, the Commission considered the proposals' impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[75] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82908; File No. SR–NSCC–2017–017]

Self-Regulatory Organizations; National Securities Clearing Corporation; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Adopt a Recovery & Wind-Down Plan and Related Rules

March 20, 2018.

I. Introduction

On December 18, 2017, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] proposed rule change SR–NSCC–2017–017 to adopt a recovery and wind-down plan and related rules (''Proposed Rule Change'').[3] The Proposed Rule Change was published for comment in the **Federal Register** on January 8, 2018.[4] The Commission did not receive any comments on the Proposed Rule Change. On February 8, 2018, pursuant to Section 19(b)(2)(A)(ii)(I) of the Act,[5] the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.[6] This order institutes proceedings, pursuant to Section 19(b)(2)(B) of the Act,[7] to determine whether to approve or disapprove the Proposed Rule Change.

II. Summary of the Proposed Rule Change

As described in the Notice,[8] NSCC proposes to adopt a Recovery & Wind-down Plan (''R&W Plan'') and three proposed rules that would facilitate the implementation of the R&W Plan: (i) Proposed Rule 41 (Corporation Default) (''Corporation Default Rule''), (ii) proposed Rule 42 (Wind-down of the Corporation) (''Wind-down Rule''), and (iii) proposed Rule 60 (Market Disruption and Force Majeure) (''Force Majeure Rule''). Additionally, NSCC proposes to re-number existing Rule 42 (Wind-down of a Member, Fund Member or Insurance Carrier/Retirement Services Member) to Rule 40, which is currently reserved for future use.

NSCC states that the R&W Plan is intended to be used by NSCC's Board of Directors and management in the event that NSCC encounters scenarios that could potentially prevent it from being able to provide its critical services as a going concern.[9] The R&W Plan would be structured to provide a roadmap, define the strategy, and identify the tools available to NSCC to either (i) recover in the event it experiences losses that exceed its prefunded resources or (ii) wind-down its business in a manner designed to permit the continuation of its critical services in the event that such recovery efforts are not successful.[10] The R&W Plan would include tools that are provided for in NSCC's existing rules, policies, procedures, and contractual arrangements,[11] as well as the proposed Corporation Default Rule, the proposed Wind-down Rule, and the proposed Force Majeure Rule.[12]

NSCC states that the proposed Corporation Default Rule, proposed Wind-down Rule, and proposed Force Majeure Rule are designed to (i) facilitate the implementation of the R&W Plan when necessary; (ii) provide Members and Limited Members with transparency around critical provisions of the R&W Plan that relate to their rights, responsibilities and obligations; and (iii) provide NSCC with the legal basis to implement the provisions of the R&W Plan that concern the proposed Corporation Default Rule, the proposed Wind-down Rule, and the proposed Force Majeure Rule, when necessary.[13]

NSCC states that it is proposing to re-number existing Rule 42 (Wind-down of a Member, Fund Member or Insurance Carrier/Retirement Services Member) to Rule 40 to align the order of NSCC's proposed rules with the order of comparable rules in the rulebooks of The Depository Trust Company and Fixed Income Clearing Corporation,[14] which, together with NSCC, are subsidiaries of The Depository Trust & Clearing Corporation (''DTCC''), a user-owned and user-governed holding company.[15]

As an overview, the R&W Plan would provide, among other matters, (i) an overview of the business of NSCC and its parent DTCC; (ii) an analysis of NSCC's intercompany arrangements and critical links to other financial market infrastructures; (iii) a description of NSCC's services, and the criteria used to determine which services are considered critical; (iv) a description of the NSCC and DTCC governance structure; (v) a description of the governance around the overall recovery and wind-down program; (vi) a discussion of tools available to NSCC to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On December 18, 2017, NSCC filed this proposal as an advance notice (SR–NSCC–2017–805) with the Commission pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') and Rule 19b–4(n)(1)(i) of the Act (''Advance Notice''). On January 24, 2018, the Commission extended the review period of the Advance Notice for an additional 60 days pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act. *See* 12 U.S.C. 5465(e)(1); 17 CFR 240.19b–4(n)(1)(i); 12 U.S.C. 5465(e)(1)(H); and Securities Exchange Act Release No. 82581 (January 24, 2018), 83 FR 4327 (January 30, 2018) (SR–NSCC–2017–805).

[4] Securities Exchange Act Release No. 82430 (January 2, 2018), 83 FR 841 (January 8, 2018) (SR–NSCC–2017–017) (''Notice'').

[5] 15 U.S.C. 78s(b)(2)(A)(ii)(I).

[6] Securities Exchange Act Release No. 82669 (February 8, 2018), 83 FR 6653 (February 14, 2018) (SR–DTC–2017–021; SR–FICC–2017–021; SR–NSCC–2017–017).

[7] 15 U.S.C. 78s(b)(2)(B).

[8] The description of the Proposed Rule Change is based on the statements prepared by NSCC in the Notice. *See* Notice, *supra* note 4. Capitalized terms used herein and not otherwise defined herein are defined in NSCC's Rules & Procedures, *available at www.dtcc.com/~/media/Files/Downloads/legal/rules/nscc_rules.pdf.*

[9] *See* Notice, *supra* note 4, at 842.

[10] *Id.* at 843.

[11] Contractual arrangements include, for example, NSCC's existing committed or pre-arranged liquidity arrangements.

[12] *See* Notice, *supra* note 4, at 842.

[13] *Id.* at 841.

[14] *Id.* at 851.

[15] *Id.* at 843.

mitigate credit/market[16] and liquidity risks, including recovery indicators and triggers, and the governance around management of a stress event along a ''Crisis Continuum'' timeline; (vii) a discussion of potential non-default losses and the resources available to NSCC to address such losses, including recovery triggers and tools to mitigate such losses;[17] (viii) an analysis of the recovery tools' characteristics, including how they are comprehensive, effective, and transparent, how the tools provide appropriate incentives to Members to, among other things, control and monitor the risks they may present to NSCC, and how NSCC seeks to minimize the negative consequences of executing its recovery tools; and (ix) the framework and approach for the orderly wind-down and transfer of NSCC's business,[18] including an estimate of the time and costs to effect a recovery or orderly wind-down of NSCC.[19]

The framework and approach for orderly wind-down would provide (i) for the transfer of NSCC's business, assets, and membership to another legal entity; (ii) that NSCC would effectuate the transfer in connection with proceedings under Chapter 11 of the U.S. Bankruptcy Code;[20] and (iii) that after effectuating this transfer, NSCC would liquidate any remaining assets in an orderly manner in bankruptcy proceedings.[21] NSCC states that it believes that the proposed transfer approach to a wind-down would meet its objectives of (i) assuring that NSCC's critical services will be available to the market as long as there are Members in good standing, and (ii) minimizing disruption to the operations of Members and financial markets generally that might be caused by NSCC's failure.[22]

III. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[23] to determine whether the Proposed Rule Change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the Proposed Rule Change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to comment on the Proposed Rule Change, and provide the Commission with arguments to support the Commission's analysis as to whether to approve or disapprove the Proposed Rule Change.

Pursuant to Section 19(b)(2)(B) of the Act,[24] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the Proposed Rule Change's consistency with Section 17A of the Act,[25] and the rules thereunder, including the following provisions:

• Section 17A(b)(3)(F) of the Act,[26] which requires, among other things, that the rules of a clearing agency, such as NSCC, must be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible and to protect investors and the public interest; and

• Rule 17Ad–22(e)(3)(ii) under the Act,[27] which requires a covered clearing agency,[28] such as NSCC, to, among other things, establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by NSCC, which includes plans for the recovery and orderly wind-down of NSCC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the Proposed Rule Change. In particular, the Commission invites the written views of interested persons concerning whether the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act,[29] Rule 17Ad–22(e)(3)(ii) under the Act,[30] or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4(g) under the Act,[31] any request for an opportunity to make an oral presentation.[32]

Interested persons are invited to submit written data, views, and arguments regarding whether the Proposed Rule Change should be approved or disapproved by April 16, 2018. Any person who wishes to file a rebuttal to any other person's

[16] NSCC states that NSCC manages its credit exposure to Members as part of its market risk management strategy. *Id.* at 844.

[17] As described in more detail in the Notice, this section of the R&W Plan would describe the proposed Force Majeure Rule, which would govern how NSCC would address extraordinary events that may occur outside its control. *See* Notice, *supra* note 4, at 851. The proposed Force Majeure Rule would identify the events or circumstances that would be considered a ''Market Disruption Event,'' including, for example, events that lead to the suspension or limitation of trading or banking in the markets in which NSCC operates, or the unavailability or failure of any material payment, bank transfer, wire or securities settlement systems. *Id.* Under the proposed Force Majeure Rule, during the pendency of a Market Disruption Event, NSCC would be entitled to (i) suspend the provision of any or all services; and (ii) take, or refrain from taking, or require Members and Limited Members to take, or refrain from taking, any actions it considers appropriate to address, alleviate, or mitigate the event and facilitate the continuation of NSCC's services as may be practicable. *Id.*

[18] This section of the R&W Plan would refer to the proposed Wind-down Rule and the proposed Corporation Default Rule. *See* Notice, *supra* note 4, at 847–49 (discussing wind-down), 849–51 (discussing the proposed Corporation Default Rule and the proposed Wind-down Rule). The proposed Wind-down Rule would provide a mechanism to implement the framework and approach for an orderly wind-down if recovery tools do not successfully return NSCC to financial viability. *Id.* at 847–51. As described more fully in the Notice, the proposed Corporation Default Rule would provide a mechanism for the termination, valuation, and netting of unsettled, guaranteed Continuous Net Settlement (''CNS'') transactions in the event NSCC is unable to perform its obligations or otherwise suffers a defined event of default, such as entering insolvency proceedings (''Corporation Default''). *Id.* at 849. Upon Corporation Default, the proposed Corporation Default Rule would provide that all unsettled, guaranteed CNS transactions would be terminated and, no later than forty-five days from the date on which the event that constitutes a Corporation Default occurred, the Board of Directors would determine a single net amount owed by or to each Member with respect to such transactions pursuant to the valuation procedures set forth in the proposed Corporation Default Rule. *Id.*

[19] *See* Notice, *supra* note 4, at 842.

[20] 11 U.S.C. 101 *et seq.*

[21] *See* Notice, *supra* note 4, at 847.

[22] *Id.*

[23] 15 U.S.C. 78s(b)(2)(B).

[24] *Id.*

[25] 15 U.S.C. 78q–1.

[26] 15 U.S.C. 78q–1(b)(3)(F).

[27] 17 CFR 240.17Ad–22(e)(3)(ii).

[28] *See* 17 CFR 240.17Ad–22(a)(5) for the definition of a covered clearing agency.

[29] 15 U.S.C. 78q–1(b)(3)(F).

[30] 17 CFR 240.17Ad–22(e)(3)(ii).

[31] 17 CFR 240.19b–4(g).

[32] Section 19(b)(2) of the Act grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

submission must file that rebuttal by April 30, 2018.

The Commission asks that commenters address the sufficiency of NSCC's statements in support of the Proposed Rule Change, which are set forth in the Notice,[33] in addition to any other comments they may wish to submit about the Proposed Rule Change.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NSCC–2017–017 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–NSCC–2017–017. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the Proposed Rule Change that are filed with the Commission, and all written communications relating to the Proposed Rule Change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of NSCC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–NSCC–2017–017 and should be submitted on or before April 16, 2018. Rebuttal comments should be submitted by April 30, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06022 Filed 3–23–18; 8:45 am]

BILLING CODE 8011–01–P

[33] *See* Notice, *supra* note 4.

[34] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82905; File No. SR–NASDAQ–2018–021]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Transaction Fees at Rule 7018 To Charge No Transaction Fee for Execution of Midpoint Extended Life Orders

March 20, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on March 9, 2018, The Nasdaq Stock Market LLC (''Nasdaq'' or ''Exchange'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's transaction fees at Rule 7018 to charge no transaction fee for execution of Midpoint Extended Life Orders. While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on March 12, 2018.

The text of the proposed rule change is available on the Exchange's website at *http://nasdaq.cchwallstreet.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's transaction fees at Rule 7018 to charge no transaction fee for execution of Midpoint Extended Life Orders. On March 7, 2018, the Commission approved the Exchange's proposal to adopt a new Order Type, the Midpoint Extended Life Order.[3] The Midpoint Extended Life Order is an Order Type with a Non-Display Order Attribute that is priced at the midpoint between the NBBO and that will not be eligible to execute until the Holding Period of one half of a second has passed after acceptance of the Order by the System. Once a Midpoint Extended Life Order becomes eligible to execute by existing unchanged for the Holding Period, the Order may only execute against other eligible Midpoint Extended Life Orders. The Exchange will begin offer Midpoint Extended Life Orders on March 12, 2018.[4]

Under Rule 7018, the Exchange assesses fees for Orders entered into the Nasdaq System. The fees cover Orders in all three tapes and in securities both priced $1 and above (Rule 7018(a)), and below $1 (Rule 7018(b)). The Exchange is proposing initially to not charge a transaction fee for execution of Midpoint Extended Life Orders. Allowing transactions to occur at no cost will promote use of the Midpoint Extended Life Order, which will help bring liquidity in Midpoint Extended Life Orders to the Exchange and promote market quality. The Exchange plans to adopt fees for Midpoint Extended Life Orders in the future and will do so through the SEC rulemaking process.[5] Accordingly, the Exchange is proposing to amend Rule 7018(a)(1)–(3) to note that members executing a Midpoint Extended Life Order will be

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 82825 (March 7, 2018) (SR–NASDAQ–2017–074) (pending publication in the **Federal Register**).

[4] *See http://www.nasdaqtrader.com/TraderNews.aspx?id=ETA2018-20.*

[5] *Id.*

assessed a charge of $0.0000 per share executed. The Exchange is amending Rule 7018(b) to note that members executing a Midpoint Extended Life Order will be assessed a charge of 0.0% of the total transaction cost.[6] The Exchange is also adding rule text to an existing fee under Rule 7018(b) to make it clear that Midpoint Extended Life Orders are excluded from the fee.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[7] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[8] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that not charging a fee for executions in Midpoint Extended Life Orders is reasonable because the Exchange does not currently charge for transactions in other Orders under Rule 7018. Specifically, the exchange does not charge a fee for transactions in Orders with a RTFY routing Order Attribute.[9] Such an Order must meet the definition of Designated Retail Order, which requires, among other things, that the Order not originate from a trading algorithm or any other computerized methodology.[10] Thus, allowing transactions of the RTFY Order Attribute at no cost is designed to promote the Exchange as a venue for retail investor Orders. Likewise, the Exchange is proposing to allow transactions in Midpoint Extended Life Orders at no cost to promote use of such Orders and consequently the quality of the market in Midpoint Extended Life Orders. As discussed extensively in its proposal,[11] the Exchange believes that the Midpoint Extended Life Order is consistent with the Act because it is emblematic of a core function of a national securities exchange, namely matching buyers and sellers of securities on a transparent and well-regulated market, and helping these buyers and sellers come together to receive the best execution possible. The Exchange achieves this by permitting Midpoint Extended Life Orders to execute solely against other Midpoint Extended Life Orders at the midpoint of the NBBO in return for providing market-improving behavior in the form of a longer-lived midpoint order. Accordingly, the Exchange believes that allowing transactions of Midpoint Extended Life Orders at no cost is reasonable.

The Exchange also believes that not charging a fee for executions in Midpoint Extended Life Order is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee to all similarly situated members. The Midpoint Extended Life Order may be used by any market participant that is willing to satisfy the requirements of the Order Type and therefore qualify for the proposed zero fee tiers. Moreover, members not interested in using Midpoint Extended Life Orders will continue to have the ability to enter midpoint Orders in the Nasdaq System, which have both fees and credits associated with their execution.[12] As noted above, the Exchange intends to assess fees for transactions in Midpoint Extended Life Orders in the near future,[13] once it has had time to assess the nature of the market in Midpoint Extended Life Orders to determine the appropriate fee. Accordingly, the proposed fee does not discriminate in any way.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposal to assess no fee for executions of Midpoint Extended Life Orders will not place any burden on competition, but rather will help launch the proposed new Order Type by making it attractive to members that seek to execute at the midpoint with like-minded members. To the extent the proposal is successful in promoting liquidity in Midpoint Extended Life Orders, other markets may be incented to provide a competitive response by innovating like the Exchange has done in this instance. To the extent the proposal is not successful in promoting liquidity in Midpoint Extended Life Orders, it would have no meaningful impact on competition as few transactions in Midpoint Extended Life Orders would occur. In sum, if the proposal to assess no fees for executions of Midpoint Extended Life Orders is unattractive to market participants, it is likely that the Exchange will not gain any market share as a result and therefore no competitive impact. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.[14]

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

[6] Unlike fees for transactions in securities price at $1 or greater, which are assessed on a per share executed basis, fees for transactions in securities less than $1 are assessed fees based on a percentage of the total transaction cost.

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(4) and (5).

[9] RTFY is a routing option available for an order that qualifies as a Designated Retail Order under which orders check the System for available shares only if so instructed by the entering firm and are thereafter routed to destinations on the System routing table. If shares remain unexecuted after routing, they are posted to the book. Once on the book, should the order subsequently be locked or crossed by another market center, the System will not route the order to the locking or crossing market center. RTFY is designed to allow orders to participate in the opening, reopening and closing process of the primary listing market for a security. *See* Rule 4758(a)(1)(A)(v)b.

[10] *See* Rule 7018.

[11] *See* note 3, *supra.*

[12] Based on whether the member is removing or adding liquidity. *See* Rule 7018(a)(b).

[13] Any fee change will be made by the rule change filing process with the Commission.

[14] 15 U.S.C. 78s(b)(3)(A)(ii).

the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2018–021 on the subject line.

Paper Comments

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2018–021. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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–NASDAQ–2018–021, and should be submitted on or before April 16, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06012 Filed 3–23–18; 8:45 am]

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15 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82909; File No. SR–FICC–2017–022]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend the Loss Allocation Rules and Make Other Changes

March 20, 2018.

I. Introduction

On December 18, 2017, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] proposed rule change SR–FICC–2017–022 to amend the loss allocation rules and make other changes (''Proposed Rule Change'').[3] The Proposed Rule Change was published for comment in the **Federal Register** on January 8, 2018.[4] The Commission did not receive any comments on the Proposed Rule Change. On February 8, 2018, pursuant to Section 19(b)(2)(A)(ii)(I) of the Act,[5] the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.[6] This order institutes proceedings, pursuant to Section 19(b)(2)(B) of the Act,[7] to determine whether to approve or disapprove the Proposed Rule Change.

II. Summary of the Proposed Rule Change [8]

As described in the Notice,[9] the proposed rule change consists of modifications to FICC's Government Securities Division (''GSD'') Rulebook (''GSD Rules'') and Mortgage-Backed Securities Division (''MBSD'' and, together with GSD, the ''Divisions'' and, each, a ''Division'') Clearing Rules (''MBSD Rules,'' and collectively with the GSD Rules, the ''Rules'') in order to amend provisions in the Rules regarding loss allocation as well as make other changes, as described in greater detail below.

FICC proposes to revise the Rules to primarily change (i) the loss allocation process,[10] (ii) the loss allocation governance for Declared Non-Default Loss Events,[11] and (iii) the application of the MBSD Clearing Fund.[12]

A. Loss Allocation Process

FICC states that the Divisions would retain the current core loss allocation process.[13] However, FICC proposes to revise Rule 4 (Clearing Fund and Loss Allocation) of each Division's Rules to make five key changes to FICC's loss allocation process.

First, FICC proposes to replace the calculation of its corporate contribution from up to 25 percent of its retained earnings or such higher amount as the Board of Directors shall determine to a defined Corporate Contribution.[14] The proposed Corporate Contribution would be defined as an amount equal to 50

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b–4.

3 On December 18, 2017, FICC filed this proposal as an advance notice (SR–FICC–2017–806) with the Commission pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') and Rule 19b–4(n)(1)(i) of the Act (''Advance Notice''). On January 24, 2018, the Commission extended the review period of the Advance Notice for an additional 60 days pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act. *See* 12 U.S.C. 5465(e)(1); 17 CFR 240.19b–4(n)(1)(i); 12 U.S.C. 5465(e)(1)(H); and Securities Exchange Act Release No. 82583 (January 24, 2018), 83 FR 4358 (January 30, 2018) (SR–FICC–2017–806).

4 Securities Exchange Act Release No. 82427 (January 2, 2018), 83 FR 854 (January 8, 2018) (SR–FICC–2017–022) (''Notice'').

5 15 U.S.C. 78s(b)(2)(A)(ii)(I).

6 Securities Exchange Act Release No. 82670 (February 8, 2018), 83 FR 6626 (February 14, 2018) (SR–DTC–2017–022; SR–FICC–2017–022; SR–NSCC–2017–018).

7 15 U.S.C. 78s(b)(2)(B).

8 The Commission notes that the Summary of the Proposed Rule Change section does not describe the Proposed Rule Change in its entirety. Other changes include, but are not limited to, the clarification of defined terms, various aspects of the Clearing Fund application, and detailed procedures of the loss allocation. The complete Proposed Rule Change can be found in the Notice. *See* Notice, *supra* note 4. In addition, the text of the Proposed Rule Change is *available at http://www.dtcc.com/legal/rules-and-procedures.aspx.*

9 The description of the Proposed Rule Change herein is based on the statements prepared by FICC in the Notice. *See* Notice, *supra* note 4. Each capitalized term not otherwise defined herein has its respective meaning either (i) as set forth in the Rules, *available at http://www.dtcc.com/legal/rules-and-procedures.aspx,* or (ii) as set forth in the Notice.

10 *See* Notice, *supra* note 4, at 855–59.

11 *See id.* at 859–60.

12 *See id.* at 860.

13 *Id.* at 855.

14 *Id.* at 856.

percent of FICC's General Business Risk Capital Requirement.[15] FICC's General Business Risk Capital Requirement is, at a minimum, equal to the regulatory capital that FICC is required to maintain in compliance with Rule 17Ad–22(e)(15) under the Act.[16] In addition, FICC proposes to mandatorily apply Corporate Contribution (i) prior to a loss allocation among the applicable Division's members, and (ii) to losses arising from both Defaulting Member Events and Declared Non-Default Loss Events.[17]

Second, FICC proposes to introduce an Event Period to address the allocation of losses and liabilities that may arise from or relate to multiple Defaulting Member Events, Declared Non-Default Loss Events, or both that arise in quick succession in a Division.[18] The proposal would group together Defaulting Member Events and Declared Non-Default Loss Events occurring in a period of 10 Business Days for purposes of allocating losses to applicable Tier One Netting Members or Tier One Members of the respective Divisions in one or more rounds.[19]

Third, FICC proposes to introduce a loss allocation ''round,'' which would mean ''a series of loss allocations relating to an Event Period, the aggregate amount of which is limited by the sum of the Loss Allocation Caps of affected Tier One Netting Members or Tier One Members, as applicable.''[20] FICC would notify applicable members subject to a loss allocation of the amounts being allocated to them.[21] Each applicable member would have five Business Days from the issuance of such first Loss Allocation Notice for the round to notify FICC of its election to withdraw from membership, and thereby benefit from its Loss Allocation Cap.[22]

Fourth, FICC proposes to revise its ''look-back'' period to calculate a member's loss allocation pro rata share and its Loss Allocation Cap.[23] Currently, the Rules calculate, in general, a Tier One Netting Member's or a Tier One Member's pro rata share for purposes of loss allocation based on the member's average daily Required Fund Deposit over the prior 12 months.[24] FICC proposes to calculate, in general, each member's pro rata share of losses and liabilities in any round to be equal to (i) the average of a member's Required Fund Deposit for 70 Business Days prior to the first day of the applicable Event Period (''Average RFD'') divided by (ii) the sum of Average RFD amounts for all members that are subject to a loss allocation in such round.[25] Additionally, FICC proposes that each member's Loss Allocation Cap would be equal to the greater of (i) its Required Fund Deposit on the first day of the applicable Event Period or (ii) its Average RFD.[26]

Fifth, FICC proposes to revise the cap on a loss allocation and the withdrawal process followed by a loss allocation. As proposed, if a member provides notice of its withdrawal from membership, in general, its maximum amount of losses with respect to any loss allocation round would be its Loss Allocation Cap.[27] FICC further proposes that members would have two Business Days after GSD or MBSD issues a first round Loss Allocation Notice to pay the amount specified in such notice.[28] Members would have five Business Days from the issuance of the first Loss Allocation Notice in any round to decide whether to terminate its membership, provided that the member complies with the requirements of the proposed withdrawal process.[29]

B. Loss Allocation Governance for Declared Non-Default Loss Events

FICC proposes to enhance the governance around Declared Non-Default Loss Events that would trigger a loss allocation by specifying that the Board of Directors would have to determine that there is a non-default loss that (i) may present a significant and substantial loss or liability, so as to materially impair the ability of FICC to provide clearance and settlement services in an orderly manner, and (ii) will potentially generate losses to be mutualized among members in order to ensure that FICC may continue to offer clearance and settlement services in an orderly manner.[30] FICC would then be required to promptly notify members of this determination.[31]

C. Application of the MBSD Clearing Fund

FICC proposes to delete language currently in MBSD Rule 4 (Clearing Fund and Loss Allocation), Section 5 (Use of Clearing Fund) that limits certain uses by FICC of the MBSD Clearing Fund to ''unexpected or unusual'' requirements for funds that represent a ''small percentage'' of the MBSD Clearing Fund.[32] Specifically, FICC proposes to delete the limiting language with respect to FICC's use of the MBSD Clearing Fund to cover losses and liabilities incident to its clearance and settlement business outside the context of an MBSD Defaulting Member Event so as to not have such language interpreted as impairing FICC's ability to access the MBSD Clearing Fund in order to manage non-default losses.[33] FICC also proposes to delete the limiting language with respect to FICC's use of the MBSD Clearing Fund to provide liquidity to meet its settlement obligation.[34]

III. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[35] to determine whether the Proposed Rule Change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the Proposed Rule Change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to comment on the Proposed Rule Change, and provide the Commission with arguments to support the Commission's analysis as to whether to approve or disapprove the Proposed Rule Change.

Pursuant to Section 19(b)(2)(B) of the Act,[36] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the Proposed Rule Change's consistency with Section 17A of the Act,[37] and the rules thereunder, including the following provisions:

- Section 17A(b)(3)(F) of the Act,[38] which requires, among other things, that the rules of a clearing agency, such as FICC, must be designed to promote the prompt and accurate clearance and settlement of securities transactions, to

[15] *Id.*

[16] *Id.;* 17 CFR 240.17Ad–22(e)(15).

[17] Notice, *supra* note 4, at 856.

[18] *Id.* at 856–57.

[19] *Id.* at 857.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 857–58.

[23] *Id.* at 858.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 858–59.

[28] *Id.* at 858.

[29] *Id.*

[30] *Id.* at 859.

[31] *Id.*

[32] *Id.* at 860.

[33] *Id.*

[34] *Id.*

[35] 15 U.S.C. 78s(b)(2)(B).

[36] *Id.*

[37] 15 U.S.C. 78q–1.

[38] 15 U.S.C. 78q–1(b)(3)(F).

assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, and to protect investors and the public interest;

• Rule 17Ad–22(e)(13) under the Act,[39] which requires, in general, a covered clearing agency, such as FICC, to establish, implement, maintain and enforce written policies and procedures reasonably designed to ensure the covered clearing agency has the authority and operational capacity to take timely action to contain losses and liquidity demands and continue to meet its obligations.

• Rule 17Ad–22(e)(23)(i) under the Act,[40] which requires a covered clearing agency, such as FICC, to establish, implement, maintain and enforce written policies and procedures reasonably designed to publicly disclose all relevant rules and material procedures, including key aspects of its default rules and procedures.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the Proposed Rule Change. In particular, the Commission invites the written views of interested persons concerning whether the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act,[41] Rule 17Ad–22(e)(13) under the Act,[42] Rule 17Ad–22(e)(23)(i) under the Act,[43] or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4(g) under the Act,[44] any request for an opportunity to make an oral presentation.[45]

Interested persons are invited to submit written data, views, and arguments regarding whether the Proposed Rule Change should be approved or disapproved by April 16, 2018. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by April 30, 2018.

The Commission asks that commenters address the sufficiency of FICC's statements in support of the Proposed Rule Change, which are set forth in the Notice,[46] in addition to any other comments they may wish to submit about the Proposed Rule Change.

Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–FICC–2017–022 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–FICC–2017–022. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the Proposed Rule Change that are filed with the Commission, and all written communications relating to the Proposed Rule Change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FICC and on The Depository Trust & Clearing Corporation's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–FICC–2017–022 and should be submitted on or before April 16, 2018. Rebuttal comments should be submitted by April 30, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[47]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06015 Filed 3–23–18; 8:45 am]

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[39] 17 CFR 240.17Ad–22(e)(13).

[40] 17 CFR 240.17Ad–22(e)(23)(i).

[41] 15 U.S.C. 78q–1(b)(3)(F).

[42] 17 CFR 240.17Ad–22(e)(13).

[43] 17 CFR 240.17Ad–22(e)(23)(i).

[44] 17 CFR 240.19b–4(g).

[45] Section 19(b)(2) of the Act grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[46] *See* Notice, *supra* note 4.

[47] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82906; File No. SR–CboeBZX–2017–012]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 2, To List and Trade Shares of the LHA Market State® Tactical U.S. Equity ETF, a Series of the ETF Series Solutions, Under Rule 14.11(i), Managed Fund Shares

March 20, 2018.

I. Introduction

On December 7, 2017, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade the shares (''Shares'') of the LHA Market State® Tactical U.S. Equity ETF (''Fund''), a Series of the ETF Series Solutions (''Trust''). The proposed rule change was published for comment in the **Federal Register** on December 28, 2017.[3] On January 31, 2018, the Exchange filed Amendment No. 1 to the proposed rule change.[4] On February 6, 2018, pursuant to Section 19(b)(2) of the Exchange Act,[5] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 82379 (Dec. 21, 2017), 82 FR 61608.

[4] Amendment No. 1, which amended and replaced the proposed rule change in its entirety, is available on the Commission's website at: *https://www.sec.gov/comments/sr-cboebzx-2017-012/cboebzx2017012-3002921-161895.pdf.*

[5] 15 U.S.C. 78s(b)(2).

rule change.[6] On February 13, 2018, the Exchange filed Amendment No. 2 to the proposed rule change.[7] The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 2.

II. Exchange's Description of the Proposal, as Modified by Amendment No. 2

The Exchange proposes to list and trade the Shares under BZX Rule 14.11(i), which governs the listing and trading of Managed Fund Shares on the Exchange. The Exchange represents that the Fund will be an actively managed exchange-traded fund that seeks to provide investment results that exceed the total return performance of the broader U.S. equity market on a risk-adjusted basis. The Exchange has submitted this proposal in order to allow the Fund to hold listed derivatives, in particular S&P 500 futures, in a manner that would exceed the limitations of BZX Rule 14.11(i)(4)(C)(iv)(b), which prevents, among other things, a series of Managed Fund Shares from holding listed derivatives based on any single underlying reference asset in excess of 30 percent of the weight of its portfolio (including gross notional exposures) (''30% Limitation'').[8] Otherwise, the Fund will comply with all other listing requirements of BZX Rule 14.11(i), including BZX Rule 14.11(i)(4)(C), on an initial and continued listing basis.

The Shares will be offered by the Trust, which is registered with the Commission as an open-end investment company.[9] The Fund's adviser, Little Harbor Advisors, LLC (''Adviser''), is not registered as a broker-dealer and is not affiliated with a broker-dealer. Adviser personnel who make decisions regarding the Fund's portfolio are subject to procedures designed to prevent the use and dissemination of material, nonpublic information regarding the Fund's portfolio. In the event that (a) the Adviser becomes registered as a broker-dealer or newly affiliated with a broker-dealer; or (b) any new adviser or sub-adviser is a registered broker-dealer or becomes affiliated with a broker-dealer; it will implement a fire wall with respect to its relevant personnel or such broker-dealer affiliate, as applicable, regarding access to information concerning the composition of, or changes to, the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, nonpublic information regarding such portfolio.

In order to achieve its investment objective, under Normal Market Conditions,[10] the Fund will invest approximately 80% of its net assets at the time of investment in U.S. exchange-listed exchange-traded funds that principally invest in U.S. equity securities (''U.S. ETFs'') [11] or the constituent stock holdings of a U.S. ETF (together with U.S. ETFs, collectively, ''U.S. Equities''). The Fund generally will invest in U.S. Equities in order to gain exposure to large cap U.S. equity securities.

As noted above, BZX Rule 14.11(i)(4)(C)(iv)(b) imposes a 30% Limitation. The Exchange is proposing to allow the Fund to hold up to 60% of the weight of its portfolio at the time of investment (including gross notional exposures) in S&P 500 futures contracts traded on the Chicago Mercantile Exchange (''S&P 500 Futures''). The Fund will utilize short or long S&P 500 Futures to the extent needed to reduce or augment, respectively, the Fund's exposure relative to the exposure resulting from investments in the U.S. Equities in order to achieve the desired net exposure. The Exchange represents that S&P 500 Futures are an efficient means of reducing or augmenting exposure to U.S. Equities, as described above. According to the Exchange, allowing the Fund to hold a greater portion of its portfolio in S&P 500 Futures would mitigate the Fund's dependency on holding over-the-counter (''OTC'') instruments, which would reduce the Fund's operational burden by allowing the Fund to primarily use listed futures contracts to achieve its investment objective and would further reduce counter-party risk associated with holding OTC instruments. The Exchange notes that the Fund may also hold certain fixed income securities and cash and cash equivalents in compliance with BZX Rules 14.11(i)(4)(C)(ii) and (iii) in order to collateralize its S&P 500 Futures positions.

As noted above, the Fund's investment in U.S. ETFs or the constituent stocks of a U.S. ETF will constitute approximately 80% of the Fund's net assets at the time of investment and under Normal Market Conditions, and such holdings will meet the requirements for U.S. Component Stocks in BZX Rule 14.11(i)(4)(C)(i)(a). The Fund may hold approximately 20% of its net assets at the time of investment in fixed income securities, cash, cash equivalents, and the cash value of futures positions [12] under Normal Market Conditions. The combination of U.S. ETFs, constituent stocks of U.S. ETFs, fixed income securities, cash, cash equivalents, and the cash value of futures positions will constitute the entirety of the Fund's holdings and the cash value of these holdings will be

[6] *See* Securities Exchange Act Release No. 82643, 83 FR 6071 (Feb. 12, 2018). The Commission designated March 28, 2018, as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

[7] In Amendment No. 2, which amended and replaced the proposed rule change, as modified by Amendment No. 1, in its entirety, the Exchange: (a) Supplemented the description of the Fund's relative exposures to the U.S. equity and S&P 500 futures markets; (b) made conforming informational and rule reference corrections to maintain internal consistency; (c) updated the status of the registration statement for the Fund; (d) clarified the use of certain defined terms; and (e) made other technical and non-substantive changes. Because Amendment No. 2 does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, it is not subject to notice and comment. Amendment No. 2 is available on the Commission's website at: *https://www.sec.gov/comments/sr-cboebzx-2017-012/cboebzx2017012-3033817-161904.pdf*.

[8] BZX Rule 14.11(i)(4)(C)(iv)(b) requires that the aggregate gross notional value of listed derivatives based on any five or fewer underlying reference assets to not exceed 65% of the weight of the portfolio (including gross notional exposures), and the aggregate gross notional value of listed derivatives based on any single underlying reference asset to not exceed 30% of the weight of the portfolio (including gross notional exposures). The Exchange states that the proposal is to allow the Fund to exceed the specific requirement of BZX Rule 14.11(i)(4)(C)(iv)(b) that prevents the aggregate gross notional value of listed derivatives based on any single underlying reference asset from exceeding 30% of the weight of the portfolio (including gross notional exposures). According to the Exchange, the Fund will meet the other requirement of BZX Rule 14.11(i)(4)(C)(iv)(b).

[9] The Exchange represents that the Trust has filed a post-effective amendment to its registration statement (''Registration Statement'') on December 18, 2017. *See* Registration Statement on Form N–1A for the Trust (File Nos. 333–179562 and 811–22668). The Commission has not yet issued an order granting exemptive relief to the Trust under the Investment Company Act of 1940 applicable to the activities of the Fund, but the Exchange further represents that the Fund Shares will not be listed on the Exchange until such an order is issued and any conditions contained therein are satisfied.

[10] As defined in BZX Rule 14.11(i)(3)(E), the term ''Normal Market Conditions'' includes, but is not limited to, the absence of trading halts in the applicable financial markets generally; operational issues causing dissemination of inaccurate market information or system failures; or force majeure type events, such as natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

[11] The Exchange states that, for purposes of the proposal, the term ''U.S. ETFs'' means Portfolio Depositary Receipts, Index Fund Shares, and Managed Fund Shares as defined in BZX Rules 14.11(b), 14.11(c), and 14.11(i), respectively, and their equivalents on other national securities exchanges.

[12] The Exchange states that cash value of futures positions is based on the value of the Fund's daily margin account with the applicable futures exchange(s).

used to form the basis for these calculations. The Exchange notes that this is different than the calculation used to measure the Fund's holdings in S&P 500 Futures (as it relates to the Fund holding up to 60% of the weight of its portfolio), which, as noted above, is calculated using gross notional exposures gained through the S&P 500 Futures in both the numerator and denominator, and which is consistent with the derivatives exposure calculation under BZX Rule 14.11(i)(4)(C)(iv). The Exchange represents that, except for the 30% Limitation, the Fund's proposed investments will satisfy, on an initial and continued listing basis, all of the generic listing standards under BZX Rule 14.11(i)(4)(C) and all other applicable requirements for Managed Fund Shares under BZX Rule 14.11(i).

III. Discussion and Commission Findings

After careful review, the Commission finds that the Exchange's proposal to list and trade the Shares, as modified by Amendment No. 2, is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange.[13] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Exchange Act,[14] which requires, among other things, that the Exchange's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission notes that, according to the Exchange, the Shares will meet each of the initial and continued listing criteria in BZX Rule 14.11(i), including BZX Rule 14.11(i)(4)(C), with the exception of the 30% Limitation. According to the Exchange, the liquidity in the S&P 500 Futures markets mitigates the concerns that BZX Rule 14.11(i)(4)(C)(iv)(b) is intended to address and that such liquidity would prevent the Shares from being susceptible to manipulation.[15]

In addition, the Exchange represents that its surveillance procedures are adequate to properly monitor the trading of the Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. The Exchange further represents that all of the futures contracts and U.S. ETFs held by the Fund will trade on markets that are members of the Intermarket Surveillance Group (''ISG'') or affiliated with a member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement. Moreover, the Exchange represents that it may obtain information regarding trading in the Shares and the underlying futures contracts and U.S. ETFs held by the Fund via the ISG from other exchanges who are members of the ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement.[16] The Commission also notes that, according to the Exchange, the Fund's investment in U.S. ETFs or the constituent stocks of a U.S. ETF will meet the requirements for U.S. Component Stocks in BZX Rule 14.11(i)(4)(C)(i)(a). BZX Rule 14.11(i)(4)(C)(i)(a) provides that equity securities in the portfolio shall be listed on a national securities exchange, except that no more than 10% of the equity weight of the portfolio may be non-exchange traded ADRs. As all national securities exchanges are ISG members, the Commission notes that no less than 90% of constituent stocks of a U.S. ETF that the Fund will hold will be traded on markets that are members of ISG. In addition, the Exchange also represents that the Shares of the Fund will comply with all requirements applicable to Managed Fund Shares, including, but not limited to, requirements relating to the dissemination of key information such as the Disclosed Portfolio,[17] net asset value,[18] and the Intraday Indicative Value,[19] suspension of trading or removal,[20] trading halts,[21] surveillance,[22] minimum price variation for quoting and order entry,[23] the information circular,[24] and firewalls[25] as set forth in Exchange rules applicable to Managed Fund Shares. Likewise, the Exchange represents that all statements and representations made in this filing regarding (a) the description of the portfolio or reference assets, (b) limitations on portfolio holdings or reference assets, (c) dissemination and availability of reference asset and intraday indicative values, (d) or the applicability of Exchange listing rules specified in this filing shall constitute continued listing requirements for listing the Shares on the Exchange. Moreover, according to the Exchange, the issuer has represented to the Exchange that it will advise the Exchange of any failure by the Fund or Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will surveil for compliance with the continued listing requirements.[26] If the Fund or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under BZX Rule 14.12.

This approval order is based on all of the Exchange's representations and description of the Fund, including those set forth above and in Amendment No. 2 to the proposed rule change.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 2, is consistent with Section 6(b)(5) of the Exchange Act[27] and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[28]

[13] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[14] 15 U.S.C. 78f(b)(5).

[15] According to the Exchange, as of December 7, 2017, the average daily notional volume for S&P 500 Futures was more than $180 billion over the previous thirty trading days. The Exchange represents that allowing the Fund to hold a greater portion of its portfolio in S&P 500 Futures would mitigate the Fund's dependency on holding OTC instruments, which would reduce the Fund's operational burden by allowing the Fund to primarily use listed futures contracts to achieve its investment objective and would further reduce counter-party risk associated with holding OTC instruments. Moreover, the Exchange represents that the diversity, liquidity, and market capitalization of the securities underlying the S&P 500 Index are sufficient to protect against market manipulation of both the Fund's holdings and the Shares as it relates to the S&P 500 Futures holdings.

[16] As stated above, S&P 500 Futures are traded on the Chicago Mercantile Exchange. The Commission notes that the Chicago Mercantile Exchange represents a significant market in S&P 500 Futures, is a regulated futures and options market, and is a member of ISG. *See supra* note 16. For a list of the current members and affiliate members of ISG, *see www.isgportal.com.* The Exchange notes that not all components of the Disclosed Portfolio for the Fund may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[17] *See* BZX Rules 14.11(i)(4)(A)(ii) and 14.11(i)(4)(B)(ii).

[18] *See* BZX Rule 14.11(i)(4)(A)(ii).

[19] *See* BZX Rule 14.11(i)(4)(B)(i).

[20] *See* BZX Rule 14.11(i)(4)(B)(iii).

[21] *See* BZX Rule 14.11(i)(4)(B)(iv).

[22] *See* BZX Rule 14.11(i)(2)(C).

[23] *See* BZX Rule 14.11(i)(2)(B).

[24] *See* BZX Rule 14.11(i)(6).

[25] *See* BZX Rule 14.11(i)(7).

[26] The Exchange represents that FINRA conducts certain cross-market surveillances on behalf of the Exchange pursuant to a regulatory services agreement. The Exchange further represents that it is responsible for FINRA's performance under this regulatory services agreement.

[27] 15 U.S.C. 78f(b)(5).

[28] 15 U.S.C. 78s(b)(2).

that the proposed rule change (SR–CboeBZX–2017–012), as modified by Amendment No. 2, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[29]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06013 Filed 3–23–18; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82904; File No. SR–CboeEDGA–2018–004]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Expand an Offering Known as Cboe Connect To Provide Connectivity to Single-Dealer Platforms Connected to the Exchange's Network and To Propose a Per Share Executed Fee for Such Service

March 20, 2018.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on March 14, 2018, Cboe EDGA Exchange, Inc. (the ''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6)(iii) thereunder,[4] which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange filed a proposal to expand an offering known as Cboe Connect to provide connectivity to single-dealer platforms connected to the Exchange's network and to propose a per share executed fee for such service.

The text of the proposed rule change is available at the Exchange's website at *www.markets.cboe.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

Cboe Connect is an optional communication service that provides Members[5] an additional means to receive market data from and route orders to any destination connected to the Exchange's network.[6] Cboe Connect is offered by the Exchange on a voluntary basis in a capacity similar to a vendor. The servers of the participant need not be located in the same facilities as the Exchange in order to subscribe to Cboe Connect. Participants may also seek to utilize Cboe Connect in the event of a market disruption where other alternative connection methods become unavailable.

Today, market participants are able to send orders directly to broker-dealers that operate single-dealer platforms, where broker-dealers would execute orders received on a principal basis or return the unexecuted order (or portion thereof) back to their customers. To connect to a single-dealer platform, the broker-dealer's customer must purchase connectivity and perform the necessary infrastructure work to be able to send orders to that single-dealer platform. Cboe Connect allows participants to send orders to other exchanges and market centers that are connected to the Exchange's network. Market centers on the Exchange's network include Alternative Trading Systems operated by broker-dealers, but do not currently include single-dealer platforms. The Exchange proposes to expand Cboe Connect to now provide optional connectivity by which market participant may send orders to these single-dealer trading platforms connected to the Exchange's network. The exchange proposes to refer to this connectivity option under Cboe Connect as C–LNK.

Orders routed via Cboe Connect to a single-dealer platform would be treated the same as orders routed today via Cboe Connect to an exchange or market center connected to the Exchange's network. Cboe Connect does not effect trade executions and would not report trades to the relevant Securities Information Processor and the Exchange does not propose to do so for orders sent to single-dealer platforms. An order sent via the service to a single-dealer platform would be handled by the Exchange's affiliated broker-dealer, Cboe Trading, Inc., and bypass the EDGA Book before going to a market center outside of the Exchange (*i.e.,* a participant could choose to route an order directly to any single-dealer platform on the Exchange's network). A participant would be responsible for identifying the single-dealer platform for any orders sent through the service and for ensuring that it had authority to access the selected destination; the Exchange would merely provide the connectivity by which orders (and associated messages) could be sent by a participant to the single-dealer platform and from the destination back to the participant.

The Exchange notes that Users sending orders to single-dealer platforms via the C–LNK connectivity service would be subject to any transaction related rates applied by the single-dealer platform executing their order.[7] This is not unique to C–LNK or Cboe Connect as market participants who chose another method to connect to a single-dealer platform would also be required to pay any transaction related fees directly to that single-dealer platform. In addition, market participants who send orders through Cboe Connect are subject to separate per transaction rates (fees/rebates) provided directly by the other exchanges and

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[29] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] 17 CFR 240.19b–4(f)(6)(iii).

[5] The term ''Member'' is defined as ''any registered broker or dealer, or any person associated with a registered broker or dealer, that has been admitted to membership in the Exchange. A Member will have the status of a ''member'' of the Exchange as that term is defined in Section 3(a)(3) of the Act.'' *See* Exchange Rule 1.5(n).

[6] *See* Exchange Rule 13.9. *See also* Securities Exchange Act Release Nos. 75112 (June 5, 2015), 80 FR 33316 (June 11, 2015) (SR–EDGA–2015–20) (proposal adopting Cboe Connect (f/k/a Bats Connect); *and* 34753 (June 11, 2015), 80 FR 34753 (June 17, 2015) (SR–EDGA–2015–24) (proposal adopting fees for Cboe Connect).

[7] Like alternative trading systems, single-dealer platforms are operated by broker-dealers and any transaction related rates are presumed to be similarly pre-negotiated between the broker-dealer and their customer.

market centers to which they send their orders for execution.

Today, the Exchange charges a monthly connectivity fee to subscribers utilizing Cboe Connect to route orders to other exchanges and broker-dealers that are connected to the Exchange's network. The amount of the connectivity fee varies based on the bandwidth selected by the subscriber.[8] Rather than charging a set connectivity fee based on bandwidth, the Exchange proposes to charge a fee of $0.0002 for each share executed by a single dealer platform for orders routed via Cboe Connect. The Exchange proposes a per share rate, as opposed to a monthly bandwidth related charge, because C–LNK is a new service and the Exchange believes a monthly bandwidth charge may prove a deterrent to attracting usage based on the anticipated preliminary volumes. The Exchange, therefore, believes it is appropriate to charge a per share fee at this time so that Users may evaluate the efficacy of C–LNK and the connectivity it provides.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act [9] in general, and furthers the objectives of Section 6(b)(5) of the Act [10] in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

C–LNK removes impediments to and perfects the mechanism of a free and open market and a national market system because it provides users with optional connectivity method by which market participant may send orders to these single-dealer trading platforms. The proposed connectivity would be provided on a voluntary basis and no rule or regulation requires that the Exchange offer it. Nor does any rule or regulation require market participants to send orders to single-dealer platforms generally, let alone through a connection like that proposed herein. The proposed connectivity to single-dealer platforms would operate in the same manner as connectively provided today to other exchanges and market centers via Cboe Connect.

The Exchange believes that the proposed fee is consistent Section 6(b)(4) [11] of the Act because it would provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities. The Exchange proposes to charge a per share fee for each order sent via C–LNK to a single-dealer platform that is connected to the Exchange's network. The proposed a per share fee is appropriate, as opposed to a monthly bandwidth related charge, because C–LNK is a new service and the Exchange believes a monthly bandwidth charge may prove a deterrent to attracting usage based on the anticipated preliminary volumes. A per share fee is intended to encourage use of C–LNK at a rate that would enable users to evaluate its efficacy and the connectivity it provides. Furthermore, the proposed fee is designed to cover the Exchange's costs related to providing the connectivity and performing the necessary infrastructure work to be able send orders to each single-dealer platform connected to the Exchange's network. The Exchange notes that, like all connectivity provide via Cboe Connect, C–LNK would be an optional service provided on a voluntary basis. Therefore, users may decide to not send orders via C–LNK due to the reasonableness of the fee charged.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is a service that is designed to provide market participants with an alternative connectivity to additional pools of liquidity and is not intended have a competitive impact. Therefore, the Exchange does not believe the proposed rule change will have any effect on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (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 [12] and subparagraph (f)(6) of Rule 19b–4 thereunder.[13]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or

• Send an email to *rule-comments@sec.gov.* Please include File Number SR–CboeEDGA–2018–004 on the subject line.

Paper Comments

• Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CboeEDGA–2018–004. 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

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[8] Specifically, the Exchange charges $500 for 1 Mb, $1,000 for 5 Mb, $1,250 for 10 Mb, $1,500 for 25 Mb, $2,500 for 50 Mb, and $3,500 for 100 Mb. *See* the Exchange's fee schedule *available at http://markets.cboe.com/us/equities/membership/fee_schedule/edga/.*

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78f(b)(4).

[12] 15 U.S.C. 78s(b)(3)(A)(iii).

[13] 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 Exchange has satisfied this requirement.

post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGA–2018–004 and should be submitted on or before April 16, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06011 Filed 3–23–18; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82913; File No. SR–FICC–2017–021]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Adopt a Recovery & Wind-Down Plan and Related Rules

March 20, 2018.

I. Introduction

On December 18, 2017, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] proposed rule change SR–FICC–2017–021 to adopt a recovery and wind-down plan and related rules (''Proposed Rule Change'').[3] The Proposed Rule Change was published for comment in the **Federal Register** on January 8, 2018.[4] The Commission did not receive any comments on the Proposed Rule Change. On February 8, 2018, pursuant to Section 19(b)(2)(A)(ii)(I) of the Act,[5] the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.[6] This order institutes proceedings, pursuant to Section 19(b)(2)(B) of the Act,[7] to determine whether to approve or disapprove the Proposed Rule Change.

II. Summary of the Proposed Rule Change

As described in the Notice,[8] FICC proposes to (i) adopt a Recovery & Wind-down Plan (''R&W Plan''), (ii) adopt rules to facilitate the implementation of the R&W Plan, and (iii) make conforming changes to existing rules. Specifically, to facilitate the implementation of the R&W Plan, FICC proposes to adopt a proposed wind-down rule and a proposed market disruption and force majeure rule to both FICC's Government Securities Division (''GSD'') Rulebook (''GSD Rules'') [9] and FICC's Mortgage-Backed Securities Division (''MBSD'') Clearing Rules (''MBSD Rules'') [10] (collectively, ''Wind-down Rule'' and ''Force Majeure Rule,'' respectively). FICC proposes to make conforming changes to existing rules to incorporate the proposed Wind-down Rule and proposed Force Majeure Rule.[11]

FICC states that the R&W Plan is intended to be used by FICC's Board of Directors and management in the event that FICC encounters scenarios that could potentially prevent it from being able to provide its critical services as a going concern.[12] The R&W Plan would be structured to provide a roadmap, define the strategy, and identify the tools available to FICC to either (i) recover in the event it experiences losses that exceed its prefunded resources or (ii) wind-down its business in a manner designed to permit the continuation of its critical services in the event that such recovery efforts are not successful.[13] The R&W Plan would include tools that are provided for in FICC's existing rules, policies, procedures, and contractual arrangements,[14] as well as the proposed Wind-down Rule and the proposed Force Majeure Rule.[15]

FICC states that the proposed Wind-down Rule and the proposed Force Majeure Rule are designed to (i) facilitate the implementation of the R&W Plan when necessary; (ii) provide Members and Limited Members with transparency around critical provisions of the R&W Plan that relate to their rights, responsibilities, and obligations; [16] and (iii) provide FICC

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On December 18, 2017, FICC filed this proposal as an advance notice (SR–FICC–2017–805) with the Commission pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') and Rule 19b–4(n)(1)(i) of the Act (''Advance Notice''). On January 24, 2018, the Commission extended the review period of the Advance Notice for an additional 60 days pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act. *See* 12 U.S.C. 5465(e)(1); 17 CFR 240.19b–4(n)(1)(i); 12 U.S.C. 5465(e)(1)(H); and Securities Exchange Act Release No. 82580 (January 24, 2018), 83 FR 4341 (January 30, 2018) (SR–FICC–2017–805).

[4] Securities Exchange Act Release No. 82431 (January 2, 2018), 83 FR 871 (January 8, 2018) (SR–FICC–2017–021) (''Notice'').

[5] 15 U.S.C. 78s(b)(2)(A)(ii)(I).

[6] Securities Exchange Act Release No. 82669 (February 8, 2018), 83 FR 6653 (February 14, 2018) (SR–DTC–2017–021; SR–FICC–2017–021; SR–NSCC–2017–017).

[7] 15 U.S.C. 78s(b)(2)(B).

[8] The description of the Proposed Rule Change is based on the statements prepared by FICC in the Notice. *See* Notice, *supra* note 4.

[9] FICC proposes to adopt GSD Rule 22D (Wind-down of the Corporation) and GSD Rule 50 (Market Disruption and Force Majeure). *See* Notice, *supra* note 4, at 872.

[10] FICC proposes to adopt MBSD Rule 17B (Wind-down of the Corporation) and MBSD Rule 40 (Market Disruption and Force Majeure). *See* Notice, *supra* note 4, at 872.

[11] FICC proposes to make conforming changes to GSD Rules, MBSD Rules, and MBSD Electronic Pool Netting (''EPN'') Rules (''EPN Rules''). Specifically, FICC proposes to amend the following GSD Rules and MBSD Rules to incorporate the proposed Wind-down Rule and proposed Force Majeure Rule, as applicable: GSD Rule 3A (Sponsoring Members and Sponsored Members), GSD Rule 3B (Centrally Cleared Institutional Triparty Service), GSD Rule 13 (Funds-Only Settlement), and MBSD Rule 3A (Cash Settlement Bank Members). *See* Notice, *supra* note 4, at 872, 881–82. Additionally, FICC proposes to amend EPN Rule 1 to provide that EPN Users are bound by proposed MBSD Rule 17B (Wind-down of the Corporation) and proposed MBSD Rule 40 (Market Disruption and Force Majeure). *Id.* Capitalized terms not defined herein are defined in the GSD Rules, MBSD Rules, and EPN Rules, as applicable, *available at http://www.dtcc.com/legal/rules-and-procedures.*

[12] *See* Notice, *supra* note 4, at 872.

[13] *Id.* at 873.

[14] Contractual arrangements include, for example, FICC's existing committed or pre-arranged liquidity arrangements.

[15] *See* Notice, *supra* note 4, at 872.

[16] Consistent with the Notice, references to ''Members'' refer to GSD Netting Members and MBSD Clearing Members. References to ''Limited Members'' refer to participants of GSD or MBSD other than GSD Netting Members and MBSD Clearing Members, including, for example, GSD

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with the legal basis to implement the provisions of the R&W Plan that concern the proposed Wind-down Rule and the proposed Force Majeure Rule, when necessary.[17]

As an overview, the R&W Plan would provide, among other matters, (i) an overview of the business of FICC and its parent, The Depository Trust & Clearing Corporation (''DTCC''); (ii) an analysis of FICC's intercompany arrangements and an existing link to another financial market infrastructures; (iii) a description of FICC's services, and the criteria used to determine which services are considered critical; (iv) a description of the FICC and DTCC governance structure; (v) a description of the governance around the overall recovery and wind-down program; (vi) a discussion of tools available to FICC to mitigate credit/market[18] and liquidity risks, including recovery indicators and triggers, and the governance around management of a stress event along a ''Crisis Continuum'' timeline; (vii) a discussion of potential non-default losses and the resources available to FICC to address such losses, including recovery triggers and tools to mitigate such losses;[19] (viii) an analysis of the recovery tools' characteristics, including how they are comprehensive, effective, and transparent, how the tools provide appropriate incentives to Members to, among other things, control and monitor the risks they may present to FICC, and how FICC seeks to minimize the negative consequences of executing its recovery tools; and (ix) the framework and approach for the orderly wind-down and transfer of FICC's business,[20] including an estimate of the time and costs to effect a recovery or orderly wind-down of FICC.[21]

The framework and approach for orderly wind-down would provide (i) for the transfer of FICC's business, assets, and memberships of both GSD and MBSD to another legal entity; (ii) that FICC would effectuate the transfer in connection with proceedings under Chapter 11 of the U.S. Bankruptcy Code;[22] and (iii) that after effectuating this transfer, FICC would liquidate any remaining assets in an orderly manner in bankruptcy proceedings.[23] FICC states that it believes that the proposed transfer approach to a wind-down would meet its objectives of (i) assuring that FICC's critical services will be available to the market as long as there are Members in good standing, and (ii) minimizing disruption to the operations of Members and financial markets generally that might be caused by FICC's failure.[24]

III. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[25] to determine whether the Proposed Rule Change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the Proposed Rule Change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to comment on the Proposed Rule Change, and provide the Commission with arguments to support the Commission's analysis as to whether to approve or disapprove the Proposed Rule Change.

Pursuant to Section 19(b)(2)(B) of the Act,[26] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the Proposed Rule Change's consistency with Section 17A of the Act,[27] and the rules thereunder, including the following provisions:

- Section 17A(b)(3)(F) of the Act,[28] which requires, among other things, that the rules of a clearing agency, such as FICC, must be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible and to protect investors and the public interest; and
- Rule 17Ad–22(e)(3)(ii) under the Act,[29] which requires a covered clearing agency,[30] such as FICC, to, among other things, establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by FICC, which includes plans for the recovery and orderly wind-down of FICC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the Proposed Rule Change. In particular, the Commission invites the written views of interested persons concerning whether the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act,[31] Rule 17Ad–22(e)(3)(ii) under the Act,[32] or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4(g) under the Act,[33] any request for an opportunity to make an oral presentation.[34]

Interested persons are invited to submit written data, views, and

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Comparison-Only Members, GSD Sponsored Members, GSD CCIT Members, and MBSD EPN Users. *Id.* at 872 n.6.

[17] *See* Notice, *supra* note 4, at 872.

[18] FICC states that FICC manages its credit exposure to Members as part of its market risk management strategy. *Id.* at 875.

[19] As described in more detail in the Notice, this section of the R&W Plan would describe the proposed Force Majeure Rule, which would govern how FICC would address extraordinary events that may occur outside its control. *See* Notice, *supra* note 4, at 881. The proposed Force Majeure Rule would identify the events or circumstances that would be considered a ''Market Disruption Event,'' including, for example, events that lead to the suspension or limitation of trading or banking in the markets in which FICC operates, or the unavailability or failure of any material payment, bank transfer, wire or securities settlement systems. *Id.* Under the proposed Force Majeure Rule, during the pendency of a Market Disruption Event, FICC would be entitled to (i) suspend the provision of any or all services, and (ii) take, or refrain from taking, or require its Members and Limited Members to take, or refrain from taking, any actions it considers appropriate to address, alleviate, or mitigate the event and facilitate the continuation of FICC's services as may be practicable. *Id.*

[20] This section of the R&W Plan would refer to the proposed Wind-down Rule.

[21] *See* Notice, *supra* note 4, at 872.

[22] 11 U.S.C. 101 *et seq.*

[23] *See* Notice, *supra* note 4, at 878.

[24] *Id.*

[25] 15 U.S.C. 78s(b)(2)(B).

[26] *Id.*

[27] 15 U.S.C. 78q–1.

[28] 15 U.S.C. 78q–1(b)(3)(F).

[29] 17 CFR 240.17Ad–22(e)(3)(ii).

[30] *See* 17 CFR 240.17Ad–22(a)(5) for the definition of a covered clearing agency.

[31] 15 U.S.C. 78q–1(b)(3)(F).

[32] 17 CFR 240.17Ad–22(e)(3)(ii).

[33] 17 CFR 240.19b–4(g).

[34] Section 19(b)(2) of the Act grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

arguments regarding whether the Proposed Rule Change should be approved or disapproved by April 16, 2018. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by April 30, 2018.

The Commission asks that commenters address the sufficiency of FICC's statements in support of the Proposed Rule Change, which are set forth in the Notice,[35] in addition to any other comments they may wish to submit about the Proposed Rule Change.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–FICC–2017–021 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–FICC–2017–021. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the Proposed Rule Change that are filed with the Commission, and all written communications relating to the Proposed Rule Change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of FICC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–FICC–2017–021 and should be submitted on or before April 16, 2018. Rebuttal comments should be submitted by April 30, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[36]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06019 Filed 3–23–18; 8:45 am]

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[35] *See* Notice, *supra* note 4.

[36] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–82912; File No. SR–DTC–2017–021]

Self-Regulatory Organizations; The Depository Trust Company; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Adopt a Recovery & Wind-Down Plan and Related Rules

March 20, 2018.

I. Introduction

On December 18, 2017, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] proposed rule change SR–DTC–2017–021 to adopt a recovery and wind-down plan and related rules (''Proposed Rule Change'').[3] The Proposed Rule Change was published for comment in the **Federal Register** on January 8, 2018.[4] The Commission did not receive any comments on the Proposed Rule Change. On February 8, 2018, pursuant to Section 19(b)(2)(A)(ii)(I) of the Act,[5] the Commission designated a longer period within which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove the Proposed Rule Change.[6] This order institutes proceedings, pursuant to Section 19(b)(2)(B) of the Act,[7] to determine whether to approve or disapprove the Proposed Rule Change.

II. Summary of the Proposed Rule Change

As described in the Notice,[8] DTC proposes to adopt a Recovery & Wind-down Plan (''R&W Plan'') and two proposed rules that would facilitate the implementation of the R&W Plan: (i) Proposed Rule 32(A) (Wind-down of the Corporation) (''Wind-down Rule''), and (ii) proposed Rule 38 (Market Disruption and Force Majeure) (''Force Majeure Rule'').

DTC states that the R&W Plan is intended to be used by DTC's Board of Directors and management in the event that DTC encounters scenarios that could potentially prevent it from being able to provide its critical services as a going concern.[9] The R&W Plan would be structured to provide a roadmap, define the strategy, and identify the tools available to DTC to either (i) recover, in the event it experiences losses that exceed its resources or (ii) wind-down its business in a manner designed to permit its critical services to continue in the event that such recovery efforts are not successful.[10] The R&W Plan would include tools that are provided for in DTC's existing rules, policies, procedures, and contractual arrangements,[11] as well as the proposed Wind-down Rule and the proposed Force Majeure Rule.[12]

DTC states that the proposed Wind-down Rule and the proposed Force Majeure Rule are designed to (i) facilitate the implementation of the R&W Plan when necessary; (ii) provide Participants with transparency around critical provisions of the R&W Plan that relate to their rights, responsibilities, and obligations; and (iii) provide DTC

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] On December 18, 2017, DTC filed this proposal as an advance notice (SR–DTC–2017–803) with the Commission pursuant to Section 806(e)(1) of the Payment, Clearing, and Settlement Supervision Act of 2010 (''Clearing Supervision Act'') and Rule 19b–4(n)(1)(i) of the Act (''Advance Notice''). On January 24, 2018, the Commission extended the review period of the Advance Notice for an additional 60 days pursuant to Section 806(e)(1)(H) of the Clearing Supervision Act. *See* 12 U.S.C. 5465(e)(1); 17 CFR 240.19b–4(n)(1)(i); 12 U.S.C. 5465(e)(1)(H); and Securities Exchange Act Release No. 82579 (January 24, 2018), 83 FR 4310 (January 30, 2018) (SR–DTC–2017–803).

[4] Securities Exchange Act Release No. 82432 (January 2, 2018), 83 FR 884 (January 8, 2018) (SR–DTC–2017–021) (''Notice'').

[5] 15 U.S.C. 78s(b)(2)(A)(ii)(I).

[6] Securities Exchange Act Release No. 82669 (February 8, 2018), 83 FR 6653 (February 14, 2018) (SR–DTC–2017–021; SR–FICC–2017–021; SR–NSCC–2017–017).

[7] 15 U.S.C. 78s(b)(2)(B).

[8] The description of the Proposed Rule Change is based on the statements prepared by DTC in the Notice. *See* Notice, *supra* note 4. Capitalized terms used herein and not otherwise defined herein are defined in the Rules, By-Laws and Organization Certificate of DTC, *available at http://www.dtcc.com/legal/rules-and-procedures.aspx.*

[9] *See* Notice, *supra* note 4, at 885.

[10] *Id.* at 886.

[11] Contractual arrangements include, for example, DTC's existing committed or pre-arranged liquidity arrangements.

[12] *See* Notice, *supra* note 4, at 885.

with the legal basis to implement the provisions of the R&W Plan that concern the proposed Wind-down Rule and the proposed Force Majeure Rule, when necessary.[13]

As an overview, the R&W Plan would provide, among other matters, (i) an overview of the business of DTC and its parent, The Depository Trust & Clearing Corporation (''DTCC''); (ii) an analysis of DTC's intercompany arrangements and critical links to other financial market infrastructures; (iii) a description of DTC's services, and the criteria used to determine which services are considered critical; (iv) a description of the DTC and DTCC governance structure; (v) a description of the governance around the overall recovery and wind-down program; (vi) a discussion of tools available to DTC to mitigate credit/market [14] and liquidity risks, including recovery indicators and triggers, and the governance around management of a stress event along a ''Crisis Continuum'' timeline; (vii) a discussion of potential non-default losses and the resources available to DTC to address such losses, including recovery triggers and tools to mitigate such losses; [15] (viii) an analysis of the recovery tools' characteristics, including how they are comprehensive, effective, and transparent, how the tools provide appropriate incentives to Participants to, among other things, control and monitor the risks they may present to DTC, and how DTC seeks to minimize the negative consequences of executing its recovery tools; and (ix) the framework and approach for the orderly wind-down and transfer of DTC's business,[16] including an estimate of the time and costs to effect a recovery or orderly wind-down of DTC.[17]

The framework and approach for orderly wind-down would provide (i) for the transfer of DTC's business, assets, securities inventory, and membership to another legal entity; (ii) that DTC would effectuate the transfer in connection with proceedings under Chapter 11 of the U.S. Bankruptcy Code; [18] and (iii) that after effectuating this transfer, DTC would liquidate any remaining assets in an orderly manner in bankruptcy proceedings.[19] DTC states that it believes that the proposed transfer approach to a wind-down would meet its objectives of (i) assuring that DTC's critical services will be available to the market as long as there are Participants in good standing, and (ii) minimizing disruption to the operations of Participants and financial markets generally that might be caused by DTC's failure.[20]

III. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [21] to determine whether the Proposed Rule Change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the Proposed Rule Change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to comment on the Proposed Rule Change, and provide the Commission with arguments to support the Commission's analysis as to whether to approve or disapprove the Proposed Rule Change.

Pursuant to Section 19(b)(2)(B) of the Act,[22] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the Proposed Rule Change's consistency with Section 17A of the Act,[23] and the rules thereunder, including the following provisions:

- Section 17A(b)(3)(F) of the Act,[24] which requires, among other things, that the rules of a clearing agency, such as DTC, must be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible and to protect investors and the public interest; and
- Rule 17Ad–22(e)(3)(ii) under the Act,[25] which requires a covered clearing agency,[26] such as DTC, to, among other things, establish, implement, maintain and enforce written policies and procedures reasonably designed to, as applicable, maintain a sound risk management framework for comprehensively managing legal, credit, liquidity, operational, general business, investment, custody, and other risks that arise in or are borne by DTC, which includes plans for the recovery and orderly wind-down of DTC necessitated by credit losses, liquidity shortfalls, losses from general business risk, or any other losses.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the Proposed Rule Change. In particular, the Commission invites the written views of interested persons concerning whether the Proposed Rule Change is consistent with Section 17A(b)(3)(F) of the Act,[27] Rule 17Ad–22(e)(3)(ii) under the Act,[28] or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4(g) under the Act,[29] any request for an opportunity to make an oral presentation.[30]

Interested persons are invited to submit written data, views, and arguments regarding whether the Proposed Rule Change should be approved or disapproved by April 16,

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[13] *Id.*

[14] DTC states that for DTC, credit risk and market risk are closely related because DTC monitors credit exposures from Participants through risk management controls that are part of its market risk management strategy. *Id.* at 888 n.22.

[15] As described in more detail in the Notice, this section of the R&W Plan would describe the proposed Force Majeure Rule, which would govern how DTC would address extraordinary events that may occur outside its control. *See* Notice, *supra* note 4, at 894. The proposed Force Majeure Rule would identify the events or circumstances that would be considered a ''Market Disruption Event,'' including, for example, events that lead to the suspension or limitation of trading or banking in the markets in which DTC operates, or the unavailability or failure of any material payment, bank transfer, wire or securities settlement systems. *Id.* Under the proposed Force Majeure Rule, during the pendency of a Market Disruption Event, DTC would be entitled to (i) suspend the provision of any or all services, and (ii) take, or refrain from taking, or require its Participants and Pledgees to take, or refrain from taking, any actions it considers appropriate to address, alleviate, or mitigate the event and facilitate the continuation of DTC's services as may be practicable. *Id.*

[16] This section of the R&W Plan would refer to the proposed Wind-down Rule.

[17] *See* Notice, *supra* note 4, at 885.

[18] 11 U.S.C. 101 *et seq.*

[19] *See* Notice, *supra* note 4, at 890.

[20] *Id.* at 890–91.

[21] 15 U.S.C. 78s(b)(2)(B).

[22] *Id.*

[23] 15 U.S.C. 78q–1.

[24] 15 U.S.C. 78q–1(b)(3)(F).

[25] 17 CFR 240.17Ad–22(e)(3)(ii).

[26] *See* 17 CFR 240.17Ad–22(a)(5) for the definition of a covered clearing agency.

[27] 15 U.S.C. 78q–1(b)(3)(F).

[28] 17 CFR 240.17Ad–22(e)(3)(ii).

[29] 17 CFR 240.19b–4(g).

[30] Section 19(b)(2) of the Act grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

2018. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by April 30, 2018.

The Commission asks that commenters address the sufficiency of DTC's statements in support of the Proposed Rule Change, which are set forth in the Notice,[31] in addition to any other comments they may wish to submit about the Proposed Rule Change.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–DTC–2017–021 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–DTC–2017–021. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the Proposed Rule Change that are filed with the Commission, and all written communications relating to the Proposed Rule Change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of DTC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). 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–DTC–2017–021 and should be submitted on or before April 16, 2018. Rebuttal comments should be submitted by April 30, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[32]

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2018–06018 Filed 3–23–18; 8:45 am]

BILLING CODE 8011–01–P

[31] *See* Notice, *supra* note 4.

[32] 17 CFR 200.30–3(a)(57).

SURFACE TRANSPORTATION BOARD

[Docket No. MCF 21081]

Larry Ferguson d/b/a Transouth Motorcoach, LLC—Acquisition of Control—C & H Bus Lines, Inc.

AGENCY: Surface Transportation Board.

ACTION: Notice tentatively approving and authorizing finance transaction.

SUMMARY: On February 27, 2018, Larry Ferguson d/b/a TranSouth Motorcoach, LLC (TranSouth) filed an application to acquire C & H Bus Lines, Inc. (C&H). TranSouth and C&H are each federally registered, passenger motor carriers incorporated and registered in Georgia. The Board is tentatively approving and authorizing the transaction and, if no opposing comments are timely filed, this notice will be the final Board action. Persons wishing to oppose the application must follow Board rules.

DATES: Comments must be filed by May 10, 2018. Applicant may file a reply by May 25, 2018. If no opposing comments are filed by May 10, 2018, this notice shall be applicable on May 11, 2018.

ADDRESSES: Send an original and 10 copies of any comments referring to Docket No. MCF 21081 to: Surface Transportation Board, 395 E Street SW, Washington, DC 20423–0001. In addition, send one copy of comments to: J. Hatcher Graham, J. Hatcher Graham, P.C., 303 Pheasant Ridge, Warner Robins, GA 31088.

FOR FURTHER INFORMATION CONTACT: Jonathon Binet at (202) 245–0368. Federal Information Relay Service (FIRS) for the hearing impaired: 1–800–877–8339.

SUPPLEMENTARY INFORMATION: TranSouth is a motor carrier licensed by the Federal Motor Carrier Safety Administration (FMCSA) (MC–465826) that provides motor carrier passenger services in Georgia. TranSouth is wholly owned by Larry Ferguson and operates eight to nine passenger vehicles and utilizes 18 drivers. (Appl. 3, Ex. 1, Motor Carrier Identification Report.) [1]

C&H is also a federally-registered motor carrier of passengers (MC–114957). In providing its passenger services to the public, C&H utilizes 18–20 passenger vehicles and 22 drivers. (Appl. 3, Ex. 2, FMCSA Safety Measurement System Data.) The stock in C&H is owned by members of the Cullens family: George L. Cullens, Sr.; George L. Cullens, Jr.; Edna F. Cullens; and Jerri J. Cullens. (Appl. 3, Ex. 3, Signatures and Certifications.) [2]

TranSouth states that, under the proposed transaction, all of the outstanding stock in C&H would be acquired by Larry Ferguson. According to TranSouth, the parties have signed a Letter of Intent, deposited earnest money, and drafted and signed a Stock Purchase Agreement. TranSouth further states that final closing will occur upon interim or final Board approval.[3]

Under 49 U.S.C. 14303(b), the Board must approve and authorize a transaction that it finds consistent with the public interest, taking into consideration at least: (1) The effect of the proposed transaction on the adequacy of transportation to the public; (2) the total fixed charges that result; and (3) the interest of affected carrier employees. TranSouth has submitted the information required by 49 CFR 1182.2, including information to demonstrate that the proposed transaction is consistent with the public interest under 49 U.S.C. 14303(b) and a statement, pursuant to 49 U.S.C. 14303(g), that TranSouth and C&H exceeded $2 million in gross operating revenues for the preceding 12-month period.[4]

TranSouth states that the proposed transaction would not have a material, detrimental impact on the adequacy of transportation services to the public but rather would improve services to the public. According to TranSouth, the

[1] Concurrent with its application, TranSouth also filed, in Docket No. MCF 21081 TA, a request under 49 U.S.C. 14303(i) to operate the assets to be acquired on an interim basis pending approval of the acquisition. The Board addresses that request in a separate decision issued concurrently with this decision.

[2] Although not mentioned in the application, both TranSouth and C&H are listed as ''interstate'' passenger carriers in their FMCSA registrations.

[3] As noted in *Larry Ferguson—Acquisition of Control—C & H Bus Lines, Inc.,* MCF 21081 TA, concurrently served with this decision, the Board reminds TranSouth that a grant of interim approval is temporary, and that final closing cannot occur until final Board approval. The grant of interim approval permits TranSouth only to operate the property of C&H until final Board approval.

[4] Parties must certify that the transaction involves carriers whose aggregate gross operating revenues exceed $2 million, as required under 49 CFR 1182.2(a)(5).

proposed transaction would allow for more efficient and productive management, modernizations of both rolling stock and maintenance equipment, and consolidation of debt structures. TranSouth states that the transaction would result in better service and savings in fares to the public. Also, TranSouth states that the proposed transaction would allow both companies to serve and expand their customer bases, thereby increasing the number of their employees in operations and maintenance.

TranSouth further asserts that the proposed transaction would not adversely affect competition or the public interest. According to TranSouth, its and C&H's service areas include the following: The entire Middle Georgia area; the cities of Macon, Savannah, Valdosta, Cordele, Forsyth, and Dublin; and the southern area of suburban Atlanta (the Service Area). TranSouth states that competition is robust with at least eight other companies providing motor coach passenger services within a 50-mile radius of the Service Area. Also, TranSouth states that the Atlanta metropolitan area is within 80 miles of the Service Area and has numerous entities that compete with both TranSouth and C&H.

On the basis of the application, the Board finds that the proposed acquisition of control is consistent with the public interest and should be tentatively approved and authorized. If any opposing comments are timely filed, these findings will be deemed vacated, and, unless a final decision can be made on the record as developed, a procedural schedule will be adopted to reconsider the application. *See* 49 CFR 1182.6(c). If no opposing comments are filed by the expiration of the comment period, this notice will take effect automatically and will be the final Board action.

This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

Board decisions and notices are available on our website at *WWW.STB.GOV.*

It is ordered:

1. The proposed transaction is approved and authorized, subject to the filing of opposing comments.

2. If opposing comments are timely filed, the findings made in this notice will be deemed vacated.

3. This notice will be effective May 11, 2018, unless opposing comments are filed by May 10, 2018.

4. A copy of this notice will be served on: (1) The U.S. Department of Transportation, Federal Motor Carrier Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue NW, Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of the General Counsel, 1200 New Jersey Avenue SE, Washington, DC 20590.

Decided: March 20, 2018.

By the Board, Board Members Begeman and Miller.

Jeffrey Herzig,

Clearance Clerk.

[FR Doc. 2018–06050 Filed 3–23–18; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2017–0071; Notice 2]

Sumitomo Rubber Industries, Ltd., Grant of Petition for Decision of Inconsequential Noncompliance

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

ACTION: Grant of petition.

SUMMARY: Sumitomo Rubber Industries, Ltd. (SRI), on behalf of itself and its subsidiary Sumitomo Rubber North America, Inc. (SRNA), have determined that certain Falken truck tires do not fully comply with Federal Motor Vehicle Safety Standard (FMVSS) No. 119, *New Pneumatic Tires for Motor Vehicles with a GVWR of more than 4,536 kilograms (10,000 pounds) and Motorcycles.* SRI filed a noncompliance report dated June 20, 2017. SRI also petitioned NHTSA on July 10, 2017, for a decision that the subject noncompliance is inconsequential as it relates to motor vehicle safety.

FOR FURTHER INFORMATION CONTACT: Abraham Diaz, Office of Vehicle Safety Compliance, the National Highway Traffic Safety Administration (NHTSA), telephone (202) 366–5310, facsimile (202) 366–5930.

SUPPLEMENTARY INFORMATION:

I. *Overview:* SRI, on behalf of itself and its subsidiary SRNA, have determined that certain Falken truck tires do not fully comply with paragraph S6.5(f) of FMVSS No. 119, *New Pneumatic Tires for Motor Vehicles with a GVWR of more than 4,536 kilograms (10,000 pounds) and Motorcycles* (49 CFR 571.119). SRI filed a noncompliance report dated June 20, 2017, pursuant to 49 CFR part 573, *Defect and Noncompliance Responsibility and Reports.* SRI also petitioned NHTSA on July 10, 2017, pursuant to 49 U.S.C. 30118(d) and 30120(h) and 49 CFR part 556, for an exemption from the notification and remedy requirements of 49 U.S.C. Chapter 301 on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety.

Notice of receipt of the petition was published, with a 30-day public comment period, on September 22, 2017, in the **Federal Register** (82 FR 44488). No comments were received. To view the petition and all supporting documents log onto the Federal Docket Management System (FDMS) website at: *http://www.regulations.gov/.* Then follow the online search instructions to locate docket number ''NHTSA–2017–0071.''

II. *Tires Involved:* Approximately 5,408 Falken truck tires (Model RI151), size 225/70R19.5, manufactured between October 17, 2016, and April 28, 2017, are potentially involved.

III. *Noncompliance:* SRI explains that the noncompliance is that the number of plies indicated on the sidewall of the subject tires do not match the actual number of plies in the tire construction, and therefore, do not meet all applicable requirements specified in paragraph S6.5(f) of FMVSS No. 119. Specifically, the tires are marked with ''TREAD 5 PLIES STEEL'' whereas the correct marking should be ''TREAD 4 PLIES STEEL.''

IV. *Rule Requirements:* Paragraph S6.5 of FMVSS No. 119, titled ''Tire Markings'' includes the requirements relevant to this petition:

- Each tire shall be marked on each sidewall with the information specified in paragraphs (a) through (j) of paragraph S6.5.
- The actual number of plies and the composition of the ply cord material in the sidewall and, if different, in the tread area.

V. *Summary of SRI's Petition:* As background, On June 12, 2017, SRI discovered that a population of 5,408 Falken brand truck tires, Model RI151, size 225/70Rl9.5 128/126L, manufactured from October 17, 2016 through April 28, 2017 at the company's plant in Miyazaki, Japan, were marked with the incorrect number of plies. On July 13, 2017, SRNA was informed of the marking error, shipments of the subject tires were halted, and the company determined that the subject tires failed to comply with the tire labeling requirements of Federal motor vehicle safety standard (FMVSS) No. 119, S6.5. Specifically, the subject tires were incorrectly marked ''TREAD 5 PLIES STEEL,'' although they should have been marked ''TREAD 4 PLIES

STEEL.'' Accordingly, these tires do not conform to the marking requirements of FMVSS No. 119, S6.5. The subject tires comply with the performance requirements and other marking requirements of FMVSS No. 119.

SRI submitted a Part 573 noncompliance report on June 20, 2017. NHTSA Recall No. l7T–012. SRI corrected the production molds. SRI began manufacturing correct versions of these tires on June 17, 2017.

SRI described the subject noncompliance and stated its belief that the noncompliance is inconsequential as it relates to motor vehicle safety.

In support of its petition, SRI submitted the following reasoning:

Under the Safety Act, each Federal motor vehicle safety standard promulgated by the National Highway Traffic Safety Administration (NHTSA) must be ''practicable, meet the need for motor vehicle safety, and be stated in objective terms.'' 49 U.S.C. 3011l(a). The Safety Act defines ''motor vehicle safety'' as:

> ''the performance of a motor vehicle or motor vehicle equipment in a way that protects the public against unreasonable risk of accidents occurring because of the design, construction or performance of a motor vehicle, and against unreasonable risk of death or injury in an accident, and includes nonoperational safety of a motor vehicle.''

49 U.S.C. 30102(a)(8) (emphasis added).

The Safety Act exempts manufacturers from the Safety Act's notice and remedy requirements when the Secretary of Transportation determines that a defect or noncompliance is inconsequential as it relates to motor vehicle safety. *See* 49 U.S.C. 30118(d). Section 30118(d) demonstrates Congress's acknowledgment that there are cases where a manufacturer has failed to comply with a safety standard, yet the impact on motor vehicle safety is so slight that an exemption from the notice and remedy requirements of the Safety Act is justified. NHTSA has stated that the relevant consideration in evaluating an inconsequentiality petition is ''whether an occupant who is affected by the noncompliance *is likely to be exposed to a significantly greater risk than an occupant in a compliant vehicle.*'' 69 FR 19897, 19900 (April 14, 2004) (emphasis added).

In the context of tires specifically, the agency has similarly stated that it ''believes that one measure of inconsequentiality to motor vehicle safety is that there is no effect of the noncompliance on the operational safety of vehicles on which the tires are mounted. Another measure of inconsequentiality . . . is the safety of people working in the tire retread, repair and recycling industries.'' *See* 72 FR 18210 (April 17, 2017) (granting petition for determination of inconsequential noncompliance with respect to SRI tires marked with the incorrect number of plies).

We believe the labeling noncompliance at issue here is inconsequential to motor vehicle safety. The subject Falken tires were manufactured as designed and meet or exceed all applicable FMVSS No. 119 performance standards. Furthermore, all of the sidewall markings related to tire service (load capacity, corresponding inflation pressure, etc.) are correct and the tires correctly show that they contain steel plies. SRI does not believe the mislabeling of these tires presents a safety concern for consumers or retreading and recycling personnel. As noted above, the affected tire mold has been corrected and tires produced on and after June 17, 2017, are marked with the correct number of plies.

NHTSA has previously granted petitions involving similar noncompliances. In the most recent of these, the agency explained:

> ''Although tire construction affects the strength and durability of tires, neither the agency nor the tire industry provides information relating tire strength and durability to the number of plies and types of ply cord material in the tread sidewall. Therefore, tire dealers and customers should consider the tire construction information along with other information such as the load capacity, maximum inflation pressure, and tread wear, temperature, and traction ratings, to assess performance capabilities of various tires. In the agency's judgement, the incorrect labeling of the tire construction information will have an inconsequential effect on motor vehicle safety because most consumers do not base tire purchases or vehicle operation parameters on the number of plies in a tire.''

See 82 FR 18210 (April 17, 2017).

Regarding potential safety risks to the tire service industry, the agency concluded that a misstatement of the number of plies ''will have no measurable effect on the safety of the tire retread, repair, and recycling industries. The use of steel cord construction in the sidewall and tread is the primary safety concern of these industries. In this case, because the sidewall markings indicate that some steel plies exist in the tire sidewall, this potential safety concern does not exist.'' As noted above, the markings on the subject tires correctly indicate that they contain steel plies (although the number is misstated as 5 instead of 4).

NHTSA also granted similar petitions involving tires manufactured by Cooper Tire and SRI (Dunlop). *See* 74 FR 10804 (March 12, 2009) (granting petition submitted by SRI where tires were labeled ''Tread 3 Polyester + 2 Steel,'' whereas the correct marking should have been ''Tread 2 Polyester + 2 Steel+ 2 Polyester''); and 82 FR 17075 (April 7, 2017) (granting petition submitted by Cooper Tire & Rubber Company where tires were marked ''TREAD 1 PLY NYLON + 2 PLY STEEL + 2 PLY POLYESTER,'' whereas the correct marking should have been ''TREAD 1 PLY NYLON + 2 PLY STEEL + 1 PLY POLYESTER.''

SRI is not aware of any warranty claims, field reports, customer complaints, legal claims, or any incidents or injuries related to the subject condition.

SRI concluded by expressing the belief that the subject noncompliance is inconsequential as it relates to motor vehicle safety, and that its petition to be exempted from providing notification of the noncompliance, as required by 49 U.S.C. 30118, and a remedy for the noncompliance, as required by 49 U.S.C. 30120, should be granted.

NHTSA'S Decision

NHTSA'S Analysis: The agency agrees with SRI that the noncompliance is inconsequential to motor vehicle safety. The agency believes that one measure of inconsequentiality to motor vehicle safety is that there is no effect of the noncompliance on the operational safety of vehicles on which these tires are mounted. Another measure of inconsequentiality which is relevant to this petition is the safety of people working in the tire retread, repair and recycling industries.

Although tire construction affects the strength and durability of tires, neither the agency nor the tire industry provides information relating tire strength and durability to the number of plies and types of ply cord material in the tread sidewall. Therefore, tire dealers and customers should consider the tire construction information along with other information such as the load capacity, maximum inflation pressure, tread wear, temperature, and traction ratings, to assess performance capabilities of various tires. In the agency's judgement, the incorrect labeling of the tire construction information will have an inconsequential effect on motor vehicle safety because most consumers do not base tire purchases or vehicle operation parameters on the number of plies in a tire.

The agency also believes the noncompliance will have no measureable effect on the safety of the tire retread, repair, and recycling industries. The use of steel cord construction in the sidewall and tread is the primary safety concern of these industries. In this case, because of the sidewall marking indicate that some steel plies exist in the tire sidewall, this potential safety concern does not exist.

NHTSA'S Decision: In consideration of the foregoing, NHTSA finds that SRI has met its burden of persuasion that the subject FMVSS No. 119 noncompliance in the affected tires is inconsequential to motor vehicle safety. Accordingly, SRI's petition is hereby granted and SRI is consequently exempted from the obligation of providing notification of, and a free remedy for, that noncompliance under 49 U.S.C. 30118 and 30120.

NHTSA notes that the statutory provisions (49 U.S.C. 30118(d) and 30120(h)) that permit manufacturers to file petitions for a determination of inconsequentiality allow NHTSA to exempt manufacturers only from the duties found in sections 30118 and 30120, respectively, to notify owners, purchasers, and dealers of a defect or noncompliance and to remedy the defect or noncompliance. Therefore, this decision only applies to the subject tires that SRI no longer controlled at the time it determined that the noncompliance existed. However, the granting of this petition does not relieve equipment distributors and dealers of the prohibitions on the sale, offer for sale, or introduction or delivery for introduction into interstate commerce of the noncompliant tires under their control after SRI notified them that the subject noncompliance existed.

Authority: 49 U.S.C. 30118, 30120: Delegations of authority at 49 CFR 1.95 and 501.8

Claudia Covell,

Acting Director, Office of Vehicle Safety Compliance.

[FR Doc. 2018–05983 Filed 3–23–18; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2018–0021]

Pipeline Safety: Information Collection Activities

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, PHMSA invites comments on three information collections that are due to expire during the summer of 2018. PHMSA will request an extension with no change for the information collections identified by OMB control numbers 2137–0048, 2137–0600, and 2137–0618.

DATES: Interested persons are invited to submit comments on or before May 25, 2018.

ADDRESSES: Comments may be submitted in the following ways:

E-Gov website: http://www.regulations.gov. This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

Fax: 1–202–493–2251.

Mail: Docket Management Facility; U.S. Department of Transportation (DOT), 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590–0001.

Hand Delivery: Room W12–140 on the ground level of DOT, West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Instructions: Identify the Docket No. PHMSA–2018–0021, at the beginning of your comments. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Privacy Act Statement: DOT may solicit comments from the public regarding certain general notices. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

Docket: For access to the docket or to read background documents or comments, go to *http://www.regulations.gov* at any time or to Room W12–140 on the ground level of DOT, West Building, 1200 New Jersey Avenue SE, Washington, DC, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. If you wish to receive confirmation of receipt of your written comments, please include a self-addressed, stamped postcard with the following statement: "Comments on Docket No. PHMSA–2018–0021." The Docket Clerk will date stamp the postcard prior to returning it to you via the U.S. mail. Please note that due to delays in the delivery of U.S. mail to Federal offices in Washington, DC, we recommend that persons consider an alternative method (internet, fax, or professional delivery service) of submitting comments to the docket and ensuring their timely receipt at DOT.

FOR FURTHER INFORMATION CONTACT: Angela Dow by telephone at 202–366–1246, by fax at 202–366–4566, or by mail at DOT, PHMSA, 1200 New Jersey Avenue SE, PHP–30, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION: Section 1320.8(d), Title 5, Code of Federal Regulations, requires PHMSA to provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This notice identifies three information collection requests that PHMSA will submit to OMB for renewal. The following information is provided for each information collection: (1) Title of the information collection; (2) OMB control number; (3) Current expiration date; (4) Type of request; (5) Abstract of the information collection activity; (6) Description of affected public; (7) Estimate of total annual reporting and recordkeeping burden; and (8) Frequency of collection. PHMSA will request a three-year term of approval for each information collection activity. PHMSA requests comments on the following information collections:

1. Title: Recordkeeping Requirements for Liquefied Natural Gas (LNG) Facilities.

OMB Control Number: 2137–0048.

Current Expiration Date: 06/30/2018.

Type of Request: Renewal with no change of a currently approved information collection.

Abstract: LNG facility owners and operators are required to maintain records, make reports, and provide information to the Secretary of Transportation at the Secretary's request.

Affected Public: Owners and Operators of Liquefied Natural Gas Facilities.

Annual Reporting and Recordkeeping Burden:

Estimated Number of Responses: 101.

Estimated Annual Burden Hours: 12,120.

Frequency of Collection: On occasion.

2. Title: Qualification of Pipeline Safety Training.

OMB Control Number: 2137–0600.

Current Expiration Date: 07/31/2018.

Type of Request: Renewal with no change of a currently approved information collection.

Abstract: All individuals responsible for the operation and maintenance of pipeline facilities are required to be properly qualified to safely perform their tasks. 49 CFR 192.807 requires each operator to maintain records that demonstrate compliance with the mandated qualification criteria. Operators must keep records to be provided upon request.

Affected Public: Operators of pipeline facilities.

Annual Reporting and Recordkeeping Burden:

Estimated Number of Responses: 29,167.

Estimated Annual Burden Hours: 7,292.

Frequency of collection: On occasion.

3. *Title:* Pipeline Safety: Periodic Underwater Inspection and Notification of Abandoned Underwater Pipelines.

OMB Control Number: 2137–0618.

Current Expiration Date: 8/31/2018.

Type of Request: Renewal with no change of a currently approved information collection.

Abstract: The Federal pipeline safety regulations at 49 CFR 192.612 and 195.413 require operators to conduct appropriate periodic underwater inspections in the Gulf of Mexico and its inlets. If an operator discovers that its underwater pipeline is exposed or poses a hazard to navigation, the operator must contact the National Response Center by telephone within 24 hours of discovery and report the location of the exposed pipeline, among other remedial actions, such as marking and reburial in some cases. The Federal pipeline safety regulations for reporting the abandonment of underwater pipelines can be found at 49 CFR 192.727 and 195.59. These provisions contain certain requirements for disconnecting and purging abandoned pipelines and require operators to notify PHMSA of each abandoned offshore pipeline facility or each abandoned onshore pipeline facility that crosses over, under or through a commercially navigable waterway.

Affected Public: Operators of pipeline facilities (except master meter operators).

Annual Reporting and Recordkeeping Burden:

Estimated Number of Responses: 92.

Estimated Annual Burden Hours: 1,372.

Frequency of collection: On occasion.

Comments are invited on:

(a) The need for the renewal and revision of these collections of information for the proper performance of the functions of the agency, including whether the information will have practical utility;

(b) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(d) Ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Authority: The Paperwork Reduction Act of 1995; 44 U.S.C. Chapter 35, as amended; and 49 CFR 1.48.

Issued in Washington, DC, on March 20, 2018, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2018–05981 Filed 3–23–18; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

[Docket No. PHMSA–2007–0039]

Gulf South/Boardwalk Pipeline Partners; Pipeline Safety: Request for Special Permit

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA); DOT.

ACTION: Notice.

SUMMARY: PHMSA is publishing this notice to invite public comment on a request received from the Gulf South Pipeline Company for a special permit seeking relief from compliance with certain requirements in the Federal pipeline safety regulations. At the conclusion of the 30-day comment period, PHMSA will review the comments received on this notice as part of its evaluation to grant or deny the special permit request.

DATES: Submit any comments regarding this special permit request by April 25, 2018.

ADDRESSES: Comments should reference the docket number for the specific special permit request and may be submitted in the following ways:

• *E-Gov website: http://www.Regulations.gov.* This site allows the public to enter comments on any **Federal Register** notice issued by any agency.

• *Fax:* 1–202–493–2251.

• *Mail:* Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

• *Hand Delivery:* Docket Management System: U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays.

Instructions: You should identify the docket number for the special permit request you are commenting on at the beginning of your comments. If you submit your comments by mail, please submit two copies. To receive confirmation that PHMSA has received your comments, please include a self-addressed stamped postcard. Internet users may submit comments at *http://www.Regulations.gov.*

Privacy Act Statement: DOT may solicit comments from the public regarding certain general notices. DOT posts these comments, without edit, including any personal information the commenter provides, to *www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *www.dot.gov/privacy.*

FOR FURTHER INFORMATION CONTACT:

General: Ms. Kay McIver by telephone at 202–366–0113, or email at *Kay.McIver@dot.gov.*

Technical: Mr. Steve Nanney by telephone at 713–628–7479, or email at *Steve.Nanney@dot.gov.*

SUPPLEMENTARY INFORMATION: On February 27, 2009, PHMSA issued a special permit (PHMSA–2007–0039) to Gulf South Pipeline Company (GSPC) for the 30-inch diameter transmission pipeline (TPL–880) pipeline located in Mobile County, Alabama. Due to several Class 1 to Class 3 location change of several areas within a 10.8-mile segment on the TPL–880 pipeline, GSPC petitioned PHMSA for an extension of the previously issued special permit.

The line transports natural gas from the Gulf of Mexico to other pipelines located in Alabama. The special permit inspection area includes 22 miles of the TPL–880 pipeline, extending from the beginning of the line at Station Number 0+00 to the pig trap at Airport Compressor Station Number 1201+68. The new permit request is located within the existing inspection area of Special Permit PHMSA–2007–0039, extends from Station Number 632+60 to Station Number 1201+68, is 10.8 miles long, and is in a suburban area of farm, pasture, and woodland. The current maximum allowable operation pressure (MAOP) for the TPL–880 is 1,073 psig. In the special permit request, GSPC seeks to waive compliance from the requirements of 49 CFR 192.611(a), which requires the pressure reduction, pressure testing, or pipe replacements to address class location changes when the MAOP of a segment of pipeline is not commensurate with the new class location. Condition #26 of the existing special permit PHMSA–2007–0039, allows extensions of the original special permit segments to include contiguous segments of the TPL–880 pipeline up to the limits of the special permit inspection area. GSPC requests one special permit to extend over all three existing special permit segments located on the TPL–880 in Mobile County, Alabama, where the class location has changed from Class 1 to Class 3, and to include additional areas that may experience further development and class change in the future. As described in this application, GSPC proposes to apply alternative risk control measures to the 10.8-mile segment of TPL–880 to provide an acceptable margin of safety and environmental protection to meet the requirements of § 192.611, as outlined in the proposed special permit conditions.

A combined Draft Environmental Assessment (DEA) and proposed Finding of No Significant Impact (FONSI), proposed special permit conditions, and supporting documentation are available at *http://www.Regulations.gov*, in Docket Number, PHMSA–2007–0039. We invite interested persons to participate by reviewing the special permit request, DEA and proposed FONSI documents at *http://www.Regulations.gov*, and by submitting written comments, data, or other views. Please include any comments on potential safety and environmental impacts that may result if the special permit is granted.

Before issuing a decision on the special permit request, PHMSA will evaluate all comments received at the close of the comment period. Comments received after the close of the comment period will be evaluated if it is possible to do so without incurring additional expense or delay. PHMSA will consider each relevant comment we receive in making our decision to grant or deny a request.

Issued in Washington, DC, on March 20, 2018, under authority delegated in 49 CFR 1.97.

Alan K. Mayberry,

Associate Administrator for Pipeline Safety.

[FR Doc. 2018–05982 Filed 3–23–18; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection of Information: Subscription for Purchase and Issue of U.S. Treasury Securities, State and Local Government Series

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995. Currently the Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Subscription for Purchase and Issue of U.S. Treasury Securities, State and Local Government Series.

DATES: Written comments should be received on or before May 25, 2018 to be assured of consideration.

ADDRESSES: Direct all written comments and requests for additional information to Bureau of the Fiscal Service, Bruce A. Sharp, 200 Third Street, Room 4006–A, Parkersburg, WV 26106–1328, or *bruce.sharp@fiscal.treasury.gov.*

SUPPLEMENTARY INFORMATION:

Title: Subscription for Purchase and Issue of U.S. Treasury Securities, State and Local Government Series.

OMB Number: 1530–0065.

Form Numbers:

FS Form 4144—Subscription for Purchase and Issuing of U.S. Securities State and Local Government Series Time Deposits.
FS Form 4144–1—Account Information for U.S. Treasury Securities State and Local Government Series Time Deposits.
FS Form 4144–2—Schedule of U.S. Treasury Securities State and Local Government Series Time Deposits.
FS Form 4144–5—Application for internet Access—U.S. Treasury Securities State and Local Government Series.
FS Form 4144–6—SLGSafe User Acknowledgement.
FS Form 4144–7—SLGSafe Template Worksheet.
FS Form 5237—Subscription for Purchase of U.S. Treasury Securities State and Local Government Series One-Day Certificate of Indebtedness
FS Form 5238—Request for Redemption of U.S. Treasury Securities State and Local Government Series One-Day Certificate of Indebtedness
FS Form 5377—U.S. Treasury Securities State and Local Government Series Early Redemption Request

Abstract: The information is requested to establish and maintain accounts for the owners of securities of the State and Local Government Series.

Current Actions: The currently approved collection is being revised to include a separate collection that is similar in nature and administered by the same program office making it organizationally efficient to combine the two. The reported burden hours in this notice include an estimated 494 respondents and total estimated burden of 247 hours previously reported under OMB Number 1530–0039; ''U.S. Treasury Securities State and Local Government Series Early Redemption Request''. A request to discontinue OMB Number 1530–0039 will be submitted at the conclusion and approval the collection under review.

Type of Review: Regular.

Affected Public: State and Local Government.

Estimated Number of Respondents: 6,437.

Estimated Time per Respondent: 22 minutes.

Estimated Total Annual Burden Hours: 2,334.

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: 1. 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; 2. the accuracy of the agency's estimate of the burden of the collection of information; 3. ways to enhance the quality, utility, and clarity of the information to be collected; 4. 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 5. estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: March 21, 2018.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2018–06054 Filed 3–23–18; 8:45 am]

BILLING CODE 4810–AS–P

FEDERAL REGISTER

Vol. 83 Monday,

No. 58 March 26, 2018

Part II

Securities and Exchange Commission

17 CFR Parts 200 and 242

Transaction Fee Pilot for NMS Stocks; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 200 and 242

[Release No. 34–82873; File No. S7–05–18]

RIN 3235–AM04

Transaction Fee Pilot for NMS Stocks

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (''Commission'' or ''SEC'') is proposing to conduct a Transaction Fee Pilot for National Market System (''NMS'') stocks to study the effects that transaction-based fees and rebates may have on, and the effects that changes to those fees and rebates may have on, order routing behavior, execution quality, and market quality more generally. The data generated by the proposed pilot should help inform the Commission, as well as market participants and the public, about any such effects and thereby facilitate a data-driven evaluation of the need for regulatory action in this area.

DATES: Comments should be received on or before May 25, 2018.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's internet comment form (*http://www.sec.gov/rules/proposed.shtml*); or

• Send an email to *rule-comments@sec.gov*. Please include File Number S7–05–18 on the subject line.

Paper Comments

• Send paper comments to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number S7–05–18. 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 website (*http://www.sec.gov/rules/proposed.shtml*). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549–1090 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. 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.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the ''Stay Connected'' option at *www.sec.gov* to receive notifications by email.

FOR FURTHER INFORMATION CONTACT: Richard Holley III, Assistant Director; Johnna Dumler, Special Counsel; Erika Berg, Special Counsel; or Benjamin Bernstein, Attorney-Advisor, each with the Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549, or at (202) 551–5777.

SUPPLEMENTARY INFORMATION: The Commission is proposing to adopt Rule 610T to establish a Transaction Fee Pilot.

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I. Overview

As an integral part of its oversight of the U.S. equities markets, where liquidity is dispersed across a large number of trading centers that are linked through technology and regulation into a national market system, the Commission assesses market developments, including changes in technology and business practices, as it seeks to ensure that the current regulatory framework continues to effectively and efficiently promote fair and orderly markets, investor protection, and capital formation. From a regulatory perspective, today's equity market structure has been shaped by, among other things, Regulation NMS, adopted in 2005, which established the regulatory framework within which the markets transitioned from a primarily manual to a primarily automated trading environment.[1] Among other things, Regulation NMS put in place order protection requirements to govern intermarket trading in an electronically linked world of dispersed markets, and supplemented those requirements with rules addressing fair and efficient access to quotations and limits on fees charged to access newly protected quotations.[2] Subsequent to the adoption of Regulation NMS, market practices, aided by technological innovation, including advancements in data

[1] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37543–46 (June 29, 2005) (''NMS Adopting Release'').

[2] *See id.*

management and analysis, and competition, have continued to evolve.

Since the adoption of Regulation NMS, the Commission and its staff have undertaken a number of reviews of market structure and market events.[3] In addition, the Commission has focused on initiatives to preserve the operational integrity of markets and market participants[4] and pursued a number of initiatives to enhance regulatory oversight of the markets, improve the information available to market participants about execution activity and the operation of Alternative Trading Systems (''ATSs''), and explored options to improve how equity market structure works for small companies.[5]

In addition, the Equity Market Structure Advisory Committee (''EMSAC'') provided the Commission with diverse perspectives on the structure and operations of the U.S. equities markets, as well as advice and recommendations on matters related to equity market structure.[6] In particular, the EMSAC's recommendations helped to shape the proposal contained herein—namely, a pilot program to produce data on the effect of equity exchange transaction fees and rebates, and changes to those fees and rebates, on order routing behavior, execution quality, and market quality. Informed by EMSAC's recommendation, the Commission believes that an appropriately constructed pilot should provide a valuable source of data to facilitate an informed data-driven discussion about potential alternative approaches to prevailing fee structures.

The discussion below references various types of ''trading centers,'' which is a collective term that refers broadly to the venues that trade NMS stocks.[7] For purposes of this release, the term ''trading center'' includes national securities exchanges that are registered with the Commission and that trade NMS stocks (referred to herein as ''equities exchanges'' or ''exchanges''), as well as other types of ''non-exchange venues'' that trade NMS stocks, including ATSs and broker-dealers that internalize orders by matching them off-exchange with reference to the national best bid and offer.[8] As discussed below, the proposed Pilot would apply only to equities exchanges.

II. Transaction Fees

A. Background

Exchanges and other trading centers aggregate orders to buy and sell securities from market participants and have historically charged their members and users fees when they match an order to buy against an order to sell, at which point an execution occurs. As competition among trading centers intensified in the late 1990s, ATSs, and then exchanges, began to offer rebates to attract order flow.[9] The predominant model that has emerged in the U.S. equities markets is the ''maker-taker'' fee model, in which, on the one hand, a trading center pays its broker-dealer participants a per share rebate to provide (*i.e.,* ''make'') liquidity in securities and, on the other hand, the trading center assesses them a fee to remove (*i.e.,* ''take'') liquidity.[10] The trading center earns as revenue the difference between the fee paid by the ''taker'' of liquidity and the rebate paid to the provider or ''maker'' of liquidity. In a variation on this theme, some other trading centers have adopted a ''taker-maker'' pricing model (also called an inverted model), in which they charge

[3] *See, e.g.,* Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3600 and 3603 (January 21, 2010) (''Concept Release'') (evaluating broadly the performance of market structure since Regulation NMS, particularly for long-term investors and for businesses seeking to raise capital, and soliciting comment on whether regulatory initiatives to improve market structure are needed). *See also* Findings Regarding the Market Events of May 6, 2010 (September 30, 2012), *available at https://www.sec.gov/news/studies/2010/marketevents-report.pdf* (a report of the staffs of the Commission and the Commodity Futures Trading Commission to the Joint Advisory Committee on Emerging Regulatory Issues on the events of May 6, 2010 (the ''Flash Crash''), which analyzed the extraordinary volatility experienced on that day and market participant behavior in response thereto). In response to lessons learned during the Flash Crash, the Commission and the self-regulatory organizations (''SROs'') focused on a number of critical market structure initiatives, including single stock circuit breakers for select NMS stocks and the Limit Up-Limit Down Plan successor thereto, which now serves as the primary volatility moderator in the U.S. equity markets. *See, e.g.,* Securities Exchange Act Release Nos. 62252 (June 10, 2010), 75 FR 34186 (June 16, 2010) (File Nos. SR–BATS–2010–014; SR–EDGA–2010–01; SR–EDGX–2010–01; SR–BX–2010–037; SR–ISE–2010–48; SR–NYSE–2010–39; SR–NYSEAmex–2010–46; SR–NYSEArca–2010–41; SR–NASDAQ–2010–061; SR–CHX–2010–10; SR–NSX–2010–05; SR–CBOE–2010–047) (order approving rule changes to provide for trading pauses in individual stocks when the price moves ten percent or more in the preceding five minute period); 62251 (June 10, 2010), 75 FR 34183 (June 16, 2010) (File No. SR–FINRA–2010–025) (order approving a rule to permit a halt trading otherwise than on an exchange where a primary listing market has issued a trading pause due to extraordinary market conditions); and 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (File No. 4–631) (order approving, on a pilot basis, the national market system plan to address extraordinary market volatility).

[4] *See* Securities Exchange Act Release Nos. 63241 (November 3, 2010), 75 FR 69792 (November 15, 2010) (File No. S7–03–10) (Market Access Rule) and 73639 (November 19, 2014), 79 FR 72252 (December 5, 2014) (File No. S7–01–13) (Regulation Systems Compliance and Integrity).

[5] *See* Securities Exchange Act Release Nos. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (File No. 4–698) (order approving the National Market System Plan Governing the Consolidated Audit Trail); 78309 (July 13, 2016), 81 FR 49431 (July 27, 2016) (File No. S7–14–16) (proposed amendments to Rule 606 of Regulation NMS that would require broker-dealers to disclose additional data to their customers on their routing and execution of institutional orders); 76474 (November 18, 2015), 80 FR 80997 (December 28, 2015) (File No. S7–23–15) (proposed rule concerning operational transparency and regulatory oversight of ATSs); and 74892 (May 6, 2015), 80 FR 27514, 27517–18 (May 13, 2015) (File No. 4–657) (order approving the NMS Plan to Implement a Tick Size Pilot Program) (''Tick Size Pilot Approval Order'').

[6] The EMSAC was a Federal Advisory Committee established as a broad-based group of experts charged with providing the Commission recommendations on a range of complex market structure issues. *See* Securities Exchange Act Release No. 74092 (January 20, 2015), 80 FR 3673 (January 23, 2015) (File No. 265–29). *See also* Equity Market Structure Advisory Committee—Subcommittees, *available at https://www.sec.gov/spotlight/equity-market-structure/equity-market-structure-advisory-committee-subcommittees.htm.* The EMSAC and its four subcommittees discussed a variety of equity market structure issues, including Regulation NMS, trading venue regulation, market quality, and customer issues. One of the EMSAC's subcommittees focused exclusively on Regulation NMS, especially Rule 610(c) (access fees) and Rule 611 (order protection), and considered whether parts of Regulation NMS should be updated in light of the evolution of technology, markets, and market participants. As part of its ongoing review of market structure, the Commission is considering the EMSAC's recommendations as it assesses potential changes to Regulation NMS.

[7] *See* 17 CFR 242.600(b)(78) (defining ''trading center'' as ''a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.'').

[8] *See* 17 CFR 242.600(b)(42) (defining ''national best bid and national best offer'').

[9] *See, e.g.,* Memorandum on Maker-Taker Fees on Equities Exchanges from the Commission's Division of Trading and Markets to the Market Structure Advisory Committee (October 20, 2015), *available at https://www.sec.gov/spotlight/emsac/memo-maker-taker-fees-on-equities-exchanges.pdf* (outlining the development of the maker-taker fee model in the U.S. and summarizing the current public debate about its impact on equity market structure) (''Staff Maker-Taker Memo''). The memo traces the development of transaction fees and summarizes the potential benefits and limitations of maker-taker pricing by presenting market participants' divergent views.

[10] *See id.* New fees that an exchange seeks to impose on its members or persons using its facilities are effective on the day that the exchange files them with the Commission, and neither advance notice nor Commission action is required before an exchange may implement a fee change. *See* 15 U.S.C. 78s(b)(3)(A)(ii). Though Form 19b–4 fee filings are not subject to Commission approval, the Commission may, within 60 days after an exchange filed its fee change with the Commission, summarily suspend the new fee and institute proceedings to determine whether to disapprove it. *See* 15 U.S.C. 78s(b)(3)(C). Exchange fees are subject to the statutory standards set forth in Section 6 of the Securities Exchange Act of 1934 (''Exchange Act''), which require, among other things, that an exchange's fees be an ''equitable allocation'' of ''reasonable'' fees and that they not be ''designed to permit unfair discrimination.'' *See* 15 U.S.C. 78f(b)(4)–(5).

the provider of liquidity and pay a rebate to the taker of liquidity.[11]

The Commission periodically has addressed the ''access fees'' charged by trading centers to access their quotes.[12] In 2005, the Commission again spoke to this issue by adopting Rule 610(c) under Regulation NMS, which prohibits trading centers from imposing, or permitting to be imposed, any fees for the execution of an order against a ''protected quotation'' [13] that exceed or accumulate to more than $0.0030 per share.[14] The $0.0030 per share cap largely codified the prevailing fee level set through competition among the various trading centers.[15] The cap on access fees established by Rule 610(c) sought in part to prevent high access fees in excess of the cap from undermining Regulation NMS's price protection and linkage requirements, while preserving the business model used by trading centers dependent upon revenue from fees.[16]

For maker-taker exchanges, the amount of the taker fee is bounded by the cap imposed by Rule 610(c) on the fees the exchange can charge to access its best bid/offer for NMS stocks.[17] This cap applies to the fees assessed on an incoming order that executes against a resting order or quote, but does not directly limit rebates paid. The Rule 610(c) cap on fees also typically indirectly limits the amount of the rebates that an exchange offers to less than $0.0030 per share in order to maintain net positive transaction revenues.[18] For taker-maker exchanges, the amount of the maker fee charged to the provider of liquidity is not bounded by the Rule 610(c) cap, but such fees typically are no more than $0.0030, and the taker of liquidity earns a rebate.[19]

As discussed below, the maker-taker and taker-maker fee models adopted by exchanges have attracted considerable attention.[20] In recent years, a variety of concerns have been expressed about the maker-taker fee model, in particular the rebates they pay to attract orders. For example, some have questioned whether the prevailing fee structure has created a conflict of interest for broker-dealers, who must pursue the best execution of their customers' orders while facing potentially conflicting economic incentives to avoid fees or earn rebates—both of which typically are not passed through the broker-dealer to its customers—from the trading centers to which they direct those orders for execution.[21] One academic study of selected market data suggested that some broker-dealers route non-marketable orders to the trading center offering the highest rebate, and do so in a manner that the authors contended might not be consistent with the broker-dealers' duty of best execution.[22] Others have expressed concern that maker-taker access fees may (a) undermine market transparency since displayed prices do not account for exchange transaction fees or rebates and therefore do not reflect the net economic costs of a trade; (b) serve as a way to effectively quote in sub-penny increments on a net basis when the effect of a maker-taker exchange's sub-penny rebate is taken into account even though the minimum quoting increment is expressed in full pennies; (c) introduce unnecessary market complexity through the proliferation of new exchange order types (and new exchanges) designed solely to take advantage of pricing models; and (d) drive orders to non-exchange trading centers as market participants seek to avoid the higher

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[11] *See, e.g.,* Cboe BYX U.S. Equities Exchange Fee Schedule (as of March 2018), *available at https://markets.cboe.com/us/equities/membership/fee_schedule/byx/.*

[12] For example, in the mid-1990s, the Commission allowed an electronic communication network (''ECN'') to facilitate specialist and market maker quotation obligations by communicating to the public quotation system the best price and size of orders entered into the ECN by specialists or market makers as long as the ECN met certain conditions and noted that ECNs may impose fees for access to its system that are ''similar to the communications and systems charges imposed by various markets, if not structured to discourage access by non-subscriber broker-dealers.'' Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290, 48314 n.272 (September 12, 1996) (File No. S7–30–95). *See also* Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70871 (December 22, 1998) (File No. S7–12–98). Commission staff subsequently issued a series of no-action letters with respect to access fees charged by ECNs to non-subscribers. These letters permitted fees in amounts equal to those that they charge a ''substantial proportion'' of their active broker-dealer subscribers, but no more than $0.009 per share. *See* Securities Exchange Act Release No. 49325 (February 26, 2004), 69 FR 11126, 11156 (March 9, 2004) (File No. S7–10–04) (''NMS Proposing Release'') (discussing the no-action relief and the inability of ECNs to charge fees that have the effect of creating barriers to access for non-subscribers).

[13] Rule 600(b)(58) of Regulation NMS defines a ''protected quotation'' as a ''protected bid or a protected offer.'' 17 CFR 242.600(b)(58). Rule 600(b)(57) of Regulation NMS, in turn, defines a ''protected bid or protected offer'' as a quotation in an NMS stock that is: (i) Displayed by an ''automated trading center,'' (ii) disseminated pursuant to an effective national market system plan, and (iii) an ''automated quotation'' that is the best bid or best offer of a national securities exchange or national securities association. 17 CFR 242.600(b)(57). *See also* 17 CFR 242.600(b)(3) (defining ''automated quotation'').

[14] *See* 17 CFR 242.610(c). *See also* NMS Adopting Release, *supra* note 1, at 37543–46. In the Regulation NMS Proposing Release, the Commission initially proposed to cap the access fees that any individual market participant could charge for equities at $0.0010 per share, with a total accumulated access fee limit of $0.0020 per share in any transaction. *See* NMS Proposing Release, *supra* note 12, at 11157–59. In its proposal, the Commission expressed concern that access fees added significant non-transparent costs to transactions, potentially encouraged locked markets, and created an unequal playing field as non-ECN broker-dealers were not permitted to charge access fees in addition to their posted quotations. *See id.* However, the Commission ultimately adopted an access fee cap of $0.0030, in order to simplify the initial proposal (*see* NMS Adopting Release, *supra* note 1, at 37502) and for the reasons outlined *infra* at notes 15–16 and accompanying text. *See* 17 CFR 242.610(c). *See also* NMS Adopting Release, *supra* note 1, at 37545.

[15] *See* NMS Adopting Release, *supra* note 1, at 37545 (stating that ''the $0.003 fee limitation is consistent with current business practices, as very few trading centers currently charge fees that exceed this amount'').

[16] *See id.* at 37596 (''In the absence of a fee limitation, the adoption of the Order Protection Rule and private linkages could significantly boost the viability of the outlier business model. Outlier markets might well try to take advantage of intermarket price protection by acting essentially as a toll booth between price levels. The high fee market likely will be the last market to which orders would be routed, but prices could not move to the next level until someone routed an order to take out the displayed price at the outlier market. Therefore, the outlier market might see little downside to charging exceptionally high fees, such as $0.009, even if it is last in priority.''). *See also* 17 CFR 242.610(c). Maker-taker fees also are subject to the proposed rule change process for fees under the Exchange Act. *See* 15 U.S.C. 78s(b)(3)(A) and 17 CFR 240.19b–4(f)(2).

[17] *See* 17 CFR 242.610(c).

[18] *See, e.g.,* Staff Maker-Taker Memo, *supra* note 9, at 3. For example, a maker-taker equities exchange may charge a member $0.0030 to remove liquidity and pay a rebate of $0.0025 to the member that adds liquidity. *See, e.g.,* Cboe BZX U.S. Equities Exchange Fee Schedule (as of March 2018), *available at https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/.* The revenue earned by a maker-taker exchange on transactions equals the difference between the fee charged and the rebate paid.

[19] *See, e.g.,* Cboe BYX U.S. Equities Exchange Fee Schedule (as of March 2018), *available at https://markets.cboe.com/us/equities/membership/fee_schedule/byx/* (where, for securities above $1.00, the fee for adding liquidity is $0.0019 and the rebate for removing liquidity is $0.0005). The make fee on a taker-maker exchange is not bounded by Rule 610(c) because such fee is not a charge to access the market's best bid/offer for NMS stocks.

[20] *See infra* notes 21–28 and accompanying text. *See also* U.S. Dep't of the Treasury, A Financial System that Creates Economic Opportunity: Capital Markets 62–63 (2017).

[21] *See, e.g.,* Stanislav Dolgopolov, ''The Maker-Taker Pricing Model and its Impact on the Securities Market Structure: A Can of Worms for Securities Fraud?,'' 8 Va. L. & Bus. Rev. 231, 270 (2014), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2399821.*

[22] Robert H. Battalio, Shane A. Corwin, and Robert H. Jennings, ''Can Brokers Have It All? On the Relation Between Make-Take Fees and Limit Order Execution Quality,'' *Journal of Finance* 71, 2193–2237 (2016), *available at http://onlinelibrary.wiley.com/doi/10.1111/jofi.12422/full (''Battalio* Equity Market *Study'').* A non-marketable order is an order with a limit price that prevents its immediate execution at current market prices. *See also infra* note 229 (discussing non-marketable orders).

fees that exchanges charge to subsidize the rebates they offer.[23]

By contrast, others have indicated that the maker-taker model may have positive effects by enabling exchanges to compete with non-exchange trading centers and narrowing quoted spreads by subsidizing posted prices.[24] In particular, maker-taker fees may narrow displayed spreads in some securities insofar as the liquidity rebate effectively subsidizes the prices of displayed liquidity.[25] In turn, that displayed liquidity may establish the national best bid and offer, which is often used as the benchmark for marketable order flow, including retail order flow, that is executed off-exchange by either matching or improving upon those prices.[26] Accordingly, retail orders may benefit indirectly from the subsidy provided by maker-taker exchanges.

Some have urged the Commission to gather data to assess the potential impact of transaction fees and rebates in the U.S. markets.[27] Most recently, as discussed below, the EMSAC recommended that the Commission conduct a pilot to study the impact of transaction fees on market quality and order routing behavior.[28] Informed by that recommendation, the views of those submitting comment letters on the EMSAC's proposal, and the information and research described herein, the Commission is proposing that a pilot program be conducted that would produce data on the effects of equity exchange transaction fees and rebates, and possible effects of changes in those fees and rebates, on order routing behavior, execution quality, and market quality.

B. Calls for a Pilot

The concept of a pilot program to gather data to study the effects of the maker-taker model on market quality and order routing behavior has attracted increasing attention in recent years.[29] Nasdaq experimented with changes to its transaction fees when it lowered access fees and rebates in 14 stocks over a four-month period in 2015.[30] Through its experiment, Nasdaq observed that ''[l]iquidity providers [were] the primary responders to the fee changes during the experiment,'' whereas there were ''no significant changes in the nature of liquidity taking during the pilot.''[31] While liquidity *providers* could readily route orders to other trading centers offering higher maker rebates, Nasdaq offered a number of possible explanations for why liquidity *takers* did not appear to respond to its experiment, including the fact that order routing decisions were primarily driven by best execution parameters not by exchange fees.[32] For these reasons, Nasdaq itself observed that ''the results for Nasdaq would not necessarily be duplicated industry-wide if access fees and rebates were reduced across the board.''[33] In other words, Nasdaq's experiment involved a small sample of stocks on a single market for a short duration, all of which make it difficult to draw inferences about what would happen if all exchanges participated in the same experiment simultaneously. The Commission preliminarily believes, therefore, that a pilot is necessary to gather data to facilitate analysis of the

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[23] *See, e.g.,* Curt Bradbury, Market Structure Task Force Chair, Board of Directors, SIFMA, and Kenneth E. Bentsen Jr., President and Chief Executive Officer, SIFMA, Opinion, ''How to Improve Market Structure,'' N.Y. Times (July 14, 2014), *available at http://dealbook.nytimes.com/2014/07/14/how-to-improve-market-structure/?_r=0*; Larry Harris, ''Maker-Taker Pricing Effects on Market Quotations,'' at 24–25 (November 14, 2013), *available at http://bschool.huji.ac.il/.upload/hujibusiness/Maker-taker.pdf* (''Harris''); Dolgopolov, *supra* note 21; Letter from Richard Steiner, Global Equities Liaison to Regulatory & Government Affairs, RBC Capital Markets, to Elizabeth Murphy, Secretary, Commission, at 4 (November 22, 2013) (''RBC Capital Markets Letter I''), *available at https://www.sec.gov/;comments/s7-02-10/s70210-411.pdf*.

[24] *See, e.g.,* Michael Brolley & Katya Malinova, ''Informed Trading and Maker-Taker Fees in a Low Latency Limit Order Market,'' at 2 (October 24, 2013), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178102* (''If a maker rebate is introduced in competitive markets, the bid-ask spread will decline by (twice) the maker rebate.'') (''Brolley and Malinova''); Shawn O'Donoghue, ''The Effect of Maker-Taker Fees on Investor Order Choice and Execution Quality in U.S. Stock Markets'' (January 23, 2015), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2607302* (''O'Donoghue''); and Jean-Edouard Colliard & Thierry Foucault, ''Trading Fees and Efficiency in Limit Order Markets,'' Oxford University Press, at n.13 (September 1, 2012), *available at http://thierryfoucault.com/publications/research-papers/* (arguing that maker-taker rebates may help equities exchanges compete with off-exchange payment for order flow arrangements, in which wholesale broker-dealers purchase retail order flow for trading off-exchange).

[25] *See, e.g.,* Letter from Richie Prager, Managing Director, Head of Trading and Liquidity Strategies, BlackRock, Inc., to Mary Jo White, Chair, SEC, at 2 (September 12, 2014), available at: *http://www.sec.gov/comments/s7-02-10/s70210-419.pdf* (''Some participants have called for elimination of rebates and maker-taker pricing in its entirety in conjunction with access fees, but BlackRock believes that incentives for providing liquidity positively impact market structure. Incentives promote price discovery in public markets, increase available liquidity and tighten spreads. Rebates compensate liquidity providers for exposing orders to adverse selection and information leakage.''). *See also* Harris, *supra* note 23, at 1–2 (noting that while economic theory suggests that maker-taker pricing should have narrowed average bid-ask spreads, intervening factors, such as the growth in electronic trading, make it difficult to ''entirely attribute[ ]'' the observed reduction in bid-ask spreads to maker-taker pricing; in addition, spreads cannot decrease for stocks that already trade at penny-wide spreads).

[26] *See* Concept Release, *supra* note 3, at 3600.

[27] *See infra* note 29 and accompanying text. Limited experiments on a single market with a limited subset of securities, like the test performed by The Nasdaq Stock Market LLC (''Nasdaq'') discussed below, where order flow can quickly move to other exchanges that are not taking part in the experiment, do not offer the same insights as a comprehensive market-wide study on transaction fees. *See infra* notes 30–34 and accompanying text.

[28] *See* Recommendation for an Access Fee Pilot (July 8, 2016), *available at https://www.sec.gov/spotlight/emsac/recommendation-access-fee-pilot.pdf* (''EMSAC Pilot Recommendation''); *see also supra* note 38 and accompanying text.

[29] *See, e.g.,* Letter from Micah Hauptman, Financial Services Counsel, Consumer Federation of America, to Brent J. Fields, Secretary, Commission, at 2 (December 22, 2014), *available at https://www.sec.gov/comments/4-657/4657-64.pdf* (recommending an access fee pilot as an alternative to a tick size pilot); and RBC Capital Markets Letter I, *supra* note 23, at 3.

[30] *See* Securities Exchange Act Release No. 73967 (December 30, 2014), 80 FR 594 (January 6, 2015) (SR–NASDAQ–2014–128) (''Nasdaq Pilot'') (lowering the access fee to remove liquidity from $0.0030 to $0.0005 and reducing the credit paid to display liquidity to $0.0004 (such credits otherwise ranged from $0.0015 to $0.00305)).

[31] *See* Nasdaq Access Fee Experiment May 2015 Report, at 1, *available at http://www.nasdaqomx.com/digitalAssets/98/98718_accessfeereporttwo.pdf* (''Nasdaq May Report''). Nasdaq noted that one of the aims of its experiment was to ''examine the importance of liquidity provider rebates to participant firms' posting behavior on Nasdaq.'' *Id.* Nasdaq's experiment showed what it characterized as statistically significant effects on the Nasdaq Stock Market. For example, Nasdaq observed the following initial impact on its market share: ''In aggregate, Nasdaq's equally-weighted market share in the experiment stocks declined by 2.9 percentage points from January to February. This compares to a decline of 0.9 percentage points in Nasdaq market share in the control stocks. The change observed in the experiment stocks is statistically significant using the diff-in-diff measure.'' *See* Nasdaq Access Fee Experiment March 2015 Report, at 1, *available at http://images.qnasdaqomx.com/Web/NASDAQOMX/%7Be737af7a-07e8-4119-859c-096b306fc6f2%7D_Fee_Cap_Report_3-6-15v3.pdf* (''Nasdaq March Report''). It also observed the following impact on its displayed liquidity: ''Nasdaq's time at the NBBO in the experiment stocks declined 4.9 percentage points from 93.0% in January to 88.1% February (Figure 2). This compares to a decline of 0.3 percentage points in the control stocks. The difference between the experiment and control stocks is statistically significant.'' *See id.* at 2.

[32] *See, e.g.,* Nasdaq May Report, *supra* note 31, at 3. Other possible explanations offered by Nasdaq include, for example, the fact that the number of stocks in its experiment was too low to justify broker-dealers recoding their liquidity taking algorithms in response to the experiment, the possibility that liquidity taking activity for some firms may not consider access fees, or that some liquidity taking algorithms may be based on displayed size. *See id.* (''. . . a fifth conjecture is that the economic incentives for taking liquidity from sources other than Nasdaq are not materially affected by the reduction in Nasdaq's access fees'').

[33] Nasdaq May Report, *supra* note 31, at 1. *See also* EMSAC Pilot Recommendation, *supra* note 28, at 3 (''Limited experiments, such as the recent Nasdaq pilot, have shown that individual market experiments do not yield conclusive results about the potential impact of market-wide policy reform on access fees.'').

impact of fees and rebates on the equities exchanges broadly.[34]

More recently, the EMSAC's Regulation NMS Subcommittee (''Subcommittee'')[35] prepared an outline for a potential access fee pilot, and the EMSAC discussed that outline, and the topic of access fees in general, at its April 2016 meeting.[36] Following that meeting, the Subcommittee revised its recommendation and prepared a formal recommendation for consideration by the EMSAC.[37] The EMSAC considered that revised proposal and recommended that the Commission pursue an access fee pilot.[38] The EMSAC's recommendation stated:

> The intent of the proposed pilot is to better understand, within the context of our current market structure, the effect of access fees on liquidity provision, liquidity taking and order routing with the ultimate goal of improving market quality. The Committee does not believe that there are any certain or predetermined outcomes from the pilot, and the net effect of many counterbalancing factors are not believed to be significantly beneficial or detrimental to any single group. Ultimately, the findings from the pilot are purely intended to inform the broader debate on how to improve market quality for issuers, investors and market participants.[39]

The EMSAC's pilot recommendation featured four buckets of common stocks and Exchange-Traded Funds (''ETFs'')[40] with a market capitalization of at least $3 billion: A control bucket and three test buckets with successively lower access fee caps of $0.0020, $0.0010, and $0.0002.[41] Consistent with the scope of Rule 610(c) of Regulation NMS, the EMSAC recommendation did not include an outright prohibition on rebates or include taker-maker exchanges in the pilot.[42] The EMSAC recommended a two-year term for a pilot and outlined a number of metrics that could be assessed in connection with the pilot.[43]

C. Comments on the EMSAC Recommendation

Following the establishment of the EMSAC, the Commission received a number of comment letters regarding the impact of access fees and rebates in the equities markets.[44] Several

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[34] *See, e.g.,* Nasdaq May Report, *supra* note 31, at 1 (noting that ''. . . the results for Nasdaq would not necessarily be duplicated industry-wide if access fees and rebates were reduced across the board.''). *See also* EMSAC Pilot Recommendation, *supra* note 28, at 3 (''Limited experiments, such as the recent Nasdaq pilot, have shown that individual market experiments do not yield conclusive results about the potential impact of market-wide policy reform on access fees.''); Nasdaq March Report, *supra* note 31, at 3 (''Some commentators on the access fee experiment have indicated that a voluntary change in the access fee by one exchange in fourteen stocks does not tell you what would happen if there were a mandatory change in the regulatory maximum access fee across all exchanges in a considerable number of stocks of NMS stocks. We do not disagree with that point. Nasdaq believed in launching the experiment that fourteen stocks were enough to induce behavioral changes with statistically and economically measurable changes. The results from February have proven that belief was correct.''); and Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, Commission (January 30, 2015), at 2, *available at http://www.sec.gov/comments/sr-nasdaq-2014-128/nasdaq2014128-1.pdf* (''In particular, the proposal's limited scope and application cannot act as a substitute for a market-wide access fee reduction that would change the dynamics of access fees and rebates across the entire market. For the proposal to accurately measure the structural impact of reduced access fees, the proposal should be carried out across all exchanges and with a larger sampling of symbols.''). *See also* Section V.B.1.b.i *infra* for additional discussion of the Nasdaq study.

[35] The Subcommittee first convened in November 2015, and began by focusing on maker-taker access fees. In a series of meetings over the following months, the Subcommittee assembled an outline of proposed terms for an access fee pilot. It identified general goals and prepared a recommendation for the consideration of the full EMSAC for the scope of a potential pilot, including stock selection, pricing buckets, and duration, and it also considered the potential inclusion of non-exchange markets, taker-maker exchanges, and a trade-at component. Minutes of those meetings and other information are *available at https://www.sec.gov/spotlight/equity-market-structure/equity-market-structure-advisory-committee-subcommittees.htm.*

[36] *See* Framework for a Potential Access Fee Pilot (April 19, 2016), *available at https://www.sec.gov/spotlight/emsac/emsac-regulation-nms-subcommittee-recommendation-041916.pdf.* At its April 2016 meeting, EMSAC discussed the topic of maker-taker fees and heard from a number of outside experts. *See* EMSAC Transcript, April 26, 2016, *available at https://www.sec.gov/spotlight/emsac/emsac-042616-transcript.txt.*

[37] *See* Regulation NMS Subcommittee Recommendation for an Access Fee Pilot (June 10, 2016), *available at https://www.sec.gov/spotlight/emsac/emsac-regulation-nms-recommendation-61016.pdf* (''June Recommendation'').

[38] The EMSAC considered the Subcommittee's June Recommendation and adopted it, by a vote of 15–1, with slight modifications that preserved the basic structure of the June Recommendation but incorporated additional detail, for example, settling on a two-year term and recommending 100 securities in each test bucket. *See* EMSAC Pilot Recommendation, *supra* note 28. *See also* EMSAC Transcript, July 8, 2016, *available at https://www.sec.gov/spotlight/emsac/emsac-070816-transcript.txt.* The EMSAC member who voted against the EMSAC Pilot Recommendation noted his concern that ''capping access fees is going to discourage liquidity provision and increase spreads'' before voting against the EMSAC Pilot Recommendation. *See id.* at 22:24–23:6.

[39] EMSAC Pilot Recommendation, *supra* note 28, at 1.

[40] *See infra* note 96 (discussing ETFs).

[41] *See* EMSAC Pilot Recommendation, *supra* note 28, at 2. The EMSAC noted that it ''intentionally selected $.0002 as the rate in Bucket 4 in order to create a bucket where any rebate should result in a de minimis economic incentive.'' *Id.* at 4.

[42] In addition, consistent with the framework of Rule 610(c), the EMSAC's proposed fee caps would apply to protected quotations and not depth of book quotations, and would have no direct application to ATSs. *See id.* at 2.

[43] *See id.* at 2. The recommendation did not include a ''trade-at'' provision that would restrict price matching of protected quotations, but mentioned an option to include ATSs in the pilot. *See id.* at 5 (noting that if trade-at were included, ''the likely shift of flows as a result of trade-at would both make the pilot more complex and impact the effective measurement of the access fee change''). The EMSAC also noted that ''[t]he tick pilot will yield some trade-at results that can be further studied; thus duplication is not warranted.'' *See id. See also* Tick Size Pilot Approval Order, *supra* note 5, at 27517–18 (discussing a trade-at prohibition that, subject to certain exceptions, prevents a trading center that was not quoting from price matching protected quotations and permits a trading center that was quoting at a protected quotation to execute orders at that level, but only up to the amount of its displayed size).

[44] Letter from Haim Bodek, Managing Principal, and Stanislav Dolgopolov, Regulatory Consultant, Decimus Capital Markets, LLC, to Brent J. Fields, Secretary, Commission (April 25, 2016), *available at https://www.sec.gov/comments/265-29/26529-63.pdf* (''Decimus Capital Markets Letter''); Letter from Elizabeth King, NYSE, to Brent J. Fields, Secretary, Commission (May 13, 2016), *available at https://www.sec.gov/comments/265-29/26529-66.pdf* (''NYSE Letter''); Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq, to Brent J. Fields, Secretary, Commission (May 24, 2016), *available at https://www.sec.gov/comments/265-29/26529-71.pdf* (''Nasdaq Letter''); Letter from Richard Steiner, RBC Capital Markets, to The Honorable Mary Jo White, Chair, Commission (May 24, 2016), *available at https://www.sec.gov/comments/265-29/26529-70.pdf* (''RBC Capital Markets Letter II''); Letter from Security Traders Association to SEC EMSAC (June 15, 2016), *available at https://www.sec.gov/comments/265-29/26529-74.pdf* (''Security Traders Association Letter''); Letter from Kermit Kubitz to SEC EMSAC (July 5, 2016), *available at https://www.sec.gov/comments/265-29/26529-73.htm* (''Kubitz Letter''); Letters from J A to Chair White, Commissioners, and SEC EMSAC (May 23, 2016, & September 13, 2016), *available at https://www.sec.gov/comments/265-29/26529-68.htm* & *https://www.sec.gov/comments/265-29/26529-85.htm* (''J A Letters''); Letter from Richard Steiner, Electronic Trading Strategist, RBC Capital Markets, to Mary Jo White, Chair, Commission (September 23, 2016), *available at https://www.sec.gov/comments/265-29/26529-86.pdf* (''RBC Capital Markets Letter III''); Letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Brent J. Fields, Secretary, Commission (December 23, 2016), *available at https://www.sec.gov/comments/265-29/26529-1441899-130023.pdf* (''Healthy Markets Letter I''); Letter from Theodore R. Lazo, Managing Director & Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, Commission (March 29, 2017), *available at https://www.sec.gov/comments/265-29/26529-1674696-149276.pdf* (''SIFMA Letter''); Letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Brent J. Fields, Secretary, Commission (April 3, 2017), *available at https://www.sec.gov/comments/265-29/26529-1681516-149500.pdf* (''Healthy Markets Letter II''); Letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Hon. W. Jay Clayton, Chairman, Commission (June 13, 2017), *available at https://www.sec.gov/comments/265-29/26529-1801830-153704.pdf* (''Healthy Markets Letter III''); Letter from Chris Concannon, President and Chief Operating Officer, Cboe, Thomas Wittman, CEO, The Nasdaq Stock Market LLC, and Thomas W. Farley, President, NYSE, to Hon. Jay Clayton, Chairman, Commission (October 13, 2017), *available at https://www.sec.gov/comments/265-29/26529-2641078-161300.pdf* (''Joint Exchange Letter''); Letter from Brad Katsuyama, Chief Executive Officer, and John Ramsay, Chief Market Policy Officer, Investors Exchange LLC, to Hon. Jay Clayton, Chairman, Commission (November 15,

commenters voiced support for a pilot in general or for the various proposals considered by the Subcommittee and the EMSAC that culminated in the EMSAC Pilot Recommendation. One commenter, for example, expressed support for an access fee pilot and characterized the Subcommittee's recommendation as ''an excellent roadmap'' for such a pilot.[45] Other commenters that support an access fee pilot remarked that the maker-taker pricing model contributes to opaque, non-transparent markets, increases market complexity and fragmentation, and generates conflicts of interest that may impede best execution of orders, and they urged the Commission to act promptly on a pilot that could produce useful data on these issues.[46]

Some of these same commenters suggested modifications to the ideas ultimately embodied in the EMSAC Pilot Recommendation. For example, one commenter suggested including a wider range of securities with lower market capitalizations, instead of focusing only on the highly liquid securities proposed by the EMSAC.[47] Several other commenters argued that any pilot should either ban rebates altogether or include a ''no-rebate'' test bucket—an approach that the EMSAC considered, but did not ultimately recommend.[48] Finally, a number of commenters advocated for applying a pilot to taker-maker exchanges as well as ATSs.[49]

In a joint letter, three exchanges recommended several other changes [50] if the Commission proceeds with a pilot based on the EMSAC's recommendation.[51] These commenters suggested that such a pilot should, among other things: (1) Study ''all forms of remuneration,'' in part by adding measures specifically to study ATS and broker-dealer remuneration and to show how the savings realized by broker-dealers from lowered exchange transaction fees are ''returned to customers,'' [52] (2) measure costs to issuers and shareholders and allow issuers to have a voice in whether they are included in a pilot,[53] (3) pre-announce the measures for benchmarking and tracking the impact of a pilot,[54] and (4) ''measure gross shifts in trading from exchange to off-exchange venues and among off-exchange venues.'' [55]

Other commenters expressed concern regarding the impact of a pilot.[56] For example, the New York Stock Exchange LLC (''NYSE'') believed that, while the pilot's lowered fee caps in the three test groups would reduce the direct costs paid by broker-dealers to access displayed exchange quotations, it also would effectively limit the rebates paid

2017), *available at https://www.sec.gov/comments/265-29/26529-2691444-161491.pdf* (''IEX Letter''); Email from Tim Quast, President, ModernNetworks IR LLC, to Hon. Jay Clayton, Chairman, Commission (December 5, 2017), *available at https://www.sec.gov/comments/265-29/26529-2777697-161622.pdf*.

[45] *See* Decimus Capital Markets Letter, *supra* note 44, at 2.

[46] *See, e.g.,* Letter from Ari Burstein, Associate General Counsel, Investment Company Institute, to Brent Fields, Secretary, Commission (May 11, 2015), *available at https://www.sec.gov/comments/265-29/26529-10.pdf* (recommending that the Commission establish a pilot program that would prohibit rebates and reduce access fees) (''Investment Company Institute Letter I''); Letter from Managed Funds Association to SEC EMSAC (September 29, 2015), *available at https://www.sec.gov/comments/265-29/26529-28.pdf* (urging ''a disciplined, data-driven study'' and calling for analysis of access fees' effects on market liquidity, order routing, execution transparency, transaction costs, and competition); Letter from David W. Blass, General Counsel, Investment Company Institute, to SEC EMSAC (January 20, 2016), *available at https://www.sec.gov/comments/265-29/26529-48.pdf* (urging the Commission to establish a phased pilot program for highly liquid stocks that would reduce access fees and prohibit rebates) (''Investment Company Letter II''); Letter from the Trading Issues Committee, Canadian Security Traders Association, Inc., to Brent Fields, Secretary, Commission (April 6, 2016), *available at https://www.sec.gov/comments/265-29/26529-61.pdf* (proposing a cross-border study on the effect of rebates on market quality in conjunction with the Canadian Securities Administrators); J A Letters, *supra* note 44 (retail investor supporting proposed pilot but suggesting test of payment for order flow and inclusion of ''trade-at'' provision); Security Traders Association Letter, *supra* note 44 (supporting a pilot of limited number of securities with varying access fee caps and ''no other variables''); RBC Capital Markets Letter III, *supra* note 44 (concluding that an access fee pilot based on the EMSAC recommendation would be ''a positive step'' and further suggesting a no-rebate bucket and the inclusion of taker-maker exchanges and ATSs); Healthy Markets Letter I, *supra* note 44 (applauding many aspects of the EMSAC recommendation, but suggesting that it include all trading venues and a ''trade-at'' provision); SIFMA Letter, *supra* note 44 (proposing, as one alternative, that the Commission adopt the EMSAC recommendation); IEX Letter, *supra* note 44 (supporting the concept of a fee pilot conducted by the SEC, but recommending that the pilot include a no-rebate bucket and apply to inverted exchanges).

[47] *See* Decimus Capital Markets Letter, *supra* note 44, at 11. *But cf.* Investment Company Institute Letter II, *supra* note 46, at 6–7 (asserting that pilot securities should be highly liquid stocks, as measured by average daily trading volume); Joint Exchange Letter, *supra* note 44, at 5 (expressing concern that liquidity in less active stocks could be negatively impacted by a pilot, but acknowledging that, ''if less active stocks are omitted, it is difficult to envision the securities that should be selected . . .''). *See also infra* Section III.B (discussing the securities to be included in the proposed pilot, which incorporates a broader range of securities than the EMSAC recommendation, including NMS stocks with market capitalizations below $3 billion).

[48] *See* Investment Company Institute Letter II, *supra* note 46, at 7 (recommending that the Commission establish a phased pilot program for highly liquid stocks that would reduce access fees and prohibit rebates); RBC Capital Markets Letter III, *supra* note 44, at 3 (advocating for the inclusion of a ''no-rebate'' bucket in the pilot); Healthy Markets Letter II, *supra* note 44, at 6 n.15 (suggesting that the Commission establish a pilot that eliminates rebates); SIFMA Letter, *supra* note 44, at 9–10 (suggesting, as an alternative to an access fee pilot, that the Commission eliminate rebates); IEX Letter, *supra* note 44, at 3–4 (stating that restrictions on access fees may not help the Commission to evaluate alternatives to the current exchange pricing system, which is driven primarily by rebates, and advocating for the inclusion of a ''no-rebate'' bucket in the pilot). *See also* Nasdaq Letter, *supra* note 44, at 3 (asserting that any pilot should apply to both fees and rebates). *But cf.* NYSE Letter, *supra* note 44, at 3–4 (arguing that elimination of rebates, without any other offsetting incentives, may reduce market-maker incentives to provide liquidity). *See also infra* Section III.C (discussing the design of the proposed pilot, which includes a ''no-rebate'' bucket).

[49] *See* RBC Capital Markets Letter III, *supra* note 44, at 4 (suggesting that the pilot should be applied to taker-maker exchanges and ATSs); Healthy Markets Letter I, *supra* note 44, at 3–4 (taking the view that ''all relevant exchanges'' and ATSs should be included in the pilot). *See also* Nasdaq Letter, *supra* note 44, at 3 (recommending that the Commission establish a pilot that applies to all trading centers, including ATSs); Joint Exchange Letter, *supra* note 44, at 5 (recommending that the pilot apply to trading in all off-exchange venues); IEX Letter, *supra* note 44, at 4 (suggesting that the access fee pilot should include taker-maker exchanges). *See also infra* Section III.A (discussing the Commission's decision to include taker-maker exchanges, but not ATSs, in the proposed pilot).

[50] *See* notes 47 and 49 *supra,* and note 62 *infra,* for a discussion of other changes recommended by these three exchanges.

[51] *See* Joint Exchange Letter, *supra* note 44, at 4–5.

[52] *But cf.* IEX Letter, *supra* note 44, at 2 (''The idea that a substantial conflict of interest cannot be addressed unless all other conflicts are addressed simultaneously is not viable.'').

[53] *See* Section III.B *infra* (discussing the Commission's decision to include a broader range of securities than the EMSAC recommendation, including NMS stocks with market capitalizations below $3 billion). *See also* Sections V.C.2.b and V.D.3 *infra* (discussing the potential costs to small and mid-capitalization issuers).

[54] *See* Section III.E *infra* (discussing the measures that the Commission intends to use to benchmark and track the impact of the proposed Pilot).

[55] *See* Joint Exchange Letter, *supra* note 44, at 4–5. *See also* Section III.E.3 *infra* (discussing the order routing data that the Commission intends to use to measure shifts in trading); Section V.E.1 *infra* (noting that the Commission can use existing data sources to track shifts in trading between equities exchanges and ATSs).

[56] *See, e.g.,* Letter from David M. Weisberger, Managing Director and Global Head, RegOne Solutions, a Markit company, to Brent Fields, Secretary, Commission (October 9, 2015), *available at https://www.sec.gov/comments/265-29/26529-30.pdf* (raising various questions about proposals to modify access fees, including risks that such proposals could hurt retail investors and lower available liquidity); Letter from John I. Sanders & Benjamin Leighton, Wake Forest School of Law Community Law and Business Clinic (October 20, 2015), at 6–7, *available at https://www.sec.gov/comments/265-29/26529-33.pdf* (opining that a shift away from maker-taker pricing could affect liquidity and suggesting that the Commission instead focus on utilizing market manipulation rules, limiting order types, and regulating colocation).

by exchanges to attract liquidity, which could ''reduce the competitiveness of exchanges relative to dark pools. . . .'' [57] NYSE further argued that the Subcommittee's concept for a pilot was ''designed to test investors' and listed companies' tolerance for worsening market quality'' since market making and market quality ''are largely driven by incentives and corresponding obligations.'' [58] NYSE recommended an alternative initiative that would lower access fee caps, prohibit maker-taker pricing models, and institute a ''trade-at'' rule.[59]

Nasdaq suggested the Commission pursue an alternative pilot that caps both fees and rebates, as it believed that more meaningful data would result by removing price from market participants' routing decisions.[60] Nasdaq also argued that the pilot should apply to all trading centers.[61] Finally, Nasdaq thought that a two-year term for a pilot would be too long, observing that its own transaction fee experiment suggested that the impact on liquidity *provision* was evident quickly.[62]

One commenter, the Chicago Board Options Exchange, Incorporated, now known as Cboe Exchange, Inc. (''Cboe''), recommended against doing a pilot, and instead suggested abolishing the equity fee cap and requiring ATSs to file fee changes with the Commission.[63] Similarly, Nasdaq, NYSE, and Cboe jointly suggested that the Commission should forgo conducting a pilot that only touches on one aspect of Regulation NMS and instead recommended a broader review of the impact of remuneration on routing and trading.[64] Alternatively, Nasdaq, NYSE, and Cboe recommended that, if the Commission seeks to conduct an access fee pilot, it should first (1) articulate a strong and clear duty of best execution to ameliorate the conflict of interest between a broker and its customer, (2) require improved disclosures regarding execution quality and routing practices to deter potential conflicts, and (3) adopt its proposed amendments to Regulation ATS [65] to enhance the operational transparency of ATSs.[66]

Investors' Exchange LLC (''IEX'') responded to the comments jointly submitted by Nasdaq, NYSE, and Cboe by characterizing those exchanges' arguments as ''part of a familiar playbook to stave off market reform.'' [67] While IEX agreed that Nasdaq, NYSE, and Cboe had identified important areas for consideration, IEX did not support delaying action on a transaction fee pilot [68] and disputed whether the broad review suggested by Nasdaq, NYSE, and Cboe was necessary.[69] Rather, IEX strongly supported the idea of a transaction fee pilot, but recommended that any such pilot include a ''no-rebate'' bucket and apply to inverted exchanges.[70]

III. Discussion of the Proposed Pilot

The Commission is proposing to conduct a Transaction Fee Pilot (the ''Pilot'' or ''Transaction Fee Pilot'') for NMS stocks, as described below. In formulating this proposal, the Commission has taken into consideration the recommendation of the EMSAC for an access fee pilot, the views of those submitting comment letters on the EMSAC's proposal, and the information and research described throughout this release. The Commission's proposal, in an effort to more broadly test the impact of transaction fees and rebates, differs from the EMSAC's recommendation in several respects, as discussed further below.[71] The Commission notes that the proposed Pilot is not designed to test the impact of transaction fees and rebates on all aspects of equities market structure, including market fragmentation and the proliferation of complex order types, but rather focuses on order routing behavior, execution quality, and market quality.

The following chart summarizes the proposed terms of the Pilot, which are discussed in more detail below:

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[57] NYSE Letter, *supra* note 44, at 3. NYSE was critical of the potential application of access fee caps to non-displayed liquidity, an idea considered but not recommended by the EMSAC, because it believed that such caps on exchanges would advantage ATSs. *Id.* at 5–6.; *but cf.* RBC Capital Markets Letter III, *supra* note 44, at 4 (asserting that the pilot program should cover non-displayed orders on exchanges to ensure complete and accurate data). *See also infra* Section III.C (discussing the design of the proposed pilot).

[58] *See* NYSE Letter, *supra* note 44, at 3.

[59] *See id.* at 6. Some commenters seemed to agree with NYSE that a ''trade-at'' rule should be included in the pilot. *See* Nasdaq Letter, *supra* note 44, at 2. Others opposed inclusion of a ''trade-at'' rule. *See* RBC Capital Markets Letter III, *supra* note 44 (stating that a ''trade-at'' rule would be duplicative, given the inclusion of such a component in the Tick Size Pilot, and opining that a ''trade-at'' rule could obscure data showing the impact of pricing); Healthy Markets Letter I, *supra* note 44, at 4 (noting that inclusion of a ''trade-at'' rule would increase the pilot's complexity and decrease its utility, but opining that all trading venues should be included in the pilot if a ''trade-at'' rule is excluded). *See also infra* Section III.C (discussing the design of the proposed pilot).

[60] *See* Nasdaq Letter, *supra* note 44, at 3. *See also infra* Section III.C.3 (discussing the Pilot's inclusion of a ''no-rebate'' bucket).

[61] *See* Nasdaq Letter, *supra* note 44, at 3. *See also infra* Section III.A (discussing the Commission's decision to expand on the EMSAC Pilot Recommendation to apply the Pilot to all equities exchanges, but not to ATSs).

[62] *See* Nasdaq Letter, *supra* note 44, at 3; Joint Exchange Letter, *supra* note 44, at 5 (recommending that the proposed pilot last no more than one year and that the Commission develop criteria for evaluating the possibility of the pilot's early termination). *See also, e.g.,* Nasdaq May Report, *supra* note 31, at 1 (summarizing some of Nasdaq's explanations regarding the results of its transaction fee experiment); and *infra* Section III.D (discussing the Commission's decision to limit the two-year term recommended by EMSAC with an automatic sunset at the end of the first year).

[63] *See* Letter from Edward T. Tilly, CEO, Cboe, to SEC EMSAC (January 28, 2016), *available at https://www.sec.gov/comments/265-29/26529-51.pdf.* Cboe opined that ''broad and arbitrary price controls'' are a ''drastic measure'' that conflicts with ''the very concept of a market-based system.'' *Id.* at 9–10. As another alternative, one commenter proposed that the Commission require venues to include ''all-in'' costs in their visible quotes. *See* Letter from Michael J. Friedman, General Counsel, Trillium, to Brent J. Fields, Secretary, Commission (May 14, 2015), *available at https://www.sec.gov/comments/265-29/26529-18.pdf.*

[64] *See* Joint Exchange Letter, *supra* note 44, at 2 and 6. Investors Exchange LLC (''IEX''), disagreed with this suggestion and pointed out that the Commission ''has been engaged in a holistic review of market structure at least since the issuance of its Equity Market Structure Concept Release in 2010,'' which ''has led to consideration of the Fee Pilot.'' *See* IEX Letter, *supra* note 44, at 3. IEX further opined that maker-taker pricing need not be addressed simultaneously with all other market structure issues, given ''the amount of fees and rebates involved (over $2.5 billion in 2016), the inefficiencies that result from hundreds of pricing tiers, and the proven negative consequences to investors that result from routing orders to high rebate exchanges.'' *Id.* at 2–3.

[65] Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998).

[66] *See* Joint Exchange Letter, *supra* note 44, at 2–4. *But cf.* IEX Letter, *supra* note 44, at 3 (characterizing this recommendation as one with ''no logic other than commercial protectionism in delaying action on fees and rebates'').

[67] *See* IEX Letter, *supra* note 44, at 2.

[68] *See id.* at 3.

[69] *See id.* at 2–3; *see also* notes 52 and 64 *supra.*

[70] *See id.* at 1–4; *see also* notes 48–49 *supra.*

[71] Because the proposed Pilot would apply more broadly to more types of transaction fees beyond only fees to access a protected quotation, the Commission therefore is not characterizing the proposal as an ''Access Fee Pilot.''

<table>
<tr><th colspan="3">Outline of the Proposed
Transaction Fee Pilot for NMS Stocks</th></tr>
<tr><td>Duration</td><td colspan="2">2 years with an automatic sunset at 1 year unless, no later than thirty days prior to that time, the Commission publishes a notice that the pilot shall continue for up to another year;
plus a six-month pre-Pilot Period and six-month post-Pilot Period</td></tr>
<tr><td>Applicable Trading Centers</td><td colspan="2">Equities exchanges (including maker-taker & taker-maker)
but not ATSs or other non-exchange trading centers</td></tr>
<tr><td>Pilot Securities</td><td colspan="2">NMS stocks with a share price ≥ $2 per share that do not close below $1 per share during the proposed Pilot and that have an unlimited duration or a duration beyond the end of the post-Pilot Period</td></tr>
<tr><td rowspan="4">Pilot Design</td><td>Test Group 1</td><td><u>$0.0015 fee cap</u>
for removing & providing displayed liquidity
(no cap on rebates)</td></tr>
<tr><td>Test Group 2</td><td><u>$0.0005 fee cap</u>
for removing & providing displayed liquidity
(no cap on rebates)</td></tr>
<tr><td>Test Group 3</td><td><u>Rebates and Linked Pricing Prohibited</u>
for removing & providing displayed & undisplayed liquidity
(Rule 610(c)'s $0.0030 cap continues to apply to fees for removing displayed liquidity)</td></tr>
<tr><td>Control Group (Remaining Pilot Securities)</td><td>Rule 610(c)'s cap continues to apply to fees for removing displayed liquidity (no cap on rebates)</td></tr>
</table>

A. Applicable Trading Centers

The proposed Pilot, consistent with the EMSAC's recommendation, would apply solely to the equities exchanges. The fee cap under Rule 610(c), on which the proposed Pilot is largely based, does not apply to options exchanges.[72] Specifically, the fee cap under Rule 610(c) applies to NMS stocks on a per share basis whereas options contracts are derivatives that represent a number of shares, typically 100 shares of stock per options contract for a single-stock option, and the current fee cap under Rule 610(c) is not calibrated to account for that difference.[73] Because options and equities are materially different types of securities, the current fee cap applicable to equities exchanges does not apply, and cannot readily be applied, to options exchanges. If options exchanges were to be included in a pilot, the Commission would first need to create a new type of fee cap to apply to options exchanges and then consider how that cap would impact current options exchange fee models, which would introduce considerable additional complexity.[74] For these reasons, the Commission is not proposing to include options exchanges in the proposed Pilot.

However, the scope of the proposed Pilot would be broader than both the EMSAC's recommendation and Rule 610(c), in that it would include all equities exchanges—including taker-maker exchanges. For example, the proposed Pilot's fee cap in Test Groups 1 and 2 (detailed below) would apply the cap to the take fee on a maker-taker exchange and also would apply the cap to the *maker* fee on a taker-maker exchange.[75] The EMSAC did not recommend including taker-maker exchanges or ATSs in an access fee pilot because it endeavored to remain consistent with the current market structure, including the Rule 610(c) access fee cap, which only caps fees for *removing* a *protected quotation* and does not apply to ATSs.[76] A number of commenters disagreed with the approach recommended by the EMSAC.[77] These commenters asserted that a pilot would provide more meaningful data if applied more broadly;[78] one commenter explained that a broader approach would reduce the possibility of ''gaming,'' as well as provide more accurate testing of order flows.[79] Another commenter believed that liquidity and market quality on traditional, maker-taker exchanges would suffer unless taker-maker exchanges and ATSs were included in the proposed Pilot.[80] Another

[72] *See* 17 CFR 242.610(c) (addressing ''fees for the execution of an order . . . in an NMS stock,'' where ''NMS stock'' is defined as ''any NMS security other than an option'' under 17 CFR 242.600(b)(47)).

[73] As a result, options exchange fees for the execution of one options contract typically far exceed the Rule 610(c) cap of $0.0030. *See, e.g.,* NYSE Arca Options Fee Schedule, *available at https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf* (including fees, as of September 2017, of $0.50 for electronic executions that take liquidity in Penny Pilot Issues for Broker-Dealer orders).

[74] *See also* EMSAC Pilot Recommendation, *supra* note 28, at 5. None of the comment letters submitted to the EMSAC advocated for including options exchanges in an access fee pilot.

[75] *See supra* note 19 (discussing Rule 610(c) and the taker-maker model). The proposed fee caps in Test Groups 1 and 2 (detailed below) would *not* apply to rebates. For example, the proposed Pilot's fee cap in Test Group 2 would *not* apply the cap to the maker rebate on a maker-taker exchange, nor would it apply the cap to the taker rebate on a taker-maker exchange.

[76] *See* EMSAC Pilot Recommendation, *supra* note 28, at 5.

[77] *See supra* note 49.

[78] *See, e.g.,* Nasdaq Letter, *supra* note 44, at 3; IEX Letter, *supra* note 44, at 4 (arguing that inverted exchanges should be included in a pilot because the pilot otherwise would test ''only how much distortive pricing can be transferred to these venues'').

[79] *See* RBC Capital Markets Letter III, *supra* note 44, at 4. *But cf. infra* notes 86–93 and accompanying text (acknowledging the potential for ''gaming,'' but discussing the Commission's decision to exclude ATSs from the Pilot).

[80] *See* Nasdaq Letter, *supra* note 44, at 2. *But cf. infra* notes 89–93 and accompanying text (noting that Nasdaq's fee experiment results would not necessarily be duplicated in an industry-wide pilot and explaining that the Pilot could potentially

Continued

commenter believed that a pilot should include all equities exchanges and ATSs, but acknowledged that a pilot based on the current parameters of Rule 610(c) would be difficult to apply to taker-maker exchanges and ATSs.[81]

The Commission believes that the proposed Pilot should be designed to broadly study the impact of transaction fees and rebates on order routing behavior, execution quality, and market quality. To achieve a broader study, the Commission preliminarily believes that including all equities exchanges, including taker-maker exchanges, in the proposed Pilot is appropriate. Including all equities exchanges in the proposed Pilot will ensure that the Pilot will collect data on all equities markets that are registered national securities exchanges, whose fees are all subject to the requirements of the Exchange Act and the rule filing requirements thereunder, thus treating equally all similarly situated entities.

However, expanding the proposed Pilot to non-exchange trading centers, such as ATSs, whose fees currently are not subject to Rule 610(c) would have the effect of imposing, in the terms of a pilot, an entirely new regulatory regime on entities whose fees are not currently subject to the substantive and process requirements applicable to exchanges, and that are currently not subject to access fee caps in any respect. The Commission, therefore, believes that doing so would introduce a number of complexities that it preliminarily does not believe are warranted for purposes of this proposed Pilot. In particular, while equities exchanges charge transaction-based fees, ATSs, especially ''dark pool'' ATSs that are part of a large broker-dealer order handling business, may not charge separate transaction-based fees for executions in their ATSs, and instead might use bundled pricing that does not associate particular orders with particular fees.[82] Consequently, incorporating ATSs into the proposed Pilot would be substantially more complex if the proposed Pilot required ATSs to radically change their fee models and renegotiate their pricing arrangements with their customers in order to assess fees differently than they do today solely to accommodate the proposed Pilot.[83]

Because the proposed Pilot is designed to study, among other things, the potential conflicts of interest faced by broker-dealers when routing orders as a result of transaction fees and rebates, it is necessary to be able to directly observe the effects of changes in transaction fees and rebates on their trading. As discussed above, some have questioned whether a broker-dealer's economic incentive to avoid transaction-based fees and earn transaction-based rebates impacts its order routing decisions in a manner that creates a misalignment between the broker-dealer's economic interests and its obligation to seek the best execution for its customer's order.[84] To the extent ATSs do not charge transaction-based fees, it is not practicable to include them in a pilot that is structured to test the impact of changes in transaction fees. Accordingly, the Commission preliminarily believes that excluding ATSs from the proposed Pilot is appropriate, and that broadly applying the Pilot to all equities exchanges, regardless of their pricing model, will allow the proposed Pilot to collect data on the effects of changes in transaction fees and rebates, which will permit the study of, among other things, potential conflicts of interest faced by broker-dealers when routing orders.[85]

The Commission acknowledges the concerns raised by Nasdaq about excluding ATSs from the proposed Pilot.[86] Specifically, Nasdaq noted that during its fee experiment, when Nasdaq lowered its rebates, liquidity providers ''immediately moved their quotes to other exchanges.'' [87] As a result, Nasdaq stated that unless ATSs are included in the pilot ''we are likely to find that liquidity and market quality on exchanges will be fundamentally harmed, ultimately to the detriment of public investors'' and ''[i]ssuers included in the pilot would see a diminishment of transparent quotes, widening of quoted spreads, and an inferior overall trading experience.'' [88] However, as discussed above, unlike for liquidity adding orders, Nasdaq found ''no significant changes in the nature of liquidity taking'' during its fee experiment.[89] The Commission believes, as discussed above and as Nasdaq itself observes, that ''the results for Nasdaq would not necessarily be duplicated industry-wide if access fees and rebates were reduced across the board.'' [90] For example, the fact that some market participants ''immediately moved their quotes to other exchanges'' may be because other equities exchanges did not participate in Nasdaq's fee experiment and those market participants who specifically sought to quote on an equities exchange, and not an ATS, responded accordingly by moving some of their activity to equities exchanges that continued to offer rebates. The Commission notes that the proposed Pilot would not impact the ability of an equities exchange to maintain a ''protected quote,'' an advantage that an ATS does not enjoy, and to the extent that the demand associated with liquidity taking on exchanges remains stable, it could continue to attract liquidity providers desiring that protection despite changes to rebates. Further, the Commission notes that some have argued that high equities exchange maker rebates necessitate high offsetting taker fees, which may cause some liquidity taking order flow to migrate to non-exchange trading centers in search of lower transaction costs.[91] The proposed Pilot's lower fee caps in Test Groups 1 and 2, discussed below, could possibly improve the competitive position of exchanges vis-à-vis ATSs.[92]

Accordingly, the Commission preliminarily believes that it is appropriate to exclude ATSs from the proposed Pilot, which also is consistent

improve the competitive position of exchanges vis-à-vis ATSs).

[81] *See* Healthy Markets Letter I, *supra* note 44, at 4; *see also* Section III.A *infra* (discussing the difficulties of applying the Pilot to ATSs).

[82] *See, e.g.,* Letter from William P. Neuberger and Andrew F. Silverman, Managing Directors and Global Co-Heads of Morgan Stanley Electronic Trading, to Brent J. Fields, Secretary, Commission (May 19, 2016), *available at https://www.sec.gov/comments/s7-23-15/s72315-37.pdf* (commenting on File No. S7–23–15 concerning regulation of NMS Stock Alternative Trading Systems and noting that ATS fees may be bundled with brokerage services).

[83] *See infra* Section V.E.1. (noting that the inclusion of ATSs in the proposed Pilot may not be practical and is likely to substantially increase the costs of the proposed Pilot).

[84] *See supra* notes 21–22 and accompanying text.

[85] While ATSs would not be subject to the proposed Pilot, data on ATS market share are available from FINRA, *available at https://otctransparency.finra.org,* which could provide an indication of whether routing to ATSs increase or decrease during the proposed Pilot. *See infra* Section V.C.1.b. (discussing possible changes in routing to ATSs during the proposed Pilot).

[86] *See* Nasdaq Letter, *supra* note 44, at 2.

[87] *Id.*

[88] *Id.*

[89] *See* Nasdaq May Report, *supra* note 31, at 1.

[90] Nasdaq May Report, *supra* note 31, at 1. *See also* EMSAC Pilot Recommendation, *supra* note 28, at 3 (''Limited experiments, such as the recent Nasdaq pilot, have shown that individual market experiments do not yield conclusive results about the potential impact of market-wide policy reform on access fees.'').

[91] *See, e.g.,* BlackRock Inc. Viewpoint, U.S. Equity Market Structure: An Investor Perspective, at 7 (April 2014), *available at https://www.blackrock.com/corporate/en-us/literature/whitepaper/viewpoint-us-equity-market-structure-april-2014.pdf* (''Reducing the access fee caps is one solution that would narrow the price disparity and lessen the impact of cost in routing decisions. This may also curb the usage of off-exchange venues, such as dark pools and internalizers, as a major benefit of these trading platforms is their cost efficiency relative to exchanges.'') (''BlackRock Viewpoint'').

[92] *See id.*

with the EMSAC's recommendation.[93] The Commission further notes that the inclusion of ATSs is discussed as an alternative in the economic analysis below.

The Commission requests comment on the trading centers to be included in the proposed Pilot. In particular, the Commission solicits comment on the following. To the extent possible, please provide specific data, analyses, or studies for support.

1. The proposed Pilot would apply to all equities exchanges. Should the scope be expanded or reduced? If so, what should the scope be? What would be the anticipated impacts of the revised scope?

2. Should the Commission include taker-maker equities exchanges in the proposed Pilot? Why or why not? What would be the anticipated impact of excluding taker-maker equities exchanges from the proposed Pilot?

3. Should the proposed Pilot be expanded to include ATSs? Why or why not? What would be the anticipated impact of including ATSs in the proposed Pilot? If the proposed Pilot were expanded to include ATSs, should all ATSs be included or only certain ATSs? What, if any, are the potential competitive impacts of excluding ATSs from the proposed Pilot? Would including ATSs in the proposed Pilot have any likely effect on ATS business models? To what extent do ATSs charge fees that are not transaction-based? If the proposed Pilot includes ATSs, how should it apply to ATS fees that are not transaction-based? Also, to apply the proposed Pilot to ATSs, would the Commission need to impose other new requirements on ATSs, such as fee disclosure requirements? If ATSs were to be included in the proposed Pilot, would they be able to collect and report the proposed data[94] or would changes be necessary to accommodate ATSs?

4. Should the proposed Pilot include options exchanges? Why or why not? What would be the anticipated impact of including options exchanges in the proposed Pilot? How would the quality and extent of the data be impacted by including or excluding options exchanges? What, if any, are the potential impacts, including competitive impacts, of excluding options exchanges from the proposed Pilot? What, if any, are the potential competitive impacts of subjecting options exchanges to fee caps?

B. Securities

The Commission proposes to include in the Pilot all NMS stocks, which includes common stocks and Exchange-Traded Products (''ETPs''), among other securities,[95] with an initial share price at the time the pre-Pilot Period commences of at least $2, an unlimited duration or a duration beyond the end of the post-Pilot Period, and no restrictions on market capitalization (collectively, ''Pilot Securities'').[96] As discussed below, throughout the duration of the proposed Pilot, including the pre- and post-Pilot Periods, if a Pilot Security in one of the Test Groups closes below $1, the security would be removed from the Test Group and would no longer be subject to the Pilot pricing restrictions.[97]

While the EMSAC did not specify a minimum price threshold, the Commission is proposing an initial $2 threshold that would apply at the time of the initial Pilot Securities selection, as was done for the Tick Size Pilot. On a continuing basis, the price threshold would be $1, also as was done for the Tick Size Pilot. If a Test Group security's share price closes below $1 at the end of a trading day during the proposed Pilot, it would be dropped from the Test Group and removed from the proposed Pilot.[98] Under Rule 610(c), stocks with quotations of less than $1 are subject to a structurally different fee cap (based on a percentage of the quoted price) than stocks with quotations of $1 or greater (based on a fixed dollar amount),[99] and equities exchanges typically also assess fees differently for stocks priced less than $1 (*i.e.,* based on a percentage of the price rather than a fixed fee amount).[100] Accordingly, the $1 minimum continuing price threshold recognizes those distinctions and avoids applying the proposed Pilot's Test Group fixed dollar fee caps to securities below $1 for which a fixed dollar cap would be incompatible with the current existing percentage-based standards applicable to those securities.[101]

The Commission preliminarily believes that an initial minimum $2 per share price threshold at the time of the initial stock selection captures substantially all NMS stocks while also providing a cushion so that substantially all of the securities selected for each Test Group will remain part of their respective Test Groups for the duration of the proposed Pilot and not be dropped on account of their share price closing below $1 during the Pilot, as it is uncommon for securities priced at $2 or more to fall below $1.[102] This

[93] *See* EMSAC Pilot Recommendation, *supra* note 28, at 5 (''. . . the Committee does not believe that extending the application of Rule 610(c) to ATSs would be a beneficial part of the pilot given that (i) such limitation does not apply today, (ii) ATSs are not afforded a protected quote, and (iii) ATS transaction fees generally take the form of an institutional commission.'').

[94] *See* Section III.E *infra* for a description of the proposed data.

[95] *See* 17 CFR 242.600(b)(47) (defining ''NMS stock''). The Commission notes that although the EMSAC recommended limiting the access fee pilot to common stocks and ETFs, because Rule 610(c) applies to all NMS stocks, and not just common stocks and ETPs (including ETFs), the Commission preliminarily believes it is appropriate to extend the Pilot to all NMS stocks.

[96] The EMSAC recommended including ETFs, which are open-end fund vehicles or unit investment trusts that are registered as investment companies under the Investment Company Act of 1940. The Commission's proposal uses the broader term of ETPs, which, in addition to ETFs, also includes trust or partnership vehicles that are not registered under the 1940 Act because they do not invest primarily in securities, as well as Exchange-Traded Notes (''ETNs''). ETNs are senior debt instruments that pay a return based on the performance of a reference asset. Unlike the two other categories of ETPs, ETNs are not pooled vehicles, and they do not hold an underlying portfolio of securities or other assets. *See generally* Securities Exchange Act Release No. 75165 (June 12, 2015), 80 FR 34729, 34731 (June 17, 2015) (Request for Comment on Exchange-Traded Products). The EMSAC record, including transcripts of EMSAC meetings, does not contain any substantive discussion of the distinction between ETFs and ETPs. However, all such securities are ''NMS stocks'' subject to Rule 610(c), and the Commission preliminarily does not believe there is a meaningful basis to justify excluding any of them from the proposed Pilot. *See* 17 CFR 242.600(b)(47) (defining ''NMS stock''). *See also* proposed Rule 610T(b)(1)(ii) (defining ''Pilot Securities'').

[97] *See also* proposed Rule 610T(b)(3)(ii)(D) (concerning the Pilot Securities Change List and the capture of the date on which any Pilot Security closes below $1).

[98] *See* Section III.E.1 *infra* (discussing the obligations for primary listing exchanges to maintain Lists of Pilot Securities that will be updated as necessary prior to the beginning of trading on each day the U.S. equities markets are open for trading to communicate changes to Pilot Securities). Stocks in the Control Group that close below $1 would be removed from the Pilot. As discussed below, exchanges would be required to record on the Pilot Securities Change Lists the date that a stock closes below $1.

[99] While Rule 610(c) imposes a cap of $0.0030 for a protected quotation of $1.00 or more, the cap is 0.3% when the protected quotation is less than $1.00. *See* 17 CFR 242.610(c).

[100] *See, e.g.,* New York Stock Exchange Price List, *available at https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Price_List.pdf.*

[101] For example, applying Test Group 2's $0.0015 cap to a security priced at $0.25, which currently would be subject to a fee cap of $0.00075 under Rule 610(c) (*i.e.,* 0.3% of $0.25) would be inapposite.

[102] Based on data computed from Center for Research on Securities Prices (CRSP), during the last five years (2012–2016), 94.4% of publicly traded common stocks and ETPs had a share price above $2. Of those stocks, only 4.3% dropped below $1 at any point in that period. In addition, NYSE and Nasdaq can initiate delisting proceedings if a security trades below $1 for a certain period of time. *See, e.g.,* NYSE Listed Company Manual Section 802.01C; Nasdaq Equity Rule 5450(a)(1). *See also* Cboe BYX Rule 14.7(e)(1) (continued listing requirement of a minimum bid price of $1 per share); NYSE Arca Rule 5.2(c) (maintenance requirement of a $5 closing bid price or $3 closing bid price under the alternate listing requirement).

initial threshold also will increase the likelihood that the securities in each Test Group remain the same throughout the entire proposed Pilot, which will provide consistency in the Test Groups and avoid any adverse impact caused by changes to the composition of the Test Groups.[103]

With respect to market capitalization, the EMSAC recommended limiting the pilot to large capitalization stocks with a minimum market capitalization of $3 billion in part to avoid overlap with the Tick Size Pilot, which commenced on October 3, 2016, and is scheduled to last for a two-year period until October 3, 2018.[104] The Commission notes that the Tick Size Pilot may conclude before the proposed Pilot commences, but if not, the Commission believes that the strong support for a pilot in the near term, reflected in the comments summarized above, as well as the proposed Pilot's design, which, as discussed below, would protect the integrity of the data in both pilots, weighs in favor of proceeding expeditiously and not waiting for the Tick Size Pilot to first expire.[105]

The Commission preliminarily believes that a more comprehensive pilot covering all NMS stocks, including those with market capitalizations below $3 billion, would produce a more meaningful dataset to facilitate broader analysis of the impact of transaction fees and rebates across the full spectrum of NMS stocks, including both large market capitalization companies with potentially substantial liquidity and trading activity as well as mid- and small capitalization companies with potentially less trading activity. A broader dataset will, in turn, permit the Commission and researchers to perform more in-depth analyses among different segments of the securities market, which may be more informative than a narrower pilot for evaluations of the various theories for how transaction fees and rebates may impact routing behavior, execution quality, and market quality.

For example, some have suggested that transaction rebates are distortive and unnecessary for liquid large capitalization companies because, to the extent that those securities already trade at spreads no wider than the minimum trading increment, the rebate cannot serve to narrow the quoted spread further and the high fee that offsets the rebate undermines price transparency because a quote at the same displayed price on different equities exchanges (with different levels of fees) less closely reflects the actual net price to trade at any one exchange.[106] The limitation or removal of rebates for liquid large capitalization stocks therefore may be less likely to lead to deterioration in market quality in those securities.[107] On the other hand, some have argued that the beneficial aspects of rebates, including their potential to contribute to narrowing quoted spreads, may outweigh their potential for these distortions in mid- and small capitalization securities, which can face persistent challenges in attracting liquidity.[108] Accordingly, transaction rebates may facilitate the provision of beneficial liquidity for mid- and small capitalization securities, and may outweigh any negative distortive impact on broker-dealer incentives, market complexity, or price transparency.[109]

To study these possible effects, the Commission believes it is important to gather data on the impact of fees and rebates on stocks of all market capitalizations. While it is possible that some observations from a pilot focused on large capitalization stocks also could be relevant to mid- and small capitalization stocks, it is likely that other observations could be inapposite, and without including smaller stocks in a pilot, the Commission and researchers would lack data to study the impact on them.

Implementing without undue delay a broad pilot that includes stocks of all market capitalizations could potentially cause the Pilot to overlap with the Tick Size Pilot. Although such an overlap may be unlikely, the proposed Pilot has been designed so that, if necessary, it could proceed simultaneously with the Tick Size Pilot without distorting the effects of either pilot.[110] Specifically, as discussed further below, in the event of an overlap each Test Group would be comprised of two subgroups, one of which contains securities included in the Tick Size Pilot, and one of which does not, enabling the Commission and researchers to identify and control for any possible effects of an overlap.[111] The Commission therefore believes that this proposed Pilot design would protect the integrity of the data in both the proposed Pilot and the Tick Size Pilot, to the extent that the pilots overlap.[112] Staging one transaction fee pilot for large capitalization stocks in

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[103] Similarly, the requirement that Pilot Securities have an unlimited duration or a duration beyond the end of the post-Pilot Period is intended to avoid selecting stocks that would expire and drop out during the Pilot, which also should provide consistency in the Test Groups and avoid adverse impacts caused by changes to the composition of the Test Groups.

[104] *See* EMSAC Pilot Recommendation, *supra* note 28, at 2. *See also* EMSAC Transcript, April 26, 2016, *supra* note 36, at 27:7–15 (reflecting the Subcommittee's desire to run the Tick Size Pilot simultaneously with the Pilot without either program impacting the other). *See also* Investor Alert: Tick Size Pilot Program—What Investors Need to Know, *available at https://www.sec.gov/oiea/investor-alerts-bulletins/ia_ticksize.html* (summarizing the Tick Size Pilot).

[105] *See, e.g.,* Healthy Markets Letter I, *supra* note 44, at 5 (noting that "market participants, experts, and policymakers have been clamoring for the Commission to adopt a study to address order routing incentives for years"); RBC Capital Markets Letter III, *supra* note 44, at 1 ("[T]he sooner that a pilot can be approved and commenced, the sooner the Commission will have the benefit of the pilot's data, and the sooner it can implement needed reforms."); IEX Letter, *supra* note 44, at 4 ("The EMSAC recommendation was issued more than one year ago, and no one believes that concerns over maker-taker pricing have become less relevant since then. We believe that the time to proceed with the pilot is long past due.").

[106] *See, e.g.,* James Angel, Lawrence Harris & Chester Spatt, "Equity Trading in the 21st Century," Quarterly Journal of Finance 1, (2011), *available at https://doi.org/10.1142/S2010139211000067* (noting that "[t]he obfuscation makes it more difficult for traders to recognize the true costs of their trading.") ("Angel, Harris, and Spatt"); Joe Ratterman, Chief Executive Officer, & Chris Concannon, President, BATS, "Open Letter to U.S. Securities Industry Participants Re: Market Structure Reform Discussion," at 1 (January 6, 2015), *available at http://cdn.batstrading.com/resources/newsletters/OpenLetter010615.pdf* ("BATS Open Letter") (arguing that "[a] substantial reduction in access fees, and their corresponding rebates, would help remove conflicts or a perception of conflicts with respect to those highly liquid securities that no longer require liquidity incentives.").

[107] *See, e.g.,* BlackRock Viewpoint, *supra* note 91, at 7 ("The value of liquidity and therefore the need for incentives and rebates is not the same across all stocks. Regulators should review whether highly liquid stocks require any rebates at all.").

[108] *See, e.g.,* BATS Open Letter, *supra* note 106, at 3 (". . . BATS does not believe that highly liquid securities require as great a rebate as less liquid securities. . . . ").

[109] *See id.*

[110] *See* Section III.C *infra* for additional explanation regarding how the Pilot would control for the potential overlap with the Tick Size Pilot. Notably, if the two pilots overlap and the Tick Size Pilot ends before the proposed Pilot (if adopted) ends, the Transaction Fee Pilot's proposed Test Groups would not change. Alternatively, if the two pilots would not overlap at all because the Tick Size Pilot ends before the proposed Pilot (if adopted) commences, then the overlap design discussed below would not be necessary. *See* Section III.C (noting that each Test Group would remain constant for the duration of the proposed Pilot with only limited exceptions).

[111] The proposed overlap structure, which can be seen in Test Groups 1(a), 2(a), and 3(a) reflected in the table below titled "Proposed Pilot Design of the Transaction Fee Pilot for NMS Stocks," is specifically designed to enable comparison between subgroups within a particular Test Group, as well as across Test Groups, to identify any differences between those securities that overlap with the Tick Size Pilot and those that do not.

[112] In addition, conducting both pilots simultaneously would increase the amount of data collected while both pilots are active, which may increase the statistical power of tests of the marginal impact of transaction fees or rebates or of different tick sizes. Statistical power refers to the ability for statistical tests to identify differences across samples when those differences are indeed significant.

the near term (*i.e.,* that does not overlap with the Tick Size Pilot's $3 billion market capitalization threshold) and conducting a separate, subsequent transaction fee pilot for mid- and small capitalization stocks following the conclusion of the Tick Size Pilot also would achieve that objective. However, the Commission preliminarily believes that it is preferable to proceed expeditiously with a broad transaction fee pilot because the data to be collected from the proposed Pilot, and the analyses that will follow, will help inform the Commission and the public on the potential impact of transaction fees and rebates across all segments of NMS stocks.

Further, the Commission preliminarily does not believe that including smaller capitalization stocks in the proposed Pilot should disproportionately harm those issuers, even though it may result in the reduction or elimination of transaction-based rebate incentives [113] that would otherwise be used to attract posted liquidity in those stocks on maker-taker exchanges, as discussed above.[114] While the proposed Pilot would reduce or eliminate rebate incentives to transact in those securities on an exchange for certain Test Groups, the proposed Pilot would not impact the ability of an exchange to maintain a ''protected quote,'' which may offset the reduced rebate incentive and continue to serve as an incentive to attract liquidity providers.[115] In addition, the proposed Pilot would reduce exchange transaction fees for certain Test Groups, as discussed below, thereby making it less expensive—and consequently more attractive—to transact in those securities on an exchange, which also may offset the reduced rebate incentive and attract liquidity providers. Accordingly, including in the proposed Pilot smaller capitalization companies that are part of the Tick Size Pilot will allow the Commission to collect data in the near term on the impact of transaction fees and rebates on NMS stocks, including smaller capitalization stocks, which may trade differently than large capitalization stocks and thus may be affected differently by changes to transaction fees and rebates.

The Commission requests comment on the securities to be included in the proposed Pilot. In particular, the Commission solicits comment on the following. To the extent possible, please provide specific data, analyses, or studies for support.

5. Is the proposed sample size of securities for the proposed Pilot reasonable? If not, what other selection criteria should be used? What changes should the Commission consider to inclusion or exclusion from the sample set? Should the Commission include a narrower or broader universe of securities? In particular, should only common stocks and ETPs be included in the proposed Pilot and should other types of NMS stocks, like rights and warrants, be excluded from the Pilot? Why or why not? Is the proposed selection method for the Pilot reasonable?

6. Is the inclusion of ETPs appropriate? Does the proposed Pilot design account for relevant distinctions between ETPs and other stocks? Should the proposed Pilot exclude ETPs that are not ETFs?

7. If the Commission excludes ETPs from the proposed Pilot, what would be the effects on the quality and extent of data? How would this impact the study?

8. Should other types of securities be included, such as options? Should certain securities be excluded? Why or why not?

9. If the timing of the proposed Pilot appears likely to coincide with the Tick Size Pilot, would it be reasonable to proceed simultaneously with the proposed Pilot? Why or why not? To the extent that there is no overlap between the proposed Pilot and the Tick Size Pilot, the Commission would not retain the overlap design. Do commenters agree with this approach?

10. Is the initial $2 per share threshold reasonable? Why or why not? Is there another level at which this threshold should be set?

11. Is the $1 per share minimum continuing price threshold reasonable? Why or why not? Is there another level at which this threshold should be set?

12. Should the Commission require a minimum market capitalization? If so, what should be the threshold? What would be the impacts of this revised market capitalization threshold?

13. Should the Commission require a minimum trading volume for NMS stocks in the proposed Pilot?

14. What are the likely effects of the proposed Pilot on issuers and capital formation? In particular, are different types of issuers likely to be affected in different ways by the proposed Pilot, and, if so, how?

15. Should issuers be allowed to opt out of the proposed Pilot or would allowing issuers to opt out adversely affect the proposed Pilot? If so, how? What would be the impact on the extent and quality of the data? For example, could it reduce the representativeness of the results obtained from the Pilot, particularly if those issuers that opt out are predominantly one type of issuer (*e.g.,* small or mid-capitalization issuers)? If issuers were allowed to opt out, should only certain types of issuers be allowed to opt out, *e.g.,* small-capitalization stocks or stocks with low levels of liquidity? How should the Commission consider the benefits and costs on the overall Pilot? How should the costs to issuers and shareholders be measured?

C. Proposed Pilot Design

Pursuant to proposed Rule 610T(b)(1), the Commission would designate by notice the initial List of Pilot Securities. That list would place each NMS stock that meets the initial criteria to be a Pilot Security into one of the three proposed Test Groups or into the Control Group. Each of the three Test Groups would be selected through stratified sampling by market capitalization, share price, and liquidity.[116] The composition of each Test Group would remain constant for the duration of the proposed Pilot, except that the exchanges would update this information, as described below, to reflect changes to the composition of the groups caused by mergers, delistings, or removal from a Test Group due to the share price of a stock closing below $1.

Each Test Group would contain 1,000 NMS stocks, with the remainder of eligible NMS stocks to be included in the Control Group. If the proposed Transaction Fee Pilot is adopted and commences before the end of the Tick Size Pilot, the selection of the common stocks for the Transaction Fee Pilot Test Groups would take into consideration the common stocks in the Tick Size Pilot.[117] If the two pilots would not

[113] *See supra* notes 108–109 and accompanying text for an explanation of the beneficial aspects of rebates for mid- and small capitalization securities. *See also* Section V.C.2.f *infra* for a discussion of the potential impact of subjecting small-capitalization securities to both the Tick Size Pilot and the proposed Pilot.

[114] *See, e.g.,* EMSAC Pilot Recommendation, *supra* note 28, at 1 (noting that there may not be ''any certain or predetermined outcomes from the pilot, and the net effect of many counterbalancing factors are not believed to be significantly beneficial or detrimental to any single group.'').

[115] The Commission has a variety of mechanisms to address issues that may arise under the Pilot. *See* 15 U.S.C. 78mm.

[116] Stratified sampling refers to selecting stocks for each Test Group and the Control Group according to predefined criteria. As proposed, the predefined criteria would result in each Test Group and the Control Group containing a group of stocks that, as a group, reflect a similar distribution of market capitalization, share price, and liquidity. For example, when stratifying stocks on the basis of liquidity, each Test Group and the Control Group would have a similar distribution of high, moderate, and low liquidity securities.

[117] Specifically, if the two pilots would overlap, then each of the proposed Transaction Fee Pilot's

Continued

overlap at all because the Tick Size Pilot ends before the proposed Pilot (if adopted) commences, then the overlap design of dividing each group into two subgroups would not be necessary and each Test Group would simply contain 1,000 NMS stocks without subgroups.

The Commission preliminarily believes that this design would be representative of the size of the overall population of NMS stocks and would provide sufficient statistical power to identify differences among the Test Groups with respect to common stocks and ETPs.[118] This selection methodology for the Pilot Securities is intended to help ensure that the proposed Transaction Fee Pilot Test Groups would be similar in composition to each other and to the Control Group, as well as to the composition of the Tick Size Pilot test groups. This proposed design would reduce the likelihood that the proposed Transaction Fee Pilot would cause data issues for the study of the Tick Size Pilot and vice versa.[119]

While the EMSAC limited its recommendation by proposing test groups modeled on the current regulatory structure reflected in Rule 610(c), the Commission instead has preliminarily determined to more broadly study the impact of all transaction fees on order routing behavior, execution quality, and market quality.[120] Including all equities exchanges in the proposed Pilot, even those with taker-maker fee models, would ensure that the Pilot will collect data on all equities markets that are registered national securities exchanges, whose fees are all subject to the requirements of the Exchange Act and the rule filing requirements thereunder, thus treating equally all similarly situated entities.

In addition, as is the case currently under Rule 610(c), the proposed Pilot would permit equities exchanges to charge varied transaction fees for Pilot Securities within each Test Group, so long as such fees comply with the conditions (including the applicable cap) set for that group. The Commission believes that this would allow equities exchanges to continue to compete for order flow by adjusting their access fees within the bounds of the proposed Pilot.

The Commission is proposing to apply the following pricing restrictions to Test Groups 1, 2, and 3, and the Control Group would remain subject to the current access fee cap in Rule 610(c):

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three Test Groups would be divided into two subgroups—one that overlaps with the Tick Size Pilot and one that does not overlap. The subgroups that overlap with the Tick Size Pilot would each contain 270 NMS stocks (45 stocks would be selected from each of the three Tick Size Pilot test groups (45 stocks × 3 Tick Size Pilot groups = 135 total), with the remaining 135 stocks coming from the Tick Size Pilot's control group, for a total of 270 common stocks). The subgroups that do not overlap with the Tick Size Pilot would each contain 730 NMS stocks: 150 large-capitalization common stocks, 100 small- and mid-capitalization stocks that do not overlap with the Tick Size Pilot, 260 ETPs, and 220 other NMS stocks. For purposes of the proposed Pilot, large-capitalization common stocks would be common stocks with market capitalizations above $3 billion and conversely, small- and mid-capitalization common stocks would be those with market capitalizations of $3 billion or less. *See* Section III.B *supra* for discussion regarding including securities with market capitalizations above, as well as below, $3 billion in the proposed Pilot. *See also* proposed Rule 610T(b)(2)(ii)(D) (containing fields for certain types of NMS stocks that would be included in the proposed Pilot). The Commission would select stocks from the pool of securities eligible for the Tick Size Pilot in the same manner as it selects the stocks that would not overlap with the Tick Size Pilot.

[118] *See supra* note 112 (defining ''statistical power''). The Commission preliminarily believes that any reduction in the number of NMS stocks in any particular group could provide less statistical power and thereby affect the conclusions of the Pilot.

[119] *See* Section V.C.1.a.i.A *infra.* The proposed design ensures that similar proportions of stocks impacted by the Tick Size Pilot would be included in each Test Group of the Transaction Fee Pilot, such that any Tick Size Pilot effects would be uniform across the proposed Pilot. Researchers would therefore be able to control for those effects and minimize any data distortion.

[120] The Commission notes that one of the goals of Rule 610(c) was to support the integrity of the price protection requirement established by Rule 611 of Regulation NMS. *See* NMS Adopting Release, *supra* note 1, at 37503 (''Finally and most importantly, the fee limitation of Rule 610 is necessary to support the integrity of the price protection requirement established by the adopted Order Protection Rule. In the absence of a fee limitation, some 'outlier' trading centers might take advantage of the requirement to protect displayed quotations by charging exorbitant fees to those required to access the outlier's quotations. Rule 610's fee limitation precludes the initiation of this business practice, which would compromise the fairness and efficiency of the NMS.'').

<table>
<tr><th colspan="6">Proposed Pilot Design of the Transaction Fee Pilot for NMS Stocks</th></tr>
<tr><th></th><th>Group</th><th colspan="2"># of NMS Stocks</th><th>Fee Cap</th><th>Rebates Permitted</th></tr>
<tr><td></td><td>Control Group</td><td colspan="2">Pilot Securities not in Test Groups 1-3</td><td>Rule 610(c) access fee cap applies</td><td>Yes</td></tr>
<tr><td rowspan="2">Test Group 1</td><td>Test Group 1a (overlap w/ Tick Size Pilot)</td><td rowspan="2">1,000</td><td>270 (45 from each Tick Size Pilot bucket, rest from Tick Size Pilot Control Group)</td><td>$0.0015</td><td>Yes</td></tr>
<tr><td>Test Group 1b (no overlap)</td><td>250 common stocks (150 large, 100 mid/small); 260 ETPs; 220 other</td><td>$0.0015</td><td>Yes</td></tr>
<tr><td rowspan="2">Test Group 2</td><td>Test Group 2a (overlap w/ Tick Size Pilot)</td><td rowspan="2">1,000</td><td>270 (45 from each Tick Size Pilot bucket, rest from Tick Size Pilot Control Group)</td><td>$0.0005</td><td>Yes</td></tr>
<tr><td>Test Group 2b (no overlap)</td><td>250 common stocks (150 large, 100 mid/small); 260 ETPs; 220 other</td><td>$0.0005</td><td>Yes</td></tr>
<tr><td rowspan="2">Test Group 3</td><td>Test Group 3a (overlap w/ Tick Size Pilot)</td><td rowspan="2">1,000</td><td>270 (45 from each Tick Size Pilot bucket, rest from Tick Size Pilot Control Group)</td><td>No Rebates or Linked Pricing (610(c) cap applies)</td><td>No</td></tr>
<tr><td>Test Group 3b (no overlap)</td><td>250 common stocks (150 large, 100 mid/small); 260 ETPs; 220 other</td><td>No Rebates or Linked Pricing (610(c) cap applies)</td><td>No</td></tr>
</table>

1. Test Group 1

For Pilot Securities in Test Group 1, equities exchanges could neither impose, nor permit to be imposed, any fee or fees for the display of, or execution against, the displayed best bid or offer of such market in NMS stocks that exceeds or accumulates to more than *$0.0015* per share. The cap in Test Group 1 would apply to transaction fees assessed on the remover (taker) of liquidity as well as transaction fees assessed on the provider (maker) of liquidity.[121]

The EMSAC recommended three test groups, with fee caps of $0.0020, $0.0010, and $0.0002, respectively. The Commission also is proposing three test groups, two with fee caps of $0.0015 and $0.0005, and one that prohibits rebates and Linked Pricing. The Commission preliminarily believes that it is appropriate to test an intermediate reduction in the fee cap. However, because the proposed Pilot includes a no-rebate bucket, the Commission preliminary believes it is preferable to test a cap, set at half of the current $0.0030 cap, rather than two intermediate caps as EMSAC recommended. This approach will allow the proposed Pilot to test more pronounced changes to the status quo without increasing the total number of Test Groups. Accordingly, as discussed below, in addition to the $0.0015 test group, the proposed Pilot also includes a test group of $0.0005 (as proposed Test Group 2) as well as a no-rebate bucket (which EMSAC did not recommend).[122] The Commission preliminarily believes that having a total of three Test Groups would allow the proposed Pilot to test several different scenarios while avoiding overcomplicating the Pilot and would represent a pilot design with which the exchanges are familiar because it aligns

[121] In other words, the fee cap in Test Group 1 would apply the cap to the take fee charged to the taker on a maker-taker exchange and also would apply the cap to the make fee charged to the maker on a taker-maker exchange.

[122] *See infra* Section III.C.2 (discussing proposed Test Group 2) and Section III.C.3 (discussing proposed Test Group 3).

with the Tick Size Pilot's three test groups.[123]

Finally, the EMSAC's proposed first group would have applied its cap only to fees assessed for removing liquidity, which is consistent with the application of Rule 610(c)'s fee cap.[124] As discussed above, the Commission instead is proposing to apply Test Group 1's cap to fees assessed for removing *or posting* liquidity. In other words, as discussed above, the proposed cap in Test Group 1 would apply to maker-taker pricing as well as taker-maker pricing, which some comments submitted in response to the EMSAC's recommendation supported. The Commission preliminarily believes that applying the cap in Test Group 1 to any fees assessed—including to fees for providing liquidity in a taker-maker pricing model—would help achieve the purpose of the proposed Pilot by applying the test conditions broadly to all equities exchange transaction fees and not just fees for accessing a protected quotation.

2. Test Group 2

For Pilot Securities in Test Group 2, equities exchanges could neither impose, nor permit to be imposed, any fee or fees for the display of, or execution against, the displayed best bid or offer of such market that exceed or accumulate to more than *$0.0005* per share. The cap in Test Group 2 would apply to transaction fees assessed on the remover (taker) of liquidity as well as transaction fees assessed on the provider (maker) of liquidity.[125]

The level of the Commission's proposed cap for Test Group 2 is intended to introduce a materially lower cap than Test Group 1 to further reduce the potential distortion created by current levels of rebates, while continuing to permit, for the preponderance of exchange transaction volume, the ability of an exchange to maintain its net profit on a transaction.[126] Specifically, Test Group 2 would prohibit exchanges from charging more than $0.0005 on one side of a transaction, which means an exchange would only have that amount (or less) to fund the rebate it pays to the other side of the transaction, unless it uses other sources of revenue to subsidize the rebate. Therefore, the Commission expects that Test Group 2's $0.0005 cap would significantly reduce, if not eliminate, the likelihood that an exchange would choose to offer rebates at their current levels for Pilot Securities in this group, while nevertheless retaining the ability of exchanges to compete by offering rebates if they so choose.[127] Accordingly, Test Group 2 is designed to test the impact of materially lower rebates *and* fees, where the potentially distortive effects of rebates, and the fees used to fund those rebates, is greatly reduced and thereby gather data on the impact of that reduction on order routing decisions, execution quality, and market quality.

3. Test Group 3

For Pilot Securities in Test Group 3, equities exchanges generally would be prohibited from offering rebates, either for removing or posting liquidity, and, as discussed further below, from offering a discount or incentive on transaction fee pricing applicable to removing (providing) liquidity that is linked to providing (removing) liquidity. In addition, for the reason discussed below, Test Group 3 would be unique in that the prohibition on rebates would apply not only to displayed top-of-book[128] liquidity, but also would apply to depth-of-book[129] and undisplayed liquidity.[130] In contrast, Test Groups 1 and 2, like the Rule 610(c) fee cap, only cap fees for the execution of an order against a ''protected quotation,'' which is defined as an exchange's displayed top-of-book quote.[131] While rebates would be prohibited in Test Group 3, transaction fees for securities in Test Group 3 would remain subject to the current $0.0030 access fee cap in Rule 610(c) for accessing a protected quotation.[132]

While the EMSAC considered recommending a zero-rebate bucket, its recommendation ultimately did not contain such a component.[133] Several commenters argued, however, that a pilot should either ban rebates altogether or include a ''no-rebate'' test bucket.[134] In light of the current debate surrounding transaction fees and the particular attention paid to the potential conflict of interest presented by the payment of transaction-based rebates, the Commission believes that the proposed Pilot would be substantially more informative with a no-rebate bucket than a pilot without one, because the no-rebate bucket would allow the proposed Pilot to gather data to test the effects of an outright prohibition on transaction-based rebates. Specifically, if rebates create a conflict of interest for broker-dealers when they decide where to route an order to post or take liquidity, and if those conflicts have an effect on order routing behavior, execution quality, or market quality, then only a complete prohibition on rebates will allow the Commission to study directly these conflicts and their effects by observing what would happen in the absence of rebates. While Test Group 2's low cap should reduce the

[123] Maintaining three test groups for the proposed Pilot would allow it to align closely with the Tick Size Pilot's three test groups, with which the exchanges are familiar. In addition, the proposed Test Groups have been designed to account for overlap between the two pilots and control for the potential that such overlap could possibly affect the results of the Pilot. *See supra* Section III.B.

[124] *See supra* note 76 and accompanying text (noting that the Rule 610(c) access fee cap only caps fees for removing a protected quotation).

[125] In other words, the fee cap in Test Group 2 would apply the cap to the take fee charged to the taker on a maker-taker equities exchange and also would apply the cap to the make fee charged to the maker on a taker-maker equities exchange.

[126] For example, if an exchange's base fee to take liquidity is $0.0030 and its base rebate to provide liquidity is $0.0020, the exchange would earn $0.0010 (net capture rate). The proposed cap for Test Group 2 would allow such an exchange to maintain its current net capture rate on such transaction if it charged both sides $0.0005, though charging both sides of a transaction for Test Group 2 securities would result in a change to the exchange's fee model to a ''traditional'' pricing structure for those securities. As of December 2017, Nasdaq's base take fee was $0.0030 and its base rebate was $0.0020; NYSE's base take fee was $0.0030 and its base rebate was $0.0014; NYSE Arca's base take fee was $0.0030 and its base rebate was $0.0020; and CboeBZX's base take fee was $0.0030 and its base rebate was $0.0020. See, respectively, *http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2* (Nasdaq), *https://www.nyse.com/markets/nyse/trading-info/fees* (NYSE), *https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf* (NYSE Arca), and *https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/* (CboeBZX).

[127] For example, a maker-taker equities exchange might choose to offer a $0.0004 rebate and charge a fee of $0.0005 for stocks in Test Group 2. In this way, exchanges could continue to compete with one another by offering rebates. Compared to current levels of rebates, which may approach the level of the current $0.0030 cap, a rebate of $0.0004, by comparison, would be materially lower.

[128] ''Top-of-book'' means the aggregated best bid and best offer resting on an exchange; in other words, aggregate interest that represents the highest bid (to buy) and the lowest offer (to sell). *See* 17 CFR 242.600(b)(7) (defining ''best bid'' and ''best offer'').

[129] ''Depth-of-book'' refers to all resting bids and offers other than the best bid and best offer; in other words, all orders to buy at all price levels less aggressive than the highest priced bid (to buy) or all offers to sell at all price levels less aggressive than the lowest priced offer (to sell). *See* 17 CFR 242.600(b)(8) (defining ''bid'' and ''offer'').

[130] ''Undisplayed'' refers to resting orders that are ''hidden'' and not displayed publicly in the consolidated market data. *See* 17 CFR 242.600(b)(13) (defining ''consolidated display'' and (b)(60) (defining ''published bid and published offer''). *See also infra* notes 136–139 and accompanying text.

[131] *See* 17 CFR 242.600(b)(58) (defining ''protected quotation'').

[132] In other words, Test Group 3 would prohibit *rebates* for both posting and taking liquidity, but would remain subject to Rule 610(c), which caps *fees* for *taking* liquidity. Test Group 3 would not cap *fees* for *posting* liquidity.

[133] *See* EMSAC Pilot Recommendation, *supra* note 28, at 4. The EMSAC acknowledged that ''[c]apping inducements is not an existing component of our market structure.'' *Id.*

[134] *See supra* note 48.

likelihood that a market will offer a material rebate because the cap would limit the market's ability to offset the rebate by charging a slightly higher fee to the other side of the transaction, the possibility exists that rebates would nevertheless continue to be offered in Test Group 2. The Commission preliminarily believes that to gather data to study potential conflicts of interest presented by the payment of rebates and the effects they may have on order routing behavior, execution quality, and market quality, it is necessary for the proposed Pilot to establish a test group that entirely prohibits the payment of transaction-based rebates—which some believe drive distortions of those items.[135] At the same time, Test Group 3 would not further restrict the ability of equities exchanges to charge for transaction services. By prohibiting all rebates, but not lowering the existing Rule 610(c) fee cap for Pilot Securities in Test Group 3, equities exchanges would no longer need to charge transaction fees at levels priced to offset the rebates they pay, while at the same time they would retain the ability to charge transaction fees as high as the current $0.0030 cap. Accordingly, Test Group 3 is intended to test, within the current regulatory structure, natural equilibrium pricing for transaction fees in an environment where all rebates are prohibited and exchanges do not need to charge offsetting transaction fees on the contra-side to subsidize those rebates.

As proposed, Test Group 3 would prohibit payment of transaction-based rebates broadly for both posting and removing liquidity. In this respect, the Commission notes that Rule 610(c)'s access fee caps do not currently apply to non-displayed liquidity and depth-of-book quotes, and exchange fee schedules typically do not impose differing fees based on those parameters.[136] The EMSAC noted a theoretical possibility that lower access fee caps could create an incentive for SROs to begin charging *more* to access non-displayed interest or depth-of-book quotes. However, such differing fees would lead to uncertainty for market participants that remove liquidity as they would not be able to control with absolute certainty whether they interact with such interest.[137] The Commission preliminarily believes that the prospect of market participant objections to the uncertainty regarding what they would expect to pay to remove liquidity would make this outcome highly unlikely.

However, in Test Group 3, the possibility of an exchange continuing to offer *rebates* for non-displayed and depth-of-book quotes, while eliminating them on displayed interest, could have the potential to distort the Pilot results to the extent that stocks in Test Group 3 remained subject to the potential conflicts of interest associated with rebates on non-displayed and depth-of-book quotes.[138] Accordingly, to avoid any potential distortion from a narrowly-tailored ''no rebate'' bucket that was subject to exceptions and permitted rebates to continue to be offered on certain interest, the Commission preliminarily believes it is necessary to outright prohibit payment of any and all rebates in Test Group 3, including non-displayed liquidity and depth-of-book interest. Doing so will permit the Commission to gather data on a ''no rebate'' environment, thereby allowing the Commission to observe directly the impact of rebates on order routing behavior, execution quality, and market quality by observing an environment where transaction-based rebates are not offered and comparing that to the control group where rebates continue to be offered. In turn, this data may inform the Commission about the extent to which rebates offered by equities markets are compatible with broker-dealers executing their customers' orders in the best market.[139]

Finally, in addition to prohibiting rebates, Test Group 3 also would prohibit exchanges from offering a discount or incentive on transaction fee pricing applicable to removing (providing) liquidity on the exchange that is linked to providing (removing) liquidity on the exchange (''Linked Pricing''). For example, for Pilot Securities in Test Group 3, an exchange would be prohibited from adopting any discounts on transaction fees to remove (*i.e.,* ''take'') liquidity where that discount is determined based on the broker-dealer's posted (*i.e.,* ''make'') volume on the exchange, which would result in the broker-dealer paying a lower take fee in return for providing a certain level of liquidity on the exchange. However, as discussed further below, exchanges would not be prohibited from adopting new rules to provide non-rebate Linked Pricing to their registered market makers if the non-rebate discount or incentive is in consideration for meeting market quality metrics specified in an exchange rule.

Prohibiting Linked Pricing for Test Group 3 is designed to support the objectives of that Test Group. Specifically, in Test Group 3, the Commission is seeking to obtain information about what would happen in the absence of the incentive created by offering rebates and the potential conflicts of interest they can present, including what would happen to fee

[135] *See, e.g., supra* notes 21 (discussing the potential distortions caused by the conflicts of interest faced by broker-dealers in light of conflicting economic incentives to earn rebates, which typically are not passed through by the broker-dealer to its customers, from the trading centers to which they direct orders for execution); 23 (discussing potential distortions of unnecessary market complexity through the proliferation of exchange order types and new exchanges, the incentive to trade off-exchange to avoid high fees, and the indirect ability to quote in sub-penny increments on a net basis); and 106 (discussing potential distortions caused by the high fees that offset rebates, which can undermine price transparency because a quote at the same displayed price on different exchanges (with different fees) does not reflect the actual net price to trade on any one trading center).

[136] Three equities exchanges do impose differing fees for certain orders based on whether the order is displayed or non-displayed, including: (1) IEX, which incentivizes displayed liquidity by charging a lower transaction fee of $0.0003 for posting or taking displayed interest and imposes a higher fee of $0.0009 per share to post or take non-displayed liquidity; (2) NYSE American, which incentivizes posting of displayed liquidity and imposes a standard fee of $0.0002 per share to remove liquidity or post non-displayed liquidity, though it does offer rebates to eDMMs; and (3) Cboe EDGA, which encourages non-displayed liquidity by not charging transaction fees for posting non-displayed liquidity and charging a low fee to take non-displayed interest, but imposes its standard fee on posting or removing displayed liquidity. *See* Investors Exchange Fee Schedule, *available at https://iextrading.com/trading/fees/; NYSE American Fee Schedule, available at https://www.nyse.com/publicdocs/nyse/markets/nyse-american/NYSE_America_Equities_Price_List.pdf*; and Cboe EDGA Exchange Fee Schedule, *available at https://markets.cboe.com/us/equities/membership/fee_schedule/edga/*. While these exchanges impose differing fees depending on the displayed nature of interest, none pay rebates uniquely for non-displayed orders or depth-of-book interest, and therefore would not be impacted by the application of Test Group 3's prohibition on the payment of rebates to all interest, including non-displayed liquidity and depth-of-book quotes.

[137] For example, a liquidity taker's order could interact with displayed or non-displayed liquidity (or both). If fees differed between them, market participants would face uncertainty when making routing decisions over what transaction fees they would incur.

[138] For example, a market participant seeking to take liquidity may have an incentive to route to a taker-maker market that offered rebates for executing against non-displayed interest if the market participant expected to trade both with the full amount of displayed interest and also with non-displayed interest (and thus collect a rebate from interacting with the latter). Alternatively, a liquidity provider could have an incentive to route to a maker-taker market that offered rebates on non-displayed interest if the participant was able to use certain order types to ensure that its order remained non-displayed and executed only as ''poster'' to earn a rebate. For example, the provider could use a post-only order instruction to ensure that it never takes liquidity (and thus gets assessed a fee) and combine that with an instruction to prevent the order from becoming displayed. In either of these two examples, the market could continue to offer an incentive to earn a rebate on, or by interacting with, non-displayed liquidity, which could distort the results of the proposed Pilot.

[139] *See* 15 U.S.C. 78k–1(a)(1)(C)(iv).

levels if they no longer subsidize those rebates. For example, if ''taker'' transaction fees no longer are used to fund ''maker'' rebates, an exchange's taker fee would no longer be subject to that potential distortion and could be set at an equilibrium level in response to competition, which could put downward pressure on ''taker'' transaction fees. Accordingly, Test Group 3 is designed to gather data on the impact of creating an environment where fee levels are not potentially distorted by rebates and rebates do not influence routing.

In support of creating such an environment for Test Group 3, exchanges also would be prohibited from introducing new Linked Pricing models that could possibly perpetuate similar potential distortions that maker-taker and taker-maker pricing models may impose on transaction fees. For example, if an exchange adopts Linked Pricing for Test Group 3 securities, it might offer a discounted transaction fee to *remove* liquidity only to those market participants that *post* a certain volume on the exchange. In effect, offering Linked Pricing to market participants in Test Group 3 without first requiring them to meet market quality metrics designed to benefit the overall market could continue to potentially distort transaction fee pricing if the fees are set at a level above their natural equilibrium, within the current regulatory structure, in order to subsidize the Linked Pricing incentive, and also could perpetuate the potential conflicts of interest associated with rebates and order routing.

If, instead of paying rebates, exchanges seek to provide a discount or incentive on transaction fee pricing applicable to removing (providing) liquidity that is linked to providing (removing) liquidity, then equilibrium pricing may not be achieved to the extent that transaction fees are linked in this way. In turn, perpetuating this potential distortion could cloud the Pilot data for Test Group 3 if the Linked Pricing incentive interferes with the proposed Pilot's ability to isolate and analyze the impacts—on both the maker rebate (fee) and the taker fee (rebate)—of eliminating rebates in Test Group 3. Accordingly, the Commission preliminarily believes that prohibiting exchanges from offering not only rebates but also Linked Pricing in Test Group 3 is appropriate to maintain the integrity of Test Group 3 and would facilitate analysis of securities in Test Group 3 consistent with its objective to test the impact of eliminating rebates and the potential distortions that rebates may cause.

While rebates and Linked Pricing would be prohibited broadly for Test Group 3, the Commission proposes to permit an exchange to adopt new rules to provide non-rebate Linked Pricing to its registered market makers during the proposed Pilot in consideration for meeting market quality metrics.[140] Exchanges have an interest in offering incentives to attract broker-dealers to become registered market makers on the exchange and commit to meet market making standards specified in exchange rules so that the exchange can, in turn, use the liquidity provided by its registered market makers to attract buyers and sellers to the exchange. The Commission preliminarily believes that permitting exchanges to adopt new rules to offer Linked Pricing to market makers for Test Group 3 securities preserves the ability of an exchange to attract market makers through non-rebate incentives and thereby helps maintain the baseline framework for registered market makers against which the effects of the proposed Pilot would be assessed.

4. Control Group

NMS stocks selected as Pilot Securities that are not placed in one of the three proposed Test Groups would be placed in the Control Group, which would be approximately the same size as each of the other three Test Groups combined and have a similar composition.[141] Transaction fees for Pilot Securities in the Control Group would remain subject to the current Rule 610(c) access fee cap. Consistent with Rule 610(c), the Control Group would only cap fees for taking (removing) a protected quotation; it would not apply to fees for posting liquidity or otherwise cap or prohibit rebates. The Commission preliminarily believes that having a control group is vital to test the effects of lower transaction fees in the proposed Test Groups and that a control group with the current access fee cap would provide an appropriate baseline for analyzing the effect of the proposed Pilot.

In sum, the Commission preliminarily believes that the proposed size and composition of each of the three Test Groups is appropriate to ensure representativeness of the samples as well as sufficient statistical power across the Control and three Test Groups and therefore will produce a robust sample size for analysis that would allow the Commission and the public to reliably examine, compare, and assess the effects of differing transaction fees and rebates to inform future regulatory initiatives in this area. Further, the Commission preliminarily believes that the proposed Pilot design is appropriately tailored to account for potential overlap with the Tick Size Pilot.

The Commission requests comment on the design of the proposed Pilot. In particular, the Commission solicits comment on the following. To the extent possible, please provide specific data, analyses, or studies for support.

16. Is the proposed Pilot reasonably designed to evaluate the effect of transaction fees on order routing behavior, execution quality, and market quality? Why or why not? Should the Commission implement an alternative design, and if so, what should it be? What would be the impacts of the alternative design?

17. Are the $0.0015 and $0.0005 fee cap levels reasonable? Should the Commission use different caps, for example $0.0002 or $0.0009 for Test Group 2? Should the Commission use the caps suggested by EMSAC (*i.e.,* $0.0020, $0.0010, and $0.0002)?

18. Rather than cap fees for Test Groups 1 and 2, should the pilot instead focus those Test Groups on rebate restrictions? If so, what restrictions and caps should the Commission impose?

19. Are the proposed restrictions in Test Group 3 on rebates and Linked Pricing reasonable? Why or why not? Is the proposed language in Rule 610T(a) clear? For example, is the phrase ''impose, or permit to be imposed'' sufficiently clear? If not, what alternative language should the Commission use?

20. If volume or liquidity changed for the Pilot Securities in Test Group 3, how, if at all, would such changes impact institutional traders? What volume or liquidity would be impactful? What would be the impact? For example, if fewer liquidity providers post orders in Test Group 3 Pilot Securities because there is no rebate for

[140] To adopt Linked Pricing for Pilot Securities in Test Group 3 during the proposed Pilot, an exchange would need to propose new market making standards in a proposed rule change filing submitted pursuant to Section 19(b)(2) of the Exchange Act, and also would need to propose the fee incentive it would provide for meeting those standards. For example, an exchange may establish a specified minimum quote size combined with a requirement to be at the national best bid and offer for a designated percentage of the day. In return for meeting those continuous quoting requirements, the exchange might offer its registered market makers a fee discount to remove liquidity.

[141] NMS stocks (including ETPs) placed in the Control Group must meet the same selection criteria as those NMS stocks placed in Test Groups 1, 2, and 3 (*e.g.,* the NMS stock must have a share price of at least $2 at the time of selection, must maintain a share price of at least $1 per share to remain in the proposed Pilot, and must have an unlimited duration or a duration beyond the end of the post-Pilot Period).

them to earn, would institutional traders be more likely to obtain queue priority? Why or why not?

21. If the Pilot data reveals an impact on quoted prices in Test Group 3 where, in the absence of rebates, spreads widen for a certain segment of stocks and ETPs (*e.g.,* those that are moderately liquid), but not others (*e.g.,* those that are highly liquid or those that are highly illiquid), how should the Commission evaluate that impact?

22. Is maintaining the current fee cap of $0.0030 reasonable for Test Group 3, or should the Commission not subject Test Group 3 to the current fee cap in Rule 610(c)? Why or why not? Should the Commission cap fees for Test Group 3 using a different amount?

23. For securities in Test Group 3, where rebates would not be permitted, will competition and market forces produce a market equilibrium that constrains exchange access fees to levels at or below today's current pricing? What do commenters consider to be a reasonable level for exchange transaction fees? If equilibrium transaction fee pricing is achieved, would such forces obviate the need for a fee cap at all? Or would a cap on exchange access fees continue to be necessary to constrain exchange pricing as long as Rule 611 of Regulation NMS imposes order protection requirements applicable to exchanges with protected quotations?

24. Should one or more of the Test Groups eliminate protected quotation status, and thus the order protection requirements of Regulation NMS, for certain securities? Would doing so provide helpful insights into order routing? Why or why not?

25. If analysis of the proposed Pilot data were to suggest that rebates offered by maker-taker exchanges do not affect quoted spreads or contribute to market quality or execution quality for the most actively traded NMS stocks, do commenters believe that the minimum trading increment for those most actively traded stocks should be reduced, for example, to a half-penny? Why?

26. Would there be a sufficient number of stocks and ETPs in each Test Group? Why or why not? Or would fewer stocks and ETPs in each Test Group be capable of providing statistically significant data? If so, how many stocks and ETPs should be included in each Test Group? How would the quality and extent of the data be affected?

27. Should the proposed Pilot overlap with the Tick Size Pilot? If so, does the proposed Pilot design adequately account for potential overlap with the Tick Size Pilot? Why or why not? What are the potential impacts of such overlap for equities exchanges, issuers, and other market participants? How could the Commission better design the proposed Pilot to deal with any overlap between the two pilots?

28. Should Test Group 3's prohibition on rebates and Linked Pricing apply to depth-of-book and undisplayed liquidity? Why or why not? Should the fee caps in the other Test Groups also apply to depth-of-book and undisplayed liquidity? Why or why not?

29. Should the proposed Pilot include a ''trade-at'' provision that would restrict price matching of protected quotations? Why or why not? How would a ''trade-at'' component affect the data generated by the proposed Pilot? Should the Commission consider an alternative methodology to evaluate ''trade at''?

30. Is the proposed Pilot design subject to any particular limitations with respect to achieving the objectives of the Pilot? Of what kind? How could the proposed Pilot design be improved to prevent such limitations?

31. Should an equities exchange be able to offer rebates in Test Group 1 or 2 in excess of the fees it charges to the contra-side of an execution? For example, should the proposed Pilot prohibit equities exchanges from offering rebates in excess of $0.0015 in Test Group 1 or $0.0005 in Test Group 2? Why or why not?

32. Would increasing transparency for customers into broker-dealer business models and/or trading practices (including, for example, transparency regarding broker-dealer revenue streams, order routing practices, or other matters) be a more effective way of addressing potential broker-dealer conflicts of interest arising from access fees and rebates?

D. Duration

The Commission is proposing a two-year term for the proposed Pilot, with an automatic sunset at the end of the first year unless, prior to that time, the Commission publishes a notice determining that the Pilot shall continue for up to another year. In addition, as discussed below, the Commission is proposing a six-month pre-Pilot Period as well as a six-month post-Pilot Period. The Commission preliminarily believes this approach will give the Commission flexibility and help ensure its ability to gather sufficient data to reliably analyze the Pilot's impact on order routing behavior, execution quality, and market quality.[142] The Commission believes that providers and takers of liquidity need time to gain experience with the different Test Groups, and the proposed Pilot needs to be long enough to make it economically worthwhile for market participants to adapt their behavior.[143] The proposed Pilot should continue to collect data over a sufficiently long period of time that is capable of providing a sample that would have adequate statistical power. The Commission would need to observe developments during the proposed Pilot to determine whether to sunset it.

The EMSAC recommended a two-year duration for a pilot, and the Commission's rule incorporates the possibility of a two-year pilot. The Commission believes that a two-year duration, with automatic possible sunset at the end of the first year is preferable because it would provide flexibility as the data from the Pilot develops. To suspend the automatic sunset, under proposed Rule 610T(c), the Commission would publish, no later than thirty days prior to the sunset date, a notice on its website and in the **Federal Register**. The Commission could suspend the sunset, for example, if it believed that additional time would help ensure that market developments are fully reflected in the data with sufficient statistical power for analysis. The Commission also, for example, could suspend the sunset if the Commission believed that a potentially disruptive event experienced during the first one-year period counsels in favor of conducting the proposed Pilot for its full two-year term. Alternatively, the Commission could leave the sunset in

[142] *See* EMSAC Pilot Recommendation, *supra* note 28, at 2. The EMSAC recommended an initial three-month phase-in period involving 10 stocks, after which each Test Group would be expanded to include the remaining securities in each group. *See id.* at 2. While a phase-in period would allow markets and market participants to implement the required fee changes in a staged manner and provide an opportunity to address unforeseen implementation issues, the Commission believes that markets and market participants are accustomed to dealing with transaction fee changes and therefore should be readily capable of accommodating the terms of the proposed Pilot with the advance notice provided by the Commission's rulemaking process. Further, though exchanges would be required to collect and report certain data, as described below, the proposed Pilot would not require equities exchanges to make any changes to any of their trading systems, and therefore the Commission preliminarily believes a phased implementation schedule would not be necessary to test changes to outward facing systems.

[143] *See, e.g.,* EMSAC Transcript, July 8, 2016, *available at https://www.sec.gov/spotlight/emsac/emsac-070816-transcript.txt* (comments of Joe Mecane noting that ''[a]fter further discussion, we thought two years was the right time frame, because the behavioral changes that we think that will result from the pilot program will take . . . some time to filter through the marketplace.'').

place by not publishing a notice if the one-year period was sufficient to fully reflect market developments and the data collected provides adequate statistical power to analyze those developments.

While the Commission considered proposing a shorter period, such as that recommended by Nasdaq,[144] a shorter duration for the Pilot than the proposal (*i.e.,* less than one year) may allow short-term or seasonal events to unduly impact the Pilot data. For example, if the proposed Pilot were only six months long, the Pilot may or may not produce a sufficiently broad set of data capable of permitting analysis into potential conflicts of interest associated with transaction-based fees and rebates and the effects that changes to those fees and rebates have on order routing behavior, execution quality, and market quality.

Further, as noted above, Commission is proposing a six-month pre-Pilot Period as well as a six-month post-Pilot Period. The pre-Pilot Period is intended to gather current data to help establish a baseline against which to assess the effects of the proposed Pilot. The post-Pilot Period is intended to help assess any post-Pilot effects following the conclusion of the proposed Pilot. For both the pre- and post-Pilot Periods, the Commission is proposing to require the equities exchanges to publicly post on their websites the same data they would be required to publicly post for the proposed Pilot.

Finally, as noted above, Nasdaq, NYSE, and Cboe have recommended that the Commission, instead of proceeding with a proposal for a transaction fee pilot, first take final action on two of the Commission's proposed rulemakings (disclosure of order handling information and regulation of NMS stock Alternative Trading Systems) and issue additional guidance on broker-dealers' duty of best execution.[145] IEX criticized those recommendations as delaying tactics motivated by ''commercial protectionism'' from exchanges whose business models are ''completely reliant on the payment of rebates.'' [146] The Commission believes that proceeding with a pilot in the near term would be appropriate as it would complement the Commission's other market structure initiatives and would gather data to inform the Commission and the public on the impact of equities transaction fees and whether additional regulatory action is needed or appropriate.

The Commission requests comment on the proposed duration for the proposed Pilot, including the pre- and post-Pilot Periods. In particular, the Commission solicits comment on the following. To the extent possible, please provide specific data, analyses, or studies for support.

33. Is the proposed duration long enough for the proposed Pilot to generate data to analyze the impact of transaction fees? If not, what time period should be selected? Is a different time period preferable?

34. Is the provision for an automatic sunset at the end of the first year unless, prior to that time, the Commission publishes a notice determining that the Pilot shall continue for up to another year, reasonable? What factors or conditions would support continuing the proposed Pilot beyond one year?

35. The EMSAC recommended an initial three-month phase-in period involving a limited number of stocks, after which each test group would be expanded to include the remaining securities in each group. As proposed, the Pilot would not include a phase-in period. Would such a period be useful? Why or why not?

36. Are the proposed pre-Pilot and post-Pilot terms sufficient? Should the Commission select different lengths, or gather different data during those periods? Specifically, instead of a 6 month pre- and post-Pilot Period, should the Commission adopt a 3, 4, or 5 month pre-Pilot and post-Pilot Period? Which, if any, of those is the shortest period that would provide sufficient statistical power for analysis, particularly with respect to ETPs? If the Commission requires at least 6 months of pre-Pilot Period data, to what extent could the exchanges access and use historical data to populate the required pre-Pilot data described in Section E below? For example, could exchanges access 3 months of historical data such that the pre-Pilot Period could be structured as a 3 month pre-Pilot Period combined with 3 months of historical data immediately preceding that period, for a total of 6 months of cumulative pre-Pilot data? How much time would be necessary for the exchanges to compile 6 months of historical data?

37. Do commenters believe that the Commission should, before taking action on the proposed Pilot, first take final action on the Commission's proposed rulemakings concerning disclosure of order handling information and regulation of NMS stock Alternative Trading Systems, and/or issue new guidance on broker-dealers' duty of best execution, or do commenters agree that proceeding with the proposed Pilot in the near term would complement the Commission's other market structure initiatives?

E. Data

The Commission preliminarily believes that the following data should be collected and made publicly available as described below in order to facilitate the Commission's ability to assess the impact of the proposed Pilot and, as discussed below, promote transparency about the Pilot Securities as well as basic information about equities exchange fees and changes to those fees during the Pilot.[147]

1. Pilot Securities Exchange Lists and Pilot Securities Change Lists

As discussed above, proposed Rule 610T(b)(1) would require the Commission to publish on its website a notice containing the initial List of Pilot Securities,[148] which would identify the securities in the proposed Pilot and assign each of them to a designated Test Group (or the Control Group). While proposed Rule 610T does not impose a deadline by which this notice must be published, the Commission preliminarily expects that it would publish this notice approximately one month prior to the start of the Pilot Period.

To account for corporate changes during the proposed Pilot that affect the Pilot Securities, such as name changes, mergers, or dissolutions, proposed paragraph (b) of Rule 610T provides a process to update and publicly disseminate information about changes to the List of Pilot Securities. As discussed and defined further below, the Commission is proposing to require each equities primary listing exchange [149] to publicly post on its

[144] *See* Nasdaq Letter, *supra* note 44, at 3.

[145] *See* Joint Exchange Letter, *supra* note 44, at 2–4.

[146] *See* IEX Letter, *supra* note 44, at 2–3.

[147] The data and information that is to be made publicly available would be records of the equities exchanges and accordingly, would be subject to the recordkeeping requirements of Rule 17a–1 under the Exchange Act. *See* 17 CFR 240.17a–1.

[148] Proposed Rule 610T(b)(1)(ii) would define ''Pilot Securities'' for purposes of Rule 610T as the NMS stocks designated by the Commission on the initial List of Pilot Securities pursuant to paragraph (b)(1)(i) of Rule 610T and any successors to such NMS stocks. At the time of selection by the Commission, an NMS stock would be included in the Pilot only if it has an unlimited duration or a duration beyond the end of the post-Pilot Period and a minimum initial share price of at least $2. If the share price of a Pilot Security in one of the Test Groups closes below $1 at the end of a trading day, it would be removed from the Test Group and would no longer be subject to the pricing restrictions set forth in (a)(1)–(3) of proposed Rule 610T.

[149] Proposed Rule 610T(b)(1)(iii) would define ''primary listing exchange'' for purposes of Rule 610T as a national securities exchange on which an

website downloadable files containing a list of its primary listed securities included in the proposed Pilot as well as an updated cumulative list of all changes to any Pilot Security for which it serves as the primary listing market.[150] An exchange would have to include this information on its website as downloadable files that are freely and persistently available and easily accessible by the general public.[151] In addition, the information must be presented in a manner that facilitates access by machines without encumbrance by user name, password, or other access constraints [152] and the files and information therein could not be subject to any usage restrictions, such as restrictions on access, retrieval, distribution, and reuse. Requiring the exchanges to make this information freely and publicly available with completely unencumbered access would facilitate the ability of any person to use the information to conduct and make public research and analyses consistent with the purposes of this Pilot.

The Commission believes that it is important to maintain an updated list of Pilot Securities so that market participants can know with certainty throughout the duration of the proposed Pilot the Test Group and/or Control Group assignments for all Pilot Securities, thereby avoiding any confusion over how the proposed Pilot affects the stocks in which market participants trade. Further, it is important to maintain detailed information on historical changes to Pilot Securities and their associated Test Groups and/or Control Group in order to ensure that market participants, researchers, and the Commission have ready access to definitive information on the Pilot Securities, which will assist the Commission and researchers in analyzing pilot data and assessing and accounting for changes to any Pilot Securities during the duration of the Pilot, including the post-Pilot Period. The Commission believes that the primary listing exchanges, as defined in proposed Rule 610T(b)(1)(iii), are in the best position to provide this information because they oversee their listed issuers and have rules in place that require listed issuers to report corporate change information to them.[153] Accordingly, the primary listing exchanges are made aware of changes relevant to the proposed Pilot for the securities listed on their markets, and therefore are in the best position to disseminate this information by making it publicly available on their websites.

a. Pilot Securities Exchange Lists

As discussed further below, prior to the beginning of trading on the first day of the Pilot Period, proposed Rule 610T(b)(2)(i) would require each national securities exchange that is a primary listing exchange for equities to publicly post on its website downloadable files containing a list, in pipe-delimited ASCII format,[154] of all securities included in the proposed Pilot for which the equities exchange serves as the primary listing exchange (the ''Pilot Securities Exchange List''). Proposed Rule 610T(b)(2)(ii) specifies the required fields for the Pilot Securities Exchange Lists, which are: Ticker symbol, security name, primary listing exchange, security type (common stock, ETP, preferred stock, warrant, closed-end fund, structured product, ADR, or other), Test Group (1, 2, 3 or Control Group), as well as the date the entry was last updated. The Commission preliminarily believes that this list would contain the essential identifying information necessary to inform market participants and the public about the securities included in the proposed Pilot, and the security type field would permit the Commission and researchers to easily identify subsets of NMS stocks so they can be analyzed separately.

Each primary listing exchange would be responsible for keeping current its Pilot Securities Exchange List to reflect any changes. Specifically, proposed Rule 610T(b)(2)(i) would require the primary listing exchanges to maintain and update their Pilot Security Exchange List, as necessary, prior to the beginning of trading on each business day that the U.S. equities markets are open for trading (also referred to herein as a ''trading day''). If a change occurs that alters any of the fields required by Rule 610T(b)(2)(ii), such as ticker symbol, security name, or Test Group, the primary listing exchange for that Pilot Security must update its Pilot Securities Exchange List prior to the beginning of trading on the first trading day for which such change is effective. The primary listing exchanges would be required to continue to update the Pilot Securities Exchange Lists, as necessary, through to the conclusion of the post-Pilot Period.

b. Pilot Securities Change Lists

In addition, proposed Rule 610T(b)(3)(i) would require each equities primary listing exchange to maintain and publicly post on its website downloadable files containing a list, in pipe-delimited ASCII format, of each separate change applicable to any Pilot Securities for which that primary listing exchange serves or, during the course of the Pilot, has served as the primary listing exchange (the ''Pilot Securities Change List''). Proposed Rule 610T(b)(3)(ii) specifies the required fields for the Pilot Securities Change List, which, in addition to the fields required for the Pilot Securities Exchange List, are: New ticker symbol (if applicable); new security name (if applicable); deleted date (if applicable); date the security closed below $1 (if applicable); effective date of the change; and reason for change. The list would be updated by the primary listing exchange

NMS stock is listed. If an NMS stock is listed on more than one national securities exchange, proposed Rule 610T(b)(1)(iii) provides that the national securities exchange upon which the NMS stock has been listed the longest shall be the primary listing exchange.

[150] The Commission notes that the primary listing exchanges maintain public web pages containing similar lists with respect to the Tick Size Pilot. The lists for NYSE and NYSE American listed stocks are available on the NYSE website, *available at https://www.nyse.com/tick-pilot*. The lists for Nasdaq listed stocks are available on the Nasdaq website, *available at https://www.nasdaqtrader.com/Trader.aspx?id=TickPilot*.

[151] ''Persistently available'' means that through the end of the required five-year post-Pilot retention period, all data from the Pilot would need to be continually available on each exchange's website. ''Accessible'' means that the Pilot data posted by each exchange must be able to be indexed by third party query applications and easily found on each exchange's website.

[152] Common access constraints may include: ''CAPTCHA'' (*i.e.,* ''Completely Automated Public Turing Test to Tell Computer and Humans Apart'') constraints, which commonly provide a challenge-response test to determine whether or not the user is human and block access to the information by machines; user name and password access requirements; user registration requirements; and limitations on downloads.

[153] *See* NYSE Listed Company Manual Rule 204.18 (Name Change) (requiring listed issuers to provide notice to NYSE of intended name changes 20 days in advance of the date set for mailing the shareholders' proxy materials dealing with the matter); Nasdaq Listing Rule 5250(e)(3)(A) (Record Keeping Change) (requiring listed issuers to provide notice to Nasdaq of name changes no later than 10 days after the change); NYSE Arca Listed Company Manual Rule 5.3–E(i)(1)(i)(D) (Financial Reports and Related Notices) (requiring listed issuers to notify the Exchange of changes in company name); Cboe BZX Exchange, Inc. Rule 14.6(e)(3)(A) (Record Keeping Change) (requiring listed issuers to provide notice to the Exchange of name changes no later than 10 days after the change); NYSE American Company Guide Sec. 930 (Change of Name) (requiring listed issuers to provide advance notice to the Exchange of intended name changes); IEX Rule 14.207(e)(3)(A) (Record Keeping Change) (requiring listed issuers to provide notice to the Exchange of name changes no later than 10 days after the change).

[154] The Commission understands that the equities exchanges and market participants have experience utilizing this common file format and will be able to create and make use of lists of Pilot Securities in pipe-delimited ASCII format (also referred to as a ''text'' file) without difficulty. In particular, the exchanges use this format in the Tick Size Pilot. *See* Tick Size Pilot Data Collection Securities Files, *available at http://www.finra.org/industry/oats/tick-size-pilot-data-collection-securities-files* (noting that ''[t]he Pilot Securities files are pipe-delimited .txt files.'').

to include all changes since the inception of the Pilot, for the Pilot Securities listed on the exchange. Examples of changes that would appear on this list include name changes, ticker symbol changes, mergers, delistings, or removal from a Test Group due to the share price of a stock closing below $1. Each primary listing exchange would be required to update and post its Pilot Securities Change List prior to the beginning of trading on each trading day the U.S. equities markets are open for trading and keep it current through the end of the post-Pilot Period. The Pilot Securities Change List is designed to serve as a cumulative list that provides ready access to all changes to Pilot Securities listed on a particular equities exchange that have occurred subsequent to a primary listing exchange posting its initial Pilot Securities Exchange List on its website.

The Commission believes that market participants and the public would benefit from having access to accurate and up-to-date information on the Pilot Securities and their classification in a particular Test Group or Control Group during the Pilot. As it is possible that changes to some of the Pilot Securities may occur over the course of the proposed Pilot, information about those changes could be useful to broker-dealers and other market participants when making routing and execution decisions. Accordingly, the Commission believes it is important for there to be ready access to relevant updates that impact the Pilot Securities Exchange Lists. Because the primary listing exchanges currently track corporate actions that affect their listed issuers, the Commission believes they are best positioned to disseminate information about those changes as they apply to the securities listed on their markets by making it publicly available on their respective websites.

Further, having access to an updated, cumulative list reflecting all changes to the Pilot Securities will assist the Commission and researchers in analyzing the Pilot data. In particular, ready public access to the record of changes to Pilot Securities and any changes to the applicable Test Groups (or Control Group) that will be reflected in the Pilot Securities Change Lists would provide transparency to the public that the Commission and researchers could use when assessing Pilot data, and also could be useful to market participants, including broker-dealers that route customer orders, to assess and review changes to the lists of Pilot Securities over time.

The primary listing exchanges would be required, pursuant to Proposed Rule 610T(b), to keep the lists publicly posted on their websites beginning with the Pilot Period through the post-Pilot Period, as defined in Proposed Rule 610T(c), and for five years after the end of the post-Pilot Period.[155] The lists must be easily accessible and freely and persistently available in downloadable form and shall not be subject to any restrictions, including, but not limited to, access or usage restrictions.[156] The Commission preliminarily believes that continued public availability of this information (particularly the Pilot Securities Change Lists) during the Pilot and for several years thereafter would be useful for market participants and the public, including academic researchers, because it would permit changes to the Pilot Securities to be easily tracked for comparison and analysis of the impact of those changes. Accordingly, the Commission expects that researchers would be interested in tracking changes to Pilot Securities over the course of the proposed Pilot, and that there likely would be continued interest in the Pilot Securities Exchange Lists and Pilot Securities Change Lists for some time following the conclusion of the proposed Pilot as researchers analyze the Pilot data and conduct their own independent assessments. Accordingly, the Commission believes that the public would benefit from the primary listing exchanges maintaining the lists they prepare pursuant to Proposed Rule 610T(b) on their public websites for a period of not less than five years following the conclusion of the post-Pilot Period because it would provide for ready access by the public to perform analyses which are likely to occur for several years following the conclusion of the proposed Pilot.

The Commission requests comment on the initial List of Pilot Securities, the Pilot Securities Exchange List, and the Pilot Securities Change List, including the contents thereof and method of publication of that information. In particular, the Commission solicits comment on the following. To the extent possible, please provide specific data, analyses, or studies for support.

38. Should the Commission determine the initial Pilot Securities and specify the Test Group (or Control Group) assignments at a specified minimum period of time prior to the start of the Pilot Period? Is one month sufficient, or should the notice be published closer to the start of the Pilot, such as two weeks prior? For comparison, the Commission selected securities for the Regulation SHO Pilot approximately ten months before the start of the Regulation SHO Pilot and the SROs assigned stocks to test groups one month before the start of the Tick Size Pilot. Does the experience with either of those pilots provide any insight into when the Commission should determine the initial Pilot Securities for the proposed Pilot? Or is it necessary for the Commission to select the Pilot Securities and assign them to groups prior to the pre-Pilot Period? Please explain. What, if any, operational or implementation complexities did market participants experience in relation to the timing of the assignment of securities in the previous pilots?

39. Do the procedures specified in Proposed Rule 610T(b) offer an appropriate framework for maintaining the list of securities for the proposed Transaction Fee Pilot? If not, what other arrangement should the Commission implement? If yes, do any adjustments need to be made to accommodate the proposed Pilot?

40. Is a pipe-delimited ASCII format the appropriate file format for maintaining the Pilot Securities Exchange Lists and Pilot Securities Change Lists? If not, what other format is more appropriate? Why is such alternate format preferred over a pipe-delimited ASCII format?

41. How long should the rule require that exchanges maintain historical versions of the lists on their public websites for public availability? Is five years appropriate, or should they be maintained on public websites for more or less time?

42. Should the Commission require, in order to make the data more accessible and usable from the exchanges' websites, more automated access to the data? For example, should the Commission require an exchange to make the data publicly available on its website via RSS Feeds[157] and/or APIs?[158] If so, which would be more preferable and why? What would be the benefits? What costs would be associated with such functionality?

43. Are the requirements for posting the required information on a public

[155] While both the Pilot Securities Exchange Lists and the Pilot Securities Change Lists would be required to be publicly posted for five years after the end of the post-Pilot Period, the primary listing exchanges would not be required to continue to update such lists following the conclusion of the post-Pilot Period.

[156] *See* proposed Rule 610T(b)(4).

[157] RSS Feeds (Really Simple Syndication) are a type of web feed which allows users to access updates to online content in a standardized, computer-readable format.

[158] API (Application Programming Interface) is a set of clearly defined methods of communication between various software components which can make it easier to develop a computer program by providing all the building blocks, which are then put together by programmers.

website, including the prohibition on access and usage restrictions, appropriate to ensure that the public and the Commission will have unfettered access to and be able to use effectively, without encumbrance, the information? Should the Commission impose any other requirements for posting the information? How would usage restrictions impact the ability to analyze the data?

2. Exchange Transaction Fee Summary

To facilitate analysis of the Pilot data, including the effect that transaction-based fees and rebates have on order routing behavior, execution quality, and market quality, the Commission preliminarily believes that it is necessary for the exchanges to post publicly standardized select data on transaction fees and rebates, including changes to fees and rebates for NMS stocks in each Test Group and the Control Group, as well as average and median realized fees measured monthly.[159] While the proposed Pilot would cap access fees differently in Test Groups 1 and 2, exchanges would have the freedom to set fees at any level below those caps. The Exchange Transaction Fee Summary should facilitate comparison of each exchange's basic fee structure across all equities exchanges and help identify, in summary fashion, changes to those fees.

Because changes to transaction fees and rebates currently are described using Form 19b–4 in individual proposed rule change filings that can be fairly complex, the Commission believes that compiling a dataset of fees and fee changes from Form 19b–4 fee filings alone for use in studying the proposed Pilot would be cumbersome and labor intensive for researchers and may discourage research. Further, the Commission recognizes that exchanges may use unique terminology to describe their fees, which could make comparison of fees across exchanges difficult for a researcher, so the proposal provides for standardized terms to ease comparison across exchanges. The Commission is proposing that exchanges publicly post on their websites in a downloadable file information on their fees (including rebates) and fee changes during the proposed Pilot (including for the pre-Pilot and post-Pilot Periods) using an eXtensible Markup Language (XML) schema to be published on the Commission's website.[160] Similar to the Pilot Securities lists, discussed above, exchanges would be required to publicly post downloadable files containing the Exchange Transaction Fee Summary, which would require exchanges to post that information on a website that is freely and persistently available and easily accessible by the general public. Further, exchanges would be required to present the information in a manner that facilitates access by machines without encumbrance, and the files and information therein could not be subject to any usage restrictions such as restrictions on access, retrieval, distribution, and reuse.

The Commission preliminarily believes that the unencumbered availability of this data using the proposed XML schema would enhance data quality and facilitate analysis on the correlation between changes in transaction fees and changes in order routing behavior, execution quality, and market quality.[161] There are other alternatives to the Commission proposed XML schema such as CSV and JSON formats. The CSV format provides the most compact file size among the alternatives; however, it also is the least flexible as it cannot convey the same complexity as XML or JSON or directly incorporate validation rules thereby potentially resulting in lower data quality. The JSON format provides a file size similar to XML and can convey complex data structures; however, XML is more widely supported by software packages and applications that are likely to be used by researchers and the public. Therefore, the use of JSON would likely impact reuse and analysis of the data provided by the proposed Pilot.

Accordingly, for the duration of the proposed Pilot, including the pre- and post-Pilot Periods, proposed Rule 610T(e) would require each national securities exchange that trades NMS stocks to compile and post publicly a dataset using an XML schema to be published on the Commission's website that contains specified information on its fees and fee changes that affect each Test Group and the Control Group.[162] Proposed Rule 610T(e) would require the equities exchanges to post on their websites an initial Exchange Transaction Fee Summary before the start of trading on the first day of the pre-Pilot Period and would require the information to be updated through the close of trading on the last day of the post-Pilot Period. During the Pilot, including the pre- and post-Pilot Periods, proposed Rule 610T(e) would require the equities exchanges to update the Exchange Transaction Fee Summary on a monthly basis within 10 business days of the first day of each calendar month to reflect data collected for the prior month.[163]

Proposed Rule 610T(e) specifies the information to be provided in the Exchange Transaction Fee Summary. Specifically, the proposed summary of information relating to fees and fee changes would identify the self-regulatory organization by name (''SRO Name'') so that the Commission and researchers would be able to link each exchange to its reported fees.

Further, the proposed summary would identify the applicable Pilot Test Group (*i.e.,* 1, 2, 3, or Control), and it would identify the ''Base'' take fee (rebate), the ''Base'' make rebate (fee), the ''Top Tier'' take fee (rebate), and the ''Top Tier'' make rebate (fee), as applicable.[164] For purposes of the Exchange Transaction Fee Summaries, ''Base'' fee/rebate refers to the standard amount assessed or rebate offered *before* any applicable discounts, tiers, caps, or other incentives are applied. Further, ''Top Tier'' fee/rebate refers to the fee assessed or rebate offered *after* all applicable discounts, tiers, caps, or other incentives are applied. The Commission preliminarily believes that the Base and Top Tier information would be useful to the Commission and researchers as an approximation of the fee and rebate information that broker-dealers incorporate into their routing decisions, which will be useful in interpreting the Pilot data. For example, the information can be used to help identify and track changes in fees and rebates and the timing of those changes, which can be compared to changes in

[159] Some fee changes would not be affected by the proposed Pilot. For example, fixed membership fees, regulatory fees, and connectivity fees that are not assessed by transaction would not fall within the scope of the proposed Pilot.

[160] *See* proposed Rule 610T(e). The Commission's schema is a set of custom XML tags and XML restrictions designed by the Commission to reflect the proposed disclosures in Rule 610T(e). This requirement does not impact a national securities exchange's obligation pursuant to Section 19(b) of the Exchange Act and Rule 19b–4 thereunder concerning filing a notice of proposed rule change to effectuate a change in transaction fees and updating the schedule of fees posted on the exchange's website to reflect such changes. *See supra* note 10 (discussing the procedural and substantive requirements applicable to Form 19b–4 fee filings).

[161] *See supra* Section V.E.4 (discussing the proposed XML format and the limits of using ASCII format for the Exchange Transaction Fee Summary).

[162] Because the Pilot Securities would be subject to a continuing minimum share price of $1, the proposed dataset would only contain information on fees applicable to transactions in securities with a per share price $1 or more.

[163] Using the month of December 2018 as an example, on or before January 16, 2019, an exchange would be required to post the required information based on data it collected during the previous month of December.

[164] *See* proposed Rule 610T(e).

order routing behavior, execution quality, and market quality.

In addition, proposed Rule 610T(e) would require exchanges to calculate the ''average'' and ''median'' per share fees and rebates, which the exchange would compute as the monthly realized average or median per-share fee paid or rebate received by participants on the exchange during the prior calendar month.[165] The summary would require average and median per share fees and rebates to be reported separately for each participant category (discussed below), Test Group, displayed/non-displayed, and top/depth of book. The Commission believes the inclusion of average and median figures is helpful as the Base and Top Tier figures are general values and not all broker-dealers would pay or receive those amounts. While Base and Top Tier would be useful to facilitate comparison across exchanges, the addition of average and median figures will provide additional insight into the typical fees paid or rebates received by broker-dealers at each exchange. In turn, this information would be useful to the Commission and researchers analyzing how fees and rebates affect order routing decisions. While the average realized fee or rebate paid/earned by market participants on an exchange can be skewed by extremely large or small values, the median figures would not be affected by such values because median figures reflect the midpoint of values with an equal probability of falling above or below that amount. The Commission preliminarily believes that both the average and median realized fee/rebate figures would be helpful to the Commission and researchers in analyzing Pilot data and the Commission and researchers could incorporate both figures into their analyses, in addition to the Base and Top Tier data, discussed above. For example, a researcher could examine average realized per share fees and rebates when exploring order routing decisions with respect to particular exchanges across broker-dealers. Likewise, a researcher could consider median realized per share fees and rebates when examining the routing decisions of an individual broker-dealer faced with a choice of multiple competing exchanges each with different fees and rebates.

Further, the proposed summary of information would require equities exchanges to report ''record type'' and ''participant type.'' Specifically, ''record type'' would be an indicator variable to enable the Commission and researchers to quickly identify whether the fee being reported is an average/median figure, or whether it is the Base or Top Tier fee. Knowing whether a particular fee or rebate is either the Base/Top Tier or average/median would help the Commission and researchers avoid confusion and provide important clarity in the dataset to facilitate use of the information. The ''participant type'' also would be an indicator variable and would require exchanges to separately report fees applicable to registered market makers or other market participants. To the extent that an exchange maintains different fees and rebates (*e.g.,* different Base or Top Tier fees or rebates) for market makers compared to other market participants, this indicator variable would allow the Commission and researchers to separately analyze market makers from other participants, which could be valuable when considering the effects of fees and rebates on execution quality and market quality as they impact the incentives on market makers to provide liquidity on specific exchanges. In addition, proposed Rule 610T(e) would require the equities exchanges to identify whether the fees and rebates reported in the summary apply to displayed or non-displayed liquidity or both displayed and non-displayed liquidity and whether they apply to the top or depth of book or to both top and depth of book.[166] These indicator variables will help the Commission and researchers identify whether the fees/rebates reported in the dataset differ between displayed and non-displayed orders or between top and depth of book. If an exchange does differentiate between those conditions in the assessment of fees or provision or rebates, then it would so indicate. Inclusion of this information in the summary of information will allow the Commission and researchers to observe differences at exchanges in fees/rebates to provide or remove liquidity, which could be used to evaluate order routing, execution quality, and market quality.

Finally, proposed Rule 610T(e)(7) and (8) would require the equities exchanges to identify the effective date for each fee (rebate) reported and, when applicable, the end date after which the fee (rebate) was no longer in effect.[167] In addition, equities exchanges would report a separate indicator variable to identify when they change fees other than on the first trading day of a calendar month.[168] Specifically, this variable would distinguish whether the average and median values reported in the dataset represent the pre-change average/median or post-change average/median. For example, if an exchange changes its fees on the 15th of a month, then the average and median fees reported before the 15th would be marked to distinguish them from the average and median fees reported on and after the 15th of the month. This indicator variable would be necessary to allow the Commission and researchers to line up the time of reported fee information with observed order routing and execution and market quality information in the Pilot data.

As proposed, each equities exchange would be required to post publicly on its website an initial Exchange Transaction Fee Summary containing the information prescribed in Rule 610T(e) using an XML schema to be published on the Commission's website prior to the start of trading on the first day of the pre-Pilot Period. Pursuant to proposed Rule 610T(e), each equities exchange thereafter would be required to publicly post an updated dataset within 10 business days of the first day of each calendar month and would continue to do so until the end of the post-Pilot Period.

The Commission recognizes that including only the Base fee (rebate), Top Tier fee (rebate), average fee (rebate), and median fee (rebate) ignores significant variation in exchange fee schedules. However, including more granular information on specific individual fees and rebates would complicate the data, could be difficult to standardize across exchanges, and could potentially make the Pilot more expensive than proposed. Further, the Commission preliminarily believes that the proposed data fields provide sufficient information to assess the range of fees and the variation across exchanges in fees and facilitate analysis of the Pilot data, which otherwise would be challenging to summarize independently and accurately in light of the considerable complexity of exchange fee schedules noted above. Reporting the fee information separately for registered market makers, as a group, and other market participants, as a group, will allow the Commission to separate out the class of market makers to see how changes to fees and rebates

[165] Using the month of December 2018 as an example, on or before January 16, 2019, an exchange would be required to post, among other data, the Base and Top Tier fees and rebates in effect on December 1, any changes to the Base or Top Tier fees and rebates during the month of December, and the average and median per-share fees paid or rebates received by participants on the exchange for the month of December.

[166] *See* proposed Rule 610T(e)(5) and (6).

[167] *See* proposed Rule 610T(e).

[168] *See* proposed Rule 610T(e)(10).

impact the fulfillment of their responsibility to provide liquidity. The Commission believes each exchange should summarize this information because each exchange is best able to understand its own fees and unique fee terminology.

The Commission requests comment on the proposed Exchange Transaction Fee Summary proposed in connection with the proposed Pilot. In particular, the Commission solicits comment on the following. To the extent possible, please provide specific data, analyses, or studies for support.

44. Is the proposed Exchange Transaction Fee Summary useful to permit comparisons to be made across exchanges? If not, what type of information should be captured?

45. Is having an Exchange Transaction Fee Summary that uses the same XML schema useful when examining the Pilot data? Should the proposed Pilot use an alternative schema? If so, how should the schema change and what would be the impacts of such changes?

46. Are the data elements included in the Commission's proposed schema reasonable? Should any changes be made and what would be the impacts of such changes?

47. What information in the Exchange Transaction Fee Summary is most useful? What additional information in the Exchange Transaction Fee Summary would be helpful? Is any information in the proposed Exchange Transaction Fee Summary not useful and, if so, should it be removed? Please explain. If so, should alternative information be selected instead?

48. Are both ''average'' and ''median'' fees useful metrics, or should other measures be selected and what would be the impacts of those alternatives?

49. The proposal would require separate reporting for registered market makers, as a group, and other market participants, as a group. Should further groups be identified? Would customers or professionals be appropriate groups on which to collect fee data?

50. Are monthly updates to the Exchange Transaction Fee Summary appropriate, or should the Commission require the exchanges to post this information more or less frequently and why?

51. Should the Commission require exchanges to report in the Exchange Transaction Fee Summary additional information on proposed rule change filings that change transaction fees reported in the Exchange Transaction Fee Summary? If so, what information should be reported? Would the file number of the exchange's proposed rule change be sufficient, or should links be captured that reference the filing?

52. Should the Commission require the exchanges to specially identify any filing submitted to the Commission that establishes or changes a fee, rebate, or other charge imposed by the Exchange? What form should this identification take? Should the title of the filing require a special identifier? Should the exchanges be required to post a consolidated list of such filings on a publicly available website?

53. Should the Commission require submission of the Exchange Transaction Fee Summaries through EDGAR instead of requiring exchanges to post that information on each individual equities exchange's website? If so, how would this affect the exchange filers and how would it affect users of the Exchange Transaction Fee Summaries?

3. Order Routing Data

To provide public data to facilitate an examination of the impact of the proposed Pilot on order routing behavior, execution quality, and market quality, the Commission proposes in Rule 610T(d) to require throughout the duration of the Pilot, as well as during the pre-Pilot Period and the post-Pilot Period, that each national securities exchange that trades NMS stocks prepare a downloadable file containing sets of order routing data in accordance with the specifications proposed in Rule 610T(d), for the prior month.[169] The data would be in pipe-delimited ASCII format, and be publicly posted on each exchange's website no later than the last day of the following month. As proposed for the lists of Pilot Securities and the Exchange Transaction Fee Summary, exchanges would be required to publicly post downloadable files containing this order routing information. Exchanges would be required to post this information on a website that is freely and persistently available and easily accessible by the general public. In addition, exchanges would be required to present this information in a manner that facilitates access by machines without encumbrance by user name, password, or access constraints and the files and information therein could not be subject to any usage restrictions, such as restrictions on retrieval, distribution, and reuse. Requiring the exchanges to post and maintain this order routing information with free and completely unencumbered access would facilitate research and analyses consistent with the purposes of this Pilot.

For the pre-Pilot Period, order routing datasets would include each NMS stock. For the Pilot Period and post-Pilot Period, order routing datasets would include each Pilot Security. As discussed below, the order routing data must contain aggregated and anonymized broker-dealer order routing information.[170] Also as discussed below, the required datasets would contain order routing information for liquidity-providing orders and liquidity-taking orders that is aggregated by day, by security, by exchange, and by broker-dealer on an anonymous basis.[171] If the equities exchanges are reporting to the Consolidated Audit Trail (''CAT'') at the time the proposed Pilot commences, they would be able to compile the required order routing data by utilizing the data they collect pursuant to the national market system plan (''CAT NMS Plan'').[172]

As described in paragraph (d) to proposed Rule 610T, the Commission is proposing that each equities exchange would be required to post publicly two datasets on their websites in pipe-delimited ASCII format. One dataset would include daily volume statistics of liquidity-providing orders by security and by anonymized broker-dealer, separating held and not-held orders. The second dataset would include daily volume statistics of liquidity-taking orders by security and by anonymized broker-dealer, separating held and not-held orders. The specific fields for each dataset as set forth in paragraph (d) to proposed Rule 610T are: Code identifying the equities exchange; eight-digit code identifying the date of the calendar day of trading; ticker symbol; unique, anonymized broker-dealer identification code; order type code; order size codes; number of orders received; cumulative number of shares of orders received; cumulative number of shares of orders cancelled prior to execution; cumulative number of shares of orders executed at receiving market center; and cumulative number of shares of orders routed to another

[169] For example, by September 30th, an exchange would be required to post the required information containing order routing data for August.

[170] *See supra* note 154 describing the reasons for requiring data to be provided in pipe-delimited ASCII format. Aggregated order routing data would consist of the cumulative (total) number of orders or shares of orders received, cancelled, executed, or routed to another trading center by order type and order size, accumulated by day, by security, by anonymized broker-dealer, and by exchange, as detailed in proposed Rule 610T(d).

[171] *See* proposed Rule 610T(d).

[172] *See* Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (Joint Industry Plan; Order Approving the National Market System Plan Governing the Consolidated Audit Trail) and CAT NMS Plan Sections 6.3–6.4.

execution venue. In addition, the liquidity-providing orders dataset also would require a field specifying the cumulative number of shares executed within certain specified time periods after order receipt by the exchange.

The Commission preliminarily believes that the publicly-available order routing data should provide researchers and the Commission with data necessary to serve the Commission's regulatory purposes in studying the potential conflicts of interest associated with transaction-based fees and rebates and the effects that changes to those fees and rebates have on order routing behavior, execution quality, and market quality. In particular, the order routing data would contain information about the exchanges to which broker-dealers route orders, which will permit a closer examination of how broker-dealers may change their order routing behavior in response to changes in fees and rebates at each exchange. Because broker-dealers may respond differently to differing levels of fees and rebates and the inherent conflicts of interest fees and rebates present when making routing decisions, the Commission preliminarily believes that data at the broker-dealer level would facilitate statistical analysis of those differences and the conflicts of interest associated with them. The order routing data also would provide valuable information on order type, order size, time to execution, and information on order execution, cancellation, and reroutes, all of which should facilitate analysis into routing behavior in response to differing levels of fees and rebates. In addition, this same information would also facilitate an analysis of the effects that changes to transaction-based fees and rebates may have on execution and market quality by permitting a close examination of matters such as liquidity concentration and competition for order flow among equities exchanges in different fee and rebate environments.

Further, proposed Rule 610T(d) would require during the course of the Pilot, as well as during the pre-Pilot Period and the post-Pilot Period, each national securities exchange that trades NMS stocks to publicly post on its website downloadable files in pipe-delimited ASCII format no later than the last day of each month, sets of order routing data in accordance with the specifications in proposed Rule 610T(d), for the prior month. The Commission is proposing to require the equities exchanges to collect and make available pre-Pilot and post-Pilot data, which would provide necessary benchmark information against which the Commission could assess the impact of the Pilot, and the impact of the Pilot on potential conflicts of interest associated with transaction-based fees and rebates and the effects that changes to those fees and rebates have on order routing behavior, execution quality, and market quality.

In preparing the datasets, the equities exchanges would be required to anonymize information relating to the identity of individual broker-dealers before making the order routing datasets publicly available. In order to track and aggregate the activity of particular broker-dealers across multiple exchanges, the Commission preliminarily believes it is important for each equities exchange to utilize the same anonymized code to identify a broker-dealer.

Using a single code to identify each unique broker-dealer will allow the Commission and researchers to easily combine the separate exchange data files and sort them by unique broker-dealers, therein allowing the Commission and researchers to identify aggregate activity at the broker-dealer level across all equities exchanges. In turn, the ability to combine and sort all exchange data by anonymized codes representing individual broker-dealers would be useful for capturing and analyzing individual broker-dealer order routing decisions.

In order to facilitate the anonymization of the identities of broker-dealers, representatives of the Commission would provide to the equities exchanges, on a confidential basis, a Broker-Dealer Anonymization Key. The Broker-Dealer Anonymization Key would provide the anonymization code for every broker-dealer whose order routing data would be included in the order routing datasets. The Commission preliminarily believes that it would be most efficient to create the Broker-Dealer Anonymization Key by assigning a unique, anonymized identification code to each central registration depository identifier (''CRD''), which are identifiers of registered broker-dealers known and regularly used by both the Commission and the equities exchanges.[173] To protect the identities of broker-dealers, the Broker-Dealer Anonymization Key would only be accessible to representatives of the Commission and the equities exchanges.

Because proposed Rule 610T would state that the identities of broker-dealers contained in the Order Routing Datasets, and the Broker-Dealer Anonymization Key, are regulatory information, exchanges would not be permitted to access or use that information for any commercial or non-regulatory purpose. The Commission considers the identities of broker-dealers in the proposed Order Routing Data, as well as the Broker-Dealer Anonymization Key, to be regulatory information produced for the specific and exclusive purpose of conducting the Pilot, which ultimately will inform the Commission's (as well as exchanges' and the public's) regulatory consideration of the impact of transaction fees on equities market structure. The Commission believes it would be inconsistent with an exchange's rules to use the Broker-Dealer Anonymization Key and the Order Routing Data to benefit its business operations.[174] Accordingly, Rule 610T would expressly prohibit exchanges from accessing or using the Pilot's order routing data for commercial or non-regulatory purposes for reasons including, but not limited to, setting transaction fees, marketing, business development, and customer outreach.[175]

The Commission believes that the public availability of the order routing datasets would be useful to allow market participants, researchers, and others to conduct independent analyses of the proposed Pilot and its impacts. To the extent these analyses reveal useful information about the potential conflicts of interest associated with transaction-based fees and rebates and the effects that changes to those fees and rebates have on order routing behavior,

[173] CRD numbers are captured in the Commission's EDGAR system.

[174] Section 19(g)(1) of the Act requires, in part, that every self-regulatory organization comply with its own rules. *See* 15 U.S.C. 78s(g)(1). Corporate governance documents for equities exchange holding companies contain rules that restrict the use of information related to an equities exchange's self-regulatory function and do not permit use or disclosure of such information for commercial purposes. *See* By-laws of Nasdaq, Inc., Article XII, Section 12.1(b), *available at http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp_1_1_3_6&manual=%2Fnasdaq%2Fmain%2Fnasdaq-corporg%2F*; Eighth Amended Bylaws of Intercontinental Exchange Inc., Article VIII, Section 8.1, *available at http://ir.theice.com/governance/governance-and-charter-documents*; Cboe Global Markets, Inc. and Subsidiaries Code of Business Conduct and Ethics, *available at http://ir.cboe.com/~/media/Files/C/CBOE-IR-V2/corporate-governance/code-of-business-conduct-and-ethics-27-oct-2017-adopted.pdf*; Bylaws of IEX Group, Inc., Article VII, Section 35, *available at https://iextrading.com/docs/governance/IEXG%20Bylaws.pdf*; Bylaws of CHX Holdings, Inc., Article III, Section 2, *available at http://www.chx.com/chx-holdings/bylaws/*.

[175] For example, proposed Rule 610T would prohibit an exchange's non-regulatory personnel from having access to the Broker-Dealer Anonymization Key or using that information to decipher the order routing data posted by competing exchanges to learn the identities of those exchanges' biggest customers and then solicit those customers for itself.

execution quality, and market quality, the Commission believes it would use the resulting analyses for its own regulatory purposes to further inform itself and the public on whether further regulatory action in this area is appropriate.

The Commission requests comment on the order routing-related data to be included in the proposed Pilot. In particular, the Commission solicits comment on the following. To the extent possible, please provide specific data, analyses, or studies for support.

54. What data are necessary to facilitate analysis of the potential conflicts of interest associated with transaction-based fees and rebates and the effects that changes to those fees and rebates have on order routing behavior, execution quality, and market quality? Are there any specific measures that commenters believe would facilitate that analysis? For example, do commenters agree with the Joint Exchange Letter's recommendation to study the impact on broker-dealers and their customers of savings realized from lowered exchange transaction fees? [176] If so, what data would facilitate that analysis?

55. If the CAT repository was operational, as specified in the CAT NMS Plan, would the Commission have sufficient data to evaluate order routing behavior without this Pilot? Does the lack of the CAT affect the costs necessary for this proposed Pilot, and if so how?

56. Should the Commission require the order routing datasets to separate out held and not-held orders? Why or why not? Are there certain shared characteristics regarding the handling of not-held orders, such as a greater likelihood to be directed to particular exchanges, that would be beneficial to assess? Please explain.

57. Should the Commission also require exchanges to separately report non-anonymized datasets to the Commission? If so, what additional data would be useful?

58. Will anonymizing the proposed data sufficiently protect confidential information? Are any further safeguards necessary? Why or why not? Are there other groupings that would be preferable, like aggregation units? If not, what benefits or limitations would there be in analyzing the data if the entirety of a broker-dealer's order routing activity is aggregated?

59. Should the Commission use CRD numbers to create the Broker-Dealer Anonymization Key? If not, why not? Are there other accessible identifying markers that the Commission should use to create the Broker-Dealer Anonymization Key?

60. Would the equities exchanges be able to work with representatives of the Commission to validate the Broker-Dealer Anonymization Key? What additional information, if any, would be helpful for constructing the Broker-Dealer Anonymization Key?

61. Should the Commission require the data to be aggregated at a broader level, such as by groups of similar market participants? Why or why not? Is there a need to aggregate the activity of any market participants to protect their identity? For example, should the identity of large market participants be aggregated? What unique risks are posed for market participants whose trading constitutes a material portion of overall volume? Why would anonymization of a particular broker-dealer not be sufficient for purposes of concealing the broker-dealer's identity? What impact would aggregating order routing data at a broader level have on the ability for the Commission and researchers to assess the impact of the proposed Pilot on order routing behavior, execution quality, and market quality?

62. Should the Commission collect pre-Pilot and post-Pilot data? For how long of a period should it collect such data? Is six months sufficient for each period? Should it collect such data for a shorter period, like three or four months, or a longer period? Should the lengths of the pre-Pilot and post-Pilot Periods be equal, or could the Commission instead collect pre-Pilot data for three months and post-Pilot data for six months and still have adequate statistical power to evaluate the results of the Pilot?

63. Should the Commission require the equities exchanges to both report the datasets to the Commission and make them publicly available on their websites? Is it sufficient to require the equities exchanges to make the datasets publicly available on their websites? To what extent would that reduce the burdens associated with complying with this provision?

F. Implementation Period

The Commission proposes to notify the public through a notice of the start and end dates of the pre-Pilot, Pilot, and post-Pilot Periods, including any suspension of the one-year sunset of the Pilot Period.[177] The start date of the pre-Pilot Period would be one month from the date the Commission issues the notice, and the end date of the pre-Pilot Period would be six months from the pre-Pilot Period's start date. Accordingly, the Pilot, which is to start at the conclusion of the pre-Pilot Period, would begin seven months from the date the Commission issues the notice. The post-Pilot Period would start at the conclusion of the Pilot and would end six months from the post-Pilot Period's start date.

The Commission recognizes that the proposed Pilot will require the equities exchanges to make certain changes to their fees to conform to the proposed terms of the Pilot and will require market participants to adjust their order routing systems in response to those changes. However, because equities exchanges frequently adjust their transaction fees and rebates with little, if any, advance notice to the public through immediately effective Form 19b–4 fee filings, the Commission preliminarily believes that broker-dealers currently are well situated to promptly accommodate any changes required to implement and comply with the proposed Pilot.[178] Such adjustments may be more time-consuming than usual for broker-dealers and other market participants insofar as additional programming may be needed to account for the different fee and rebate levels across three Test Groups and one Control Group of proposed Pilot.[179] Nevertheless, the Commission preliminarily believes that broker-dealers and other market participants will have time and notice before the onset of the proposed Pilot, including the proposed six-month pre-Pilot Period, to begin to make updates to their trading strategies and execution algorithms, including planning for the prohibition on rebates and Linked Pricing in Test Group 3 and the fact that different stocks will be subject to different fee caps during the proposed Pilot. Thereafter, when the initial List of Pilot Securities is released and the exchanges submit their fee filings, broker-dealers could input those data points into their trading systems in the same manner they do today when exchanges change their fees.

In addition, for the duration of the proposed Pilot and during the pre- and post-Pilot Periods, each equities exchange would be required, pursuant

[176] *See* Joint Exchange Letter, *supra* note 44, at 4.

[177] *See* proposed Rule 610T(c). The notice would be posted on the Commission's website.

[178] SROs are required to file with the Commission copies of any proposed rule or any proposed rule change. 15 U.S.C. 78s(b)(1). Any proposed rule change establishing or changing a due, fee, or other charge imposed by the self-regulatory organization takes effect upon filing with the Commission. 15 U.S.C. 78s(b)(3)(A)(ii).

[179] *See* Section V.C.2.b. *infra* for a discussion of the costs that broker-dealers and other market participants may face in complying with the Pilot.

to proposed Rule 610T(d), to post publicly on its website specified datasets of order routing data aggregated by date, ticker symbol, national securities exchange, and broker-dealer. Separately, the equities exchanges also would be required to make changes to accommodate the requirements of proposed Rule 610T(b) concerning publication of information about the Pilot Securities and proposed Rule 610T(e) concerning reports of data on their fees and fee changes.

To provide time for the equities exchanges to make these changes, the Commission proposes that the start date of the pre-Pilot Period would be one month from the date it issues the notice pursuant to proposed Rule 610T(c). Accordingly, the start date of the Pilot Period, which would begin at the conclusion of the pre-Pilot Period, would be no earlier than seven months from the date of the Commission's notice issued pursuant to proposed Rule 610T(c). The Commission preliminarily believes that this process should provide sufficient advance notice to the equities exchanges to allow them time to put in place mechanisms to comply with the proposed requirements of Rule 610T and sufficient advance notice to broker-dealers and other market participants to allow them time to put in place any necessary changes to their order routing programming.[180]

The Commission requests comment on the proposed implementation period for the proposed Pilot. Specifically, the Commission solicits comment on the following. To the extent possible, please provide specific data, analyses, or studies for support.

64. Is a one month period following the Commission's notice prior to the start of the pre-Pilot Period sufficient time to allow the equities exchanges to prepare for the pre-Pilot Period requirements? Why or why not?

65. Is a minimum seven month period following the Commission's notice sufficient time to allow affected entities to establish and test mechanisms to comply with the proposed requirements? Why or why not? Should there be an alternate implementation period, such as twelve months? If so, what would be preferable and why?

66. What technological or systems changes are necessary to effectuate the proposed Pilot? How would any such changes differ from changes required to accommodate routine changes in exchange fee schedules?

[180] *See id.*

IV. Paperwork Reduction Act

Certain provisions of the proposed rule contain ''collection of information requirements'' within the meaning of the Paperwork Reduction Act of 1995 (''PRA'').[181] The Commission is submitting these collections of information to the Office of Management and Budget (''OMB'') for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11.[182] An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the agency displays a currently valid control number.[183] The title of the new collection of information is ''Transaction Fee Pilot Data.''

A. Summary of Collection of Information

1. Pilot Securities Exchange Lists and Pilot Securities Change Lists

As discussed above, the Commission would publish by notice the initial List of Pilot Securities, which would identify the securities in the proposed Pilot and assign each of them to a designated Test Group (or the Control Group).

Prior to the start of trading on the first day of the Pilot Period, proposed Rule 610T(b)(2)(i) would require each national securities equities exchange that is a primary listing exchange for NMS stocks to publicly post on its website a Pilot Securities Exchange List, in pipe-delimited ASCII format, of all Pilot Securities for which it serves as the primary listing exchange. Proposed Rule 610T(b)(2)(i) also would require each primary listing exchange to maintain and update this list as necessary prior to the beginning of each trading day. In addition, proposed Rule 610T(b)(3)(i) would require that prior to the beginning of trading each trading day, a primary listing exchange would be required to publicly post on its website a Pilot Securities Change List, in pipe-delimited ASCII format, that cumulatively lists each separate change to Pilot Securities for which it serves or has served as the primary listing exchange. A proposed set of specifications for both lists is set forth in paragraph (b) of the proposed Rule.

The two lists are intended to make available information about updates to the List of Pilot Securities as well as detailed information on changes to Pilot Securities and their associated Test Groups. Proposed Rule 610T(b) would require both the Pilot Securities Exchange List and the Pilot Securities Change List to be made publicly available on equities exchange websites and remain posted for the duration of the proposed Pilot, including the post-Pilot Period, as well as for five years thereafter. Because the primary listing exchanges oversee their listed issuers and have rules in place that require listed issuers to report corporate change information to them, the primary listing exchanges are in the best position to make this information publicly available.

Further, the Commission believes that market participants and the public would benefit from having access to accurate and up-to-date information on the Pilot Securities and their respective test groups during the proposed Pilot. In addition, access to cumulative detailed information about changes to the Pilot Securities will assist the Commission in analyzing order routing data and will provide information to the public that researchers could use when assessing Pilot data.

[181] 44 U.S.C. 3501 *et seq.*

[182] 44 U.S.C. 3507; 5 CFR 1320.11.

[183] 5 CFR 1320.11(l).

2. Exchange Transaction Fee Summary

As discussed above, the Commission preliminarily believes that it is necessary for the exchanges to post publicly standardized and simplified data on the equities exchanges' transaction fees and rebates, and the effective date for any change thereto, individually for each Test Group and the Control Group.[184] This information is intended to facilitate analysis of the Pilot's order routing data, including the effect that transaction-based fees and rebates have on order routing behavior, execution quality, and market quality.

In particular, while the proposed Pilot would cap access fees differently in Test Groups 1 and 2, exchanges would have the freedom to set fees at any level below those caps. Changes to equities exchange transaction fees and rebates currently are described in individual proposed rule change filings, so compiling a summary of information relating to fees and fee changes from Form 19b–4 fee filings for use in studying the proposed Pilot would be cumbersome and labor intensive for researchers and could discourage research and analysis of the Pilot data. Further, because equities exchanges may use unique terminology to describe their fees, the Commission preliminarily believes the equities exchanges are in the best position to provide this information and ensure that information

[184] Some fee changes would not impact or relate to the proposed Pilot. For example, fixed membership fees, regulatory fees, and connectivity fees that are not assessed by transaction would not fall within the scope of the proposed Pilot.

relating to their fees and rebates and changes thereto is correctly reflected using a common XML schema to facilitate comparison. In addition, only equities exchanges have access to information necessary to compute monthly realized average and median transaction fees, which would be required fields.

Proposed Rule 610T(e) specifies the proposed fields to be required, including information on Base fees and rebates, Top Tier fees and rebates, and monthly realized average and median fees paid or rebates given, each reported separately for registered market makers and other participants.[185] In addition, proposed Rule 610T(e) would require equities exchanges to identify the effective date for each fee (rebate) change reported and, when applicable, the end date after which the fee (rebate) was no longer in effect. It also would require equities exchanges to specify fees and rebates that apply to each Pilot Test Group (or the Control Group), and to what type of participant (market maker or other market participant) they apply. Further, equities exchanges would be required to indicate whether any of the reported fees or rebates are applied differently depending on whether the interest is non-displayed or ranked in the depth-of-book. Finally, as proposed in Rule 610T(e), the equities exchanges would prepare this information and make it publicly available on their websites.

This Exchange Transaction Fee Summary would be intended to facilitate comparison of exchanges' basic fee structures and help identify, in summary fashion, changes to those fees (rebates).

Rule 610T(e) would require each national securities exchange that trades NMS stocks to publicly post this information before the beginning of trading on the first day of the pre-Pilot Period, and update it on a monthly basis thereafter through the close of trading on the last day of the post-Pilot Period.

3. Order Routing Data

Proposed Rule 610T(d) would require each national securities exchange that trades NMS stocks to prepare, in pipe-delimited ASCII format, and publicly post on its website, no later than the last day of each month, specified order routing data containing aggregated and anonymized broker-dealer order routing information for the prior month in accordance with the specifications set forth in proposed Rule 610T(d). Such data would be collected throughout the duration of the proposed Pilot, as well as during the pre-Pilot Period and the post-Pilot Period. For the pre-Pilot Period, order routing datasets would include each NMS stock. For the Pilot Period and post-Pilot Period, order routing datasets would include each Pilot Security. As noted above, if the equities exchanges are reporting to the CAT at the time the proposed Pilot commences, the Commission preliminarily believes that they would be able to compile the required order routing data by using the data reported to the central repository. Publicly posting the datasets would provide the Commission, market participants, academic scholars, and the public with order routing data necessary to serve the Commission's regulatory purposes in studying the potential conflicts of interest associated with transaction-based fees and rebates and the effects that changes to those fees and rebates have on order routing behavior, execution quality, and market quality. In particular, the proposed order routing datasets would contain aggregated order routing data on liquidity-providing and liquidity-taking orders by security, by day, by exchange, and by anonymized broker-dealer, separating held and not-held orders, which should facilitate analysis into order routing behavior in response to differing levels of fees and rebates under the proposed Pilot. Further, in order to construct a dataset that both provides benchmark statistics for the pre-Pilot Period and also captures data to show changes after the end of the proposed Pilot, equities exchanges would provide the required data for dates starting six months prior to the Pilot Period through six months after the end of the Pilot Period. As proposed, the exchanges would publicly post the order routing datasets on their websites in pipe-delimited ASCII format, which would provide ready access to the data to facilitate analyses of the impact of the proposed Pilot.

B. Proposed Use of Information

The data collected during the proposed Pilot would allow the Commission, market participants, academic scholars, and the public to study the potential conflicts of interest associated with transaction-based fees and rebates and the effects that changes to those fees and rebates have on order routing behavior, execution quality, and market quality. In turn, this information should facilitate a data-driven evaluation of future policy choices.

By publishing and maintaining a Pilot Securities Exchange List and a Pilot Securities Change List, each primary listing exchange would help ensure that the Commission, market participants, academic scholars, and the public have up-to-date information on corporate changes to listed issuers that impact the list of Pilot Securities, as well as changes to the composition of any of the proposed test groups. For example, if a stock undergoes a name change, ticker symbol change, corporate merger, or goes out of business, the primary listing exchanges would help disseminate information necessary to keep current the Pilot Securities Exchange List and the Test Groups into which the Pilot Securities are placed by the proposed Pilot.

The proposed Exchange Transaction Fee Summary containing information on fees and fee changes that affect each Test Group and the Control Group should help facilitate more efficient analysis of the effect that transaction-based fees and rebates, and changes to transaction-based fees and rebates, have on order routing behavior, execution quality, and market quality by facilitating comparison across equities exchanges of each exchange's basic fee structure and identifying, in summary fashion, changes to those fees. The Commission preliminarily believes that the public availability of this data would facilitate this analysis of order routing data by the Commission, as well as by market participants, academic scholars, and the public.

The proposed collection of order routing data would provide to the Commission and others necessary information on broker-dealer order routing behavior in response to changes in fees and rebates at each exchange, as well as information on order type, order size, time to execution, and information on order execution, cancellation, and reroutes, all of which should facilitate analysis of routing behavior in response to differing levels of fees and rebates and the impact of fee changes on execution quality and market quality. In addition, the collection of data for a pre-Pilot Period would provide an important benchmark against which to evaluate the order routing data collected during the proposed Pilot, and the collection of post-Pilot data would allow analysis of changes to order routing behavior when the proposed Pilot ends. Together, the information on changes and updates to the universe of Pilot Securities, the Exchange Transaction Fee Summary, and the order routing datasets is intended to

[185] Including only the Base fee (rebate), average fee (rebate), median fee (rebate), and the Top Tier fee (rebate) ignores significant variation in exchange fee schedules. However, additional information would complicate the data and could be difficult to standardize across exchanges. Further, the Commission preliminarily believes that the proposed data fields provide sufficient information to assess the range of fees and the variation across exchanges in fees.

allow the Commission and others ready access to information to assess whether and in what ways changes to fees and rebates affect market participant behavior and impact the conflicts of interest faced by market participants. In addition to analysis by the Commission, market participants, academic scholars, and the public would be able to use this data for their own studies.

C. Respondents

The respondents to this collection of information would be the equities exchanges, which are registered national securities exchanges that trade NMS stocks. Specifically, Rule 610T(b), which covers the Pilot Securities Exchange Lists and Pilot Securities Change Lists, would apply to the five primary listing exchanges for NMS stocks. Rule 610T(d), which requires datasets on order routing, would apply to all thirteen equities exchanges that are currently registered with the Commission. Rule 610T(e), which requires datasets on fees (rebates) and fee (rebate) changes, would apply to all thirteen equities exchanges currently registered with the Commission.

D. Total Initial and Annual Reporting and Recordkeeping Burdens

1. Pilot Securities Exchange Lists and Pilot Securities Change Lists

After the Commission designates the initial List of Pilot Securities and prior to the start of trading on the first day of the Pilot Period, proposed Rule 610T(b)(2) would require each primary listing exchange to compile in pipe-delimited ASCII format, publicly post on its website, and update as necessary, a list of the Pilot Securities for which the equities exchange serves as the primary listing exchange (*i.e.,* the ''Pilot Securities Exchange List''), as well as a list of certain changes to any Pilot Security for which it serves or has served as the primary listing market (*i.e.,* the ''Pilot Securities Change List''). Specifically, upon publication of the initial List of Pilot Securities by the Commission, the primary listing exchanges would be required to determine which Pilot Securities are listed on their market and compile and publicly post downloadable files containing a list of those securities, including all data fields specified in proposed Rule 610T(b)(2)(i) on their websites in pipe-delimited ASCII format. The Commission preliminarily estimates that each primary listing exchange would incur, on average, a one-time burden of approximately 8 burden hours per primary listing exchange to compile and publicly post their initial Pilot Securities Exchange List.[186] Accordingly, the Commission preliminarily believes that the aggregate one-time burden associated with the initial Pilot Securities Exchange Lists would be 40 burden hours.[187]

After posting its initial Pilot Securities Exchange List, each equities exchange would be required to keep current that list to reflect any changes, and to prepare and publicly post on its website until the end of the post-Pilot Period the Pilot Securities Change List prior to the beginning of trading each trading day. The Commission preliminarily believes that each primary listing exchange has existing systems to monitor the names of listed companies and process any changes due to mergers, name changes, or other corporate actions, or transfer of a security that closed below $1 per share from a Test Group to the Control Group.[188] Moreover, the Commission preliminarily believes these systems are currently being used to maintain the lists of pilot securities for the Tick Size Pilot, which, as noted above, employs a similar test-group structure and applies to many of the same securities, so the primary listing exchanges already have a process in place to update lists of pilot securities.[189] However, each primary listing exchange would have to adapt these systems as necessary for the proposed Transaction Fee Pilot, notably the fact that the proposed Transaction Fee Pilot would apply to a larger number of securities than does the Tick Size Pilot. Accordingly, the Commission preliminarily estimates that each primary listing market would incur a one-time burden of approximately 12 burden hours of internal legal, compliance, and information technology operations to develop appropriate systems to track and compile changes relevant to Pilot Securities listed on their market for an aggregate one-time burden of approximately 60 burden hours.[190] The Commission preliminarily estimates that, once the primary listing exchanges have established these systems, on average, each primary listing exchange would incur 126 burden hours annually to compile any changes related to Pilot Securities, such as name changes or mergers, and to publicly post the updated Pilot Securities Exchange Lists and Pilot Securities Change Lists on their websites prior to the start of each trading day.[191] Accordingly, the Commission preliminarily estimates an average, aggregate annual burden of 630 burden hours to update and publicly post the lists of Pilot Securities.[192]

2. Exchange Transaction Fee Summary

Proposed Rule 610T(e) would require each national securities exchange that trades NMS stocks to maintain and publicly post on their websites downloadable files, using an XML schema to be published on the Commission's website, data concerning changes in transaction fees (rebates), and the effective date for each fee (rebate) change, for securities subject to the proposed Pilot. The Exchange Transaction Fee Summary would be required to be posted on the equities exchanges' websites before the start of trading on the first day of the pre-Pilot Period through the close of trading on the last day of the post-Pilot Period. Proposed Rule 610T(e) would require equities exchanges to update this summary of information within ten business days following the beginning of each calendar month. Proposed Rule 610T(e) specifies the proposed fields to be required, including, among other things, information on Base fees and rebates, average and median per share fees paid or rebates given, and Top Tier fees and rebates, each reported separately for registered market makers and other participants. In addition, proposed Rule 610T(e) would require equities exchanges to specify whether the fees (rebates) reported in the summary apply to displayed or non-displayed orders or between top and depth of book. Finally, the proposed rule would require equities exchanges to identify the effective date for each fee (rebate) change reported, including, when applicable, an indicator to flag instances where an equities exchange has changed fees other than on the first trading day of a calendar month and the end date after which the fee (rebate) was no longer in effect. It also would require exchanges to specify fees that apply to

[186] The Commission bases this estimate on a full-time Compliance Manager and Programmer Analyst each spending approximately 4 hours, for a combined total of approximately 8 hours, to compile and publicly post to an exchange's website a downloadable file containing the initial Pilot Securities Exchange List.

[187] 8 burden hours per primary listing exchange × 5 primary listing exchanges = 40 burden hours.

[188] *See supra* note 153 and accompanying text.

[189] *See supra* note 150 and accompanying text.

[190] The Commission derived the total estimated burdens from the following estimates: (Attorney at 4 hours) + (Compliance Manager at 4 hours) + (Programmer Analyst at 4 hours) = 12 burden hours. 12 burden hours per primary listing exchange × 5 primary listing exchanges = 60 burden hours.

[191] The Commission bases this estimate on a full-time Compliance Manager and Programmer Analyst together spending approximately 30 minutes per trading day updating and posting the required lists (approximately 252 trading days × 30 minutes per trading day = 7,560 minutes (126 hours)).

[192] 126 burden hours per primary listing exchange × 5 primary listing exchanges = 630 burden hours.

each Pilot Test Group (or the Control Group), and to what type of interest the fees apply.[193]

The Commission is proposing to require that each equities exchange publicly post on its websites the Exchange Transaction Fee Summary each month, using an XML schema published on the Commission's website. The Commission preliminarily believes that all the data necessary to complete the summary are currently maintained by the equities exchanges. However, the equities exchanges would be required to compute the monthly realized average and median per share fees and rebates, using fee and volume information that the equities exchanges maintain. The Commission preliminarily estimates that each equities exchange would incur a one-time burden of approximately 80 burden hours of internal legal, compliance, information technology, and business operations to develop appropriate systems for tracking fee changes, computing the monthly averages, and formatting the data and posting it on its website in accordance with the proposed rule.[194] Therefore, the Commission preliminarily estimates that the average one-time initial aggregate burden for all equities exchanges necessary for the development and implementation of the systems needed to capture the transaction fee information and post it on their websites in the specified format in compliance with proposed Rule 610T(e) would be 1,040 hours.[195]

Once an equities exchange has established the appropriate systems required for compiling, formatting, and publicly posting the Exchange Transaction Fee Summary in the specified format, the Commission preliminarily believes that it would be necessary for each equities exchange to monitor its systems to ensure its technology is up to date and reporting the required data in accordance with proposed Rule 610T(e). The Commission preliminarily estimates that, on average, an equities exchange would incur an ongoing burden of approximately 40 burden hours per year to monitor and, if necessary, update its systems used for compiling, formatting and publicly posting the Exchange Transaction Fee Summaries in accordance with the proposed Rule.[196] Therefore, the Commission preliminarily estimates that the average aggregate, ongoing, annual burden for all equities exchanges to monitor their systems would be 520 hours.[197]

Under the proposed rule, the equities exchanges would be required to format, calculate certain figures and post their initial Exchange Transaction Fee Summary at the outset of the pre-Pilot Period. As this would be the first time an equities exchange would be required to produce and post on their website such a summary, the Commission preliminarily estimates that it would require approximately 4 burden hours for each equities exchange to complete the initial Exchange Transaction Fee Summary and perform the necessary calculations.[198] In addition, each equities exchange would be required to make its summary publicly available on its website using an XML schema to be published on the Commission's website. As discussed below, the Commission preliminarily believes that the equities exchanges have experience applying the XML format to market data.[199] However, the Commission preliminarily believes that initially each equities exchange would incur a burden specific to the initial Exchange Transaction Fee Summary to ensure that it has properly implemented the XML schema. Therefore, the Commission preliminarily estimates that each equities exchange would incur a burden of 2 burden hours related to post the initial Exchange Transaction Fee Summary publicly on its website using the XML schema to be published on the Commission's website.[200] Accordingly, the Commission preliminarily estimates that equities exchanges would incur, in aggregate, an initial burden of 52 hours to complete their initial Exchange Transaction Fee Summary[201] and an initial burden of 26 hours to post that dataset publicly on their websites using an XML schema to be published on the Commission's website, for a total aggregate, initial burden of 78 burden hours.[202]

In addition, each equities exchange would be required to update the Exchange Transaction Fee Summary on a monthly basis to account for changes from the prior month, if any, and to report monthly realized average median fee and rebate information. The Commission preliminarily believes that such updates would require fewer burden hours, as the equities exchanges would have experience calculating necessary data and formatting the reports as required by the proposed Rule. Accordingly, the Commission preliminarily estimates that it would require approximately 2 burden hours each month, or 24 burden hours on an annualized basis, for each equities exchange to update.[203] This estimate contemplates the impact of publicly posting the summary using the XML schema to be published on the Commission's website. Accordingly, the Commission preliminarily estimates that equities exchanges would incur, an aggregate, annual burden of 312 burden hours to publicly post on their websites

[193] In addition, the Commission anticipates that each equities exchange would submit one Form 19b–4 fee filing to implement the proposed Pilot and one Form 19b–4 fee filing at the conclusion of the proposed Pilot to remove the required pricing restrictions. Each equities exchange might also choose to submit additional Form 19b–4 fee filings during the proposed Pilot. While such filings may impose certain costs on the equities exchanges, those burdens are already accounted for in the comprehensive Paperwork Reduction Act Information Collection submission for Form 19b–4. *See* OMB Control No. 3235–0045 (August 19, 2016), 81 FR 57946 (August 24, 2016) (Request to OMB for Extension of Rule 19b–4 and Form 19b–4 PRA). The Commission does not expect the baseline number of Form 19b–4 fee filings to increase as a result of the proposed Pilot, nor does it believe that the incremental costs outlined in Section V.C.2.a exceed those costs used to arrive at the average costs and/or burdens reflected in the Form 19b–4 PRA submission.

[194] The Commission preliminarily estimates that an equities exchange would assign responsibilities for review and potential modification of its systems and technology to an Attorney, a Compliance Manager, a Programmer Analyst and a Senior Business Analyst. The Commission estimates the burden of reviewing and potentially modifying its systems and technology to be as follows: (Attorney at 20 hours) + (Compliance Manager at 20 hours) + (Programmer Analyst at 20 hours) + (Business Analyst at 20 hours) = 80 burden hours per equities exchange. *See* Securities Exchange Act Release No. 76624 (Dec. 11, 2015), 80 FR 79757, 79771 fn. 93 (Dec. 23, 2015) (SBS Taxonomy Proposing Release) (estimating the types of employees that would retain responsibility for modifying technology systems).

[195] 80 burden hours per equities exchange × 13 equities exchanges = 1,040 burden hours.

[196] Total estimated burdens which reflect the Commission's preliminary view that annual ongoing burdens would be approximately half the burdens of initially ensuring it has the appropriate systems to capture the required information in the required format: (Attorney at 10 hours) + (Compliance Manager at 10 hours) + (Programmer Analyst at 10 hours) + (Senior Business Analyst at 10 hours) = 40 burden hours.

[197] 40 burden hours per equities exchange × 13 equities exchanges = 520 burden hours.

[198] The Commission derived the total estimated burden from the following estimates: (Compliance Manager at 2 hours) + (Senior Business Analyst at 2 hours) = 4 burden hours per equities exchange.

[199] *See infra* notes 364–366 and accompanying text.

[200] The Commission derived the total estimated burden from the following estimates, which reflect the Commission's preliminary belief that the equities exchanges have experience posting information in an XML format on publicly-available websites: (Compliance Manager at 1 hour) + (Programmer Analyst at 1 hour) = 2 burden hours per equities exchange.

[201] 4 burden hours per equities exchange × 13 equities exchanges = 52 burden hours.

[202] 2 burden hours per equities exchange × 13 equities exchanges = 26 burden hours.

[203] The Commission derived the total estimated burden from the following estimates: (Compliance Manager at 1 hour) + (Programmer Analyst at 1 hour) = 2 burden hours per equities exchange per month. 2 burden hours per equities exchange per month × 12 months per year = 24 burden hours per equities exchange per year.

the Exchange Transaction Fee Summaries.[204]

3. Order Routing Data

Proposed Rule 610T(d) would require each national securities exchange that trades NMS stocks to prepare, in pipe-delimited ASCII format, and publicly post on its website, no later than the last day of each month, specified data containing aggregated and anonymized broker-dealer order routing information for the prior month in accordance with the specifications set forth in proposed Rule 610T(d). Such data would be collected throughout the duration of the Pilot, as well as during the six-month pre-Pilot Period and the six-month post-Pilot Period. For the pre-Pilot Period, order routing datasets would include each NMS stock. For the Pilot Period and post-Pilot Period, order routing datasets would include each Pilot Security. In preparing the order routing datasets, the equities exchanges would be required to anonymize information relating to the identity of individual broker-dealers before making the datasets publicly available. This anonymization would be achieved through the use of an anonymization key developed by the Commission, using CRDs.[205]

The Commission preliminarily estimates that, on average, there would be no paperwork burden to the equities exchanges to capture the required order routing data, as the Commission expects that the equities exchanges would collect the required data to create the order routing datasets through existing systems and technology already in place for the collection and reporting of data pursuant to the CAT NMS Plan. Furthermore, the Commission notes that the equities exchanges currently generate similar monthly datasets pursuant to Rule 605 of Regulation NMS.[206] Accordingly, the Commission preliminarily believes that the equities exchanges would be able to leverage existing systems and technology utilized for Rule 605 reporting purposes to create the proposed monthly order routing datasets. The Commission preliminarily believes, however, that the equities exchanges would incur an initial one-time burden of 80 burden hours per equities exchange to ensure that its systems and technology are able to accommodate the proposed requirements to aggregate, anonymize, and publicly post the order routing information.[207] Accordingly, the Commission preliminarily estimates that the aggregate one-time initial burden for ensuring its systems and technology are able to aggregate, anonymize, and post the required order routing data in compliance with proposed Rule 610T(d) would be 1,040 burden hours.[208]

Once an equities exchange has determined that it maintains the appropriate systems and technology required for aggregation, anonymization, and posting of the required information, the Commission preliminarily believes that it would be necessary for each equities exchange to undertake ongoing efforts to ensure that their systems and technology are up to date so that the equities exchange may remain in compliance with the proposed Rule. These efforts could include personnel time to monitor the posting of the required data and the maintenance of the systems necessary to post the required data. The Commission preliminarily estimates that, on average, it would take an equities exchange approximately 40 burden hours per year to ensure that the systems and technology are up to date so as to facilitate compliance with the proposed Rule.[209] Therefore, the Commission preliminarily estimates that the aggregate annual burden to maintain the systems necessary to aggregate, anonymize, and post the required order routing information to be approximately 520 burden hours per year.[210]

In addition, each equities exchange would incur an ongoing burden associated with creating and formatting the order routing datasets to be publicly posted each month. The equities exchanges have experience with creating similar datasets in accordance with their obligations under Rule 605 of Regulation NMS. The Commission preliminarily believes that each equities exchange would incur burdens similar to those associated with preparing Rule 605 reports.[211] Accordingly, the Commission preliminarily believes that each equities exchange would incur a burden of six burden hours per month, or 72 burden hours per year, to prepare and publicly post on its website the order routing datasets.[212] Therefore, the aggregate, annual burden to publicly post on their websites order routing datasets in accordance with proposed Rule 610T(d) would be approximately 936 burden hours.[213]

E. Collection of Information Is Mandatory

Each collection of information discussed above would be a mandatory collection of information.

F. Confidentiality of Responses to Collection of Information

The Pilot Securities Exchange List, Pilot Securities Change List, Order Routing Datasets, and the Exchange Transaction Fee Summary would not be confidential. Rather, each would be publicly posted by the exchanges. With respect to the Order Routing Datasets, the equities exchanges would anonymize the data they collect under Proposed Rule 610T(d) before publicly posting it on their respective websites.

G. Retention Period for Recordkeeping Requirements

National securities exchanges would be required to retain records and information pursuant to Rule 17a–1 under the Exchange Act.[214]

H. Request for Comments

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

67. Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;

68. Evaluate the accuracy of our estimates of the burden of the proposed collection of information;

69. Determine whether there are ways to enhance the quality, utility, and

[204] 2 burden hours per equities exchange × 13 equities exchanges × 12 monthly updates = 312 burden hours per year.

[205] *See supra* Section III.E.3.

[206] *See* 17 CFR 242.605.

[207] The Commission preliminarily estimates that an equities exchange will assign responsibilities for review and potential modification of its systems and technology to an Attorney, a Compliance Manager, a Programmer Analyst and a Senior Business Analyst. The Commission estimates the burden of reviewing and potentially modifying its systems and technology to be as follows: (Attorney at 20 hours) + (Compliance Manager at 20 hours) + (Programmer Analyst at 20 hours) + (Senior Business Analyst at 20 hours) = 80 burden hours per equities exchange. *See supra* note 194.

[208] 80 burden hours per equities exchange × 13 equities exchanges = 1,040 burden hours.

[209] The Commission derived the total estimated burdens from the following estimates, which reflect the Commission's preliminary view that annual ongoing burdens would be approximately half the burdens of initially ensuring it has the appropriate systems to capture the required information in the required format: (Attorney at 10 hours) + (Compliance Analyst at 10 hours) + (Programmer Analyst at 10 hours) + (Business Analyst at 10 hours) = 40 burden hours per equities exchange.

[210] 40 burden hours per equities exchange × 13 equities exchanges = 520 burden hours.

[211] *See* FR Doc. 2016–08552, 81 FR 22143 (April 14, 2016) (''Request to OMB for Extension of Rule 605 of Regulation NMS'').

[212] Compliance Manager at 3 hours + Programmer Analyst at 3 hours = 6 burden hours per month, per equities exchange. 6 burden hours per month × 12 months = 72 burden hours per year, per equities exchange.

[213] 72 burden hours per year × 13 equities exchanges = 936 burden hours.

[214] 17 CFR 240.17a–1. *See also supra* note 147.

clarity of the information to be collected; and

70. Evaluate whether there are ways to minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090, with reference to File Number S7–05–18. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, with reference to File Number S7–05–18 and be submitted to the Securities and Exchange Commission, Office of FOIA/PA Services, 100 F Street NE, Washington, DC 20549–2736. As OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

V. Economic Analysis

As explained above, the proposed Transaction Fee Pilot is designed to produce information on the effect of transaction-based fees on order routing decisions by broker-dealers, as well as execution and market quality.[215] In recent years, a number of academics and market participants have expressed concern that the structure of transaction-based fee pricing may lead to potential conflicts of interest between broker-dealers and their customers when brokers-dealers route customer orders to trading centers offering large rebates so that the broker-dealer can capture the rebates, even when these venues do not offer high execution quality.[216] However, as discussed in more detail below, the Commission cannot determine from existing empirical evidence the impact, if any, of transaction-based fees on order routing decisions by broker-dealers. Specifically, determining whether a causal relationship between exchanges' choice of transaction-based fees and broker-dealers' routing decisions is complicated because transaction-based fees and order routing decisions could be jointly determined and order routing decisions could influence fees just as fees could influence order routing decisions. Currently available data do not permit researchers to isolate these factors and thus identify the existence or direction of such a causal relationship, which in turn impedes researchers' ability to determine the extent to which conflicts may exist.[217] Moreover, the identification of potential causal relations between fees and order routing decisions becomes increasingly complex as exchanges modify their fees.[218]

Because of the existing lack of empirical evidence regarding these potential conflicts of interest, additional information would assist the Commission in making regulatory decisions about whether and how to address transaction-based fees and rebates. To remedy the insufficiency of existing empirical evidence, the Commission is proposing a Transaction Fee Pilot, which would provide the Commission and the public with data currently unavailable to study fees and rebates that exchanges assess to broker-dealers and observe the effects of potential conflicts of interest that could arise between broker-dealers and their customers in connection with these fees. Specifically, the Commission expects that these data are likely to shed light on the extent, if any, to which broker-dealers route orders in ways that benefit the broker-dealer but may not be optimal for customers. The data obtained from the proposed Transaction Fee Pilot would inform any possible future regulatory action that addresses these potential conflicts of interest to the ultimate benefit of investors. In addition, the proposed Transaction Fee Pilot data would also provide information about other potential economic effects of reducing access fee caps or prohibiting rebates or Linked Pricing. For example, the proposed Transaction Fee Pilot could offer information on whether prohibiting rebates or Linked Pricing alters broker-dealer behavior in a manner that affects market quality. Specifically, the proposed Pilot may provide information on how rebates affect quoted spreads, particularly for small and mid-cap securities, as well as how changes to fees affect order flow among trading centers.[219]

The proposed Transaction Fee Pilot would permit the study of whether conflicts of interest exist by (1) providing an exogenous shock to transaction-based fees and rebates, and (2) enabling the collection of representative results of data across a broad range of securities.[220] An exogenous shock is an unpredictable or unexpected event that is outside of the economy or the system (*i.e.,* not under the control or influence of those being studied) but can induce endogenous (*i.e.,* within the system) responses. In the context of this proposed rule, the exogenous shock would take the form of either a reduction of the maximum permissible access fees or a prohibition on rebates or Linked Pricing paid by all U.S. equities exchanges. This shock would allow the Commission and others to explore how exogenous changes to fees and rebates could lead to changes in the ways in which broker-dealers route customer orders for a broad sample of NMS securities. Specifically, the reduction in fees or elimination of rebates or Linked Pricing, as required in specific test groups of the proposed Pilot, may reduce the magnitude of a potential conflict of interest between broker-dealers and their clients caused by transaction-based fees and rebates. A

[215] Execution quality generally refers to how favorably customer orders are executed. Execution quality measures are similar to liquidity measures and tend to include transaction costs, the speed of execution, the probability that the trade will be executed, and the price impact of the trade. *See* NMS Adopting Release, *supra* note 1, at 37513–15, 37537–38. Market quality encompasses execution quality but also relates more generally to how well the markets function. Market quality measures include liquidity, price discovery, and volatility in prices. *See, e.g.,* Henrik Bessembinder, ''Trade Execution Costs and Market Quality after Decimalization,'' *Journal of Financial and Quantitative Analysis* 38, 747–777 (2003) *available at https://doi.org/10.2307/4126742*; Maureen O'Hara and Mao Ye, ''Is Market Fragmentation Harming Market Quality?'', *Journal of Financial Economics* 100, 459–474 (2011) *available at https://www.sciencedirect.com/science/article/pii/S0304405X11000390.*

[216] *See, e.g.,* Angel, Harris and Spatt, *supra* note 106; Battalio Equity Market Study, *supra* note 22; Harris, *supra* note 23.

[217] As proposed, the Transaction Fee Pilot would require the exchanges to make data available to the Commission and the public. Raw data provided by the Transaction Fee Pilot are likely to be used by a subset of academic and regulatory researchers (hereafter ''researchers'') to develop analyses and discussion about the effects of transaction-based fees and rebates on order routing decisions, which could provide valuable information to the public and to the Commission.

[218] Over the last five years, U.S. equities exchanges, on average, have made 34 revisions, or approximately 6.7 revisions per year, to their transaction-based fees and rebates. In contrast to these changes, which are at the discretion of the exchanges and subject to Commission review, the proposed Transaction Fee Pilot would impose a change to access fees and rebates outside of the exchanges' control. *See* Section V.B.2.b *infra.*

[219] *See* Section V.C.1.a.ii *infra,* for further discussion of the benefits of studying other economic effects of transaction fees and rebates.

[220] *See* Section V.B.1 *infra,* for discussion of existing studies related to these topics and their limitations. *See also* Section II.B *supra,* for details of the Nasdaq study, which examined a change in the access fees and rebates charged by Nasdaq for 14 stocks over a four-month period.

reduction in this potential conflict of interest would, in turn, be reflected in measurable changes to broker-dealer order routing decisions.

As discussed in Section III.C, the proposed Pilot would span a two-year period, with an automatic sunset at the end of the first year unless, prior to that date, the Commission publishes a notice determining that the proposed Pilot shall continue for up to another year,[221] and would apply to both maker-taker and taker-maker exchanges. All NMS stocks (including ETPs) that have prices of at least $2.00 at the time of selection would be included in the proposed Pilot and would be segmented into three test groups and one control group. Each test group would contain a mix of stocks and ETPs, stratified based on variables such as market capitalization, share price, and liquidity.[222] Under the requirements of the proposed Pilot, the exchanges could not charge any access fee or, where applicable, provide rebates or Linked Pricing, in excess of the limitations indicated by the proposed Pilot. Stocks and ETPs in Test Groups 1 and 2 would be restricted to maximum fees of $0.0015 and $0.0005 (with no restrictions on rebates), respectively, while Test Group 3 would eliminate the exchanges' ability to provide rebates to liquidity providers on maker-taker exchanges and liquidity takers on taker-maker exchanges for both displayed and non-displayed liquidity and would prohibit Linked Pricing. Both the Control Group and Test Group 3 would maintain the current access fee cap of $0.0030 required by Rule 610(c) of Regulation NMS. By construction, Test Group 3 is designed to observe the effect of the absence of rebates or Linked Pricing on conflicts of interest and the equilibrium fee level and how that fee level would affect order routing decisions, execution quality, and market quality. Further, exchanges would continue to be permitted to have varying fees within each test group, and would be permitted to change their fees at their discretion, subject to Commission review, during the proposed Pilot for securities within each test group, so long as they comply with the conditions of the applicable test group.

In the absence of the proposed Pilot, the Commission preliminarily believes it is unlikely that exchanges would collectively undertake a similar pilot and voluntarily coordinate the exogenous shock to fees and rebates across a broad set of securities, broker-dealers, and exchanges that would be required to appropriately analyze the effects of changes to fees and rebates.[223] By imposing the same modifications to fees and rebates on all U.S. equities exchanges, the proposed Pilot would allow the Commission and the public to obtain data that would permit them to examine how changes to fees and rebates affect order routing decisions of broker-dealers. Accordingly, the Commission believes that the proposed Pilot would enable the collection of valuable data for both the Commission and the public that would otherwise be unavailable.

The Commission is mindful of the costs imposed by, and the benefits obtained from, our rules. Whenever the Commission engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, Section 3(f) of the Exchange Act requires the Commission to consider whether the action would promote efficiency, competition, and capital formation, in addition to the protection of investors.[224] Further, when making rules under the Exchange Act, Section 23(a)(2) of the Exchange Act requires the Commission to consider the impact such rules would have on competition.[225] Section 23(a)(2) of the Exchange Act also prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[226] The Commission preliminarily believes that many of the likely impacts of this proposal on efficiency, competition, and capital formation would be temporary in nature and would affect markets only for the duration of the proposed Pilot. The following analysis considers in detail the economic effects that may result from the Transaction Fee Pilot proposed in this release.

Where possible, the Commission has quantified the likely economic effects of the proposed Transaction Fee Pilot; 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, which make it difficult to predict how market participants would act under the conditions of the proposed Pilot. For example, because of the flexibility that market participants have with respect to the choice of trading center for execution of transactions and because those choices can be influenced by factors outside of the scope of this pilot, such as volume discounts, the Commission cannot quantify, ahead of the proposed Pilot, the economic impact of any changes in order routing decisions by broker-dealers that may result from the proposed Pilot. Nevertheless, as described more fully below, the Commission provides both a qualitative assessment of the potential effects and a quantified estimate of the potential aggregate initial and aggregate ongoing costs, where feasible. The Commission encourages commenters to provide data and information to help quantify the costs, benefits, and the potential impacts of the proposed rule on efficiency, competition, and capital formation.

A. Background on Transaction-Based Fees and Potential Conflicts of Interest

This section provides a review of transaction-based fee models, including a discussion of the history and mechanics of transaction-based pricing. This section also presents an overview of the recent concerns about potential conflicts of interest between broker-dealers and their customers attributed to access fees and rebates assessed by exchanges.

1. Overview of Transaction-Based Fees

Maker-taker pricing models originated on electronic communications networks (ECNs) in the late 1990s as ECNs attempted to attract order flow and draw liquidity from traditional exchanges by offering rebates to market participants that posted liquidity to their platforms.[227] Shortly thereafter, exchanges followed suit and adopted maker-taker pricing models as market share migrated from traditional exchanges to ECNs. Today, nearly all U.S. equities exchanges have some form of transaction-based pricing models.[228]

Generally, transaction-based pricing models charge fees or remit rebates to members depending on whether their executed orders ''make'' or ''take'' liquidity from the market. An order that makes liquidity provides share volume (or depth) on a trading center at various execution prices, whereas an order that

[221] *See* Section III.D *infra.*

[222] *See supra* note 116. The Commission would detail the specifications of the stratification by notice.

[223] *See* Section V.B.1.b.i *infra.*

[224] *See* 15 U.S.C. 77b(b) and 15 U.S.C. 78c(f).

[225] *See* 15 U.S.C. 78w(a)(2).

[226] *Id.*

[227] In 1997, Island ECN was the first electronic trading platform to offer rebates to attract limit orders to its platform.

[228] As of March 2018, EDGA and IEX do not operate as a maker-taker or taker-maker market, although both charge flat fees. The remaining 11 exchanges are either maker-taker (nine) or taker-maker (two) exchanges. The baseline discusses these exchanges in more detail.

takes liquidity removes the volume (or depth) resting on the trading center provided by the make orders. Orders that make, or provide, liquidity are non-marketable limit orders, which are limit orders that are submitted to an exchange or other trading center that cannot be filled immediately when they arrive because no market participant is willing to trade at the price of the order (*i.e.,* the limit price).[229] For example, if a customer places an order to sell 100 shares of a security at $9.00 per share when the prevailing market bid price is $8.75, that customer is placing a non-marketable limit sell order that indicates her willingness to provide 100 shares of liquidity to the market at a price of $9.00. In contrast, orders that take, or remove, liquidity, are marketable orders. A marketable order, in turn, can be either a market order, which is an order to buy or sell a security to be executed immediately at current market prices,[230] or a marketable limit order, which is either a limit buy order with a price at or above the lowest offer price in the market or a limit sell order with a price at or below the highest bid in the market. For example, if a customer places an order to sell 100 shares of a security at $8.50 per share when the prevailing market bid price is $8.75 at a depth of more than 100 shares, that customer is placing a marketable limit sell order, and would take 100 shares of liquidity at a price of $8.75.

In maker-taker models, an exchange charges an access fee to broker-dealers that take liquidity using marketable orders and remits a rebate to broker-dealers that make liquidity by placing standing non-marketable limit orders that subsequently interact with marketable orders. In a taker-maker market, the exchange charges an access fee to broker-dealers that provide liquidity by placing non-marketable limit orders and pays a rebate to market participants that take liquidity using marketable orders. In 2005, the Commission adopted Rule 610(c) of Regulation NMS,[231] which limited the maximum access fee that could be charged by maker-taker exchanges to $0.0030 per share. The adoption of the fee limit was designed to ensure the fairness and accuracy of the displayed quotations by establishing an upper bound on the cost of accessing such quotations,[232] while also precluding certain trading centers from raising their fees substantially to market participants required to access their quotations by the Order Protection Rule,[233] and preventing certain trading centers from taking advantage of intermarket price protection by acting as toll booths between price levels.[234]

2. Potential Conflicts of Interest

Academics, market participants, regulators, and legislators recently have expressed concern about how transaction-based fees have affected order routing decisions by broker-dealers and the execution quality obtained by customers.[235] This concern has centered on the potential for conflicts of interest between broker-dealers and their customers that may distort best execution practices.

Broker-dealers are required to use reasonable diligence to execute customer orders according to best execution standards, which require broker-dealers ''to execute customers' trades at the most favorable terms reasonably available under the circumstances . . .'' [236] When seeking best execution for their orders, broker-dealers often consider opportunities to obtain prices better than those currently quoted. In order to comply with best execution standards, broker-dealers evaluate their aggregate customer orders and periodically assess which competing trading center offers the most favorable terms of execution.[237] The quoted prices that are used by broker-dealers to meet their best execution standards do not reflect any access fees assessed or rebates offered by the exchanges.[238]

Even while complying with best execution requirements, broker-dealers may route non-marketable limit orders to trading centers that offer the best quoted prices but that also offer high rebates for those orders, which the broker-dealers may then retain, rather than pass through to customers.[239] The availability of high rebates, however, may influence how broker-dealers route customer orders to the detriment of customers, even if orders are still routed to an exchange posting the best quoted prices.[240] One study, for example, shows lower execution quality, in terms of reduced probability of execution or increased time to execution, for non-marketable limit orders on exchanges that pay high rebates.[241] Thus, broker-dealers may route orders to exchanges that have the best quoted prices but are suboptimal for customers in other ways

[229] A limit order is an order to buy or sell a security at a specified price or better. As the price of the non-marketable order gets further from the bid or offer price, the greater the likelihood that the non-marketable order must rest until better priced orders execute.

[230] As long as there are willing sellers and buyers, market orders are filled.

[231] *See* NMS Adopting Release, *supra* note 1.

[232] *See id.* at 37543–46.

[233] *See* NMS Adopting Release, *supra* note 1, at 37504–38. The Order Protection Rule is designed to ensure that investors receive a consistent price quotation for NMS stocks across all exchanges where a security is traded and that investors receive the best possible execution price for marketable orders.

[234] *See id.* at 37584. *See also* Harris, *supra* note 23 (suggesting that large access fees were a response to some trading venues paying large rebates to market participants as a means of attracting order flow to those venues in the early days of maker-taker exchanges).

[235] *See* Staff Maker-Taker Memo, *supra* note 99. *See also* Angel, Harris, and Spatt, *supra* note 106; Jeffrey Bacidore, Hernan Otero, and Alak Vasa, ''Does Smart Routing Matter?'', Working Paper, Investment Technology Group, Inc. (2010), *available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1681449* (''Bacidore, Otero, and Vasa''); Battalio Equity Market Study, *supra* note 22; Harris, *supra* note 23. In addition to potential conflicts of interest, several of these studies have also indicated that transaction-based pricing models have led to reduced price transparency for investors and increased market fragmentation and complexity. These are discussed in greater detail in Section V.C.1.b, *infra.*

[236] *See* NMS Adopting Release, *supra* note 1, at 37537–38. *See also supra* note 215.

[237] *See* NMS Adopting Release, *supra* note 1, at 37537–38.

[238] *See, e.g.,* Angel, Harris, and Spatt, *supra* note 106.

[239] The potential conflicts of interest are more likely when broker-dealers retain the rebates, because such broker-dealers have greater incentive to maximize those rebates potentially at the expense of customer execution quality. The Battalio Equity Market Study, for example, found that a sample of retail broker-dealers appear to route orders to venues that offer large rebates, thereby maximizing order flow payments. However, as noted in the Battalio Equity Market Study, routing orders to venues with large rebates did not result in superior execution quality for non-marketable limit orders. *See* Battalio Equity Market Study, *supra* note 22. *See also* David Cimon, ''Broker Routing Decisions in Limit Order Markets,'' Working paper, Bank of Canada, (2017) *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2789804.* Cimon provides a theoretical model of conflicts of interest in broker-dealer markets, where broker-dealers route marketable orders to venues with low access fees to reduce the access fees paid by the broker-dealer, increasing the volume of uninformed orders and lowering the risk of adverse selection for non-marketable limit orders posted to that venue.

[240] The duty of best execution requires broker-dealers to execute customer trades at the most favorable terms reasonably available under the circumstances. *See* NMS Adopting Release, *supra* note 1, at 37537–38. The duty of best execution is not inconsistent with the automated routing of orders; however, broker-dealers must periodically assess the quality of competing markets to ensure that order flow is directed to markets providing the most beneficial terms for their customer orders.

[241] *See,* Battalio Equity Market Study, *supra* note 22, which finds some evidence that execution quality is related to the transaction-based fees. For instance, in their analysis of a single order-routing system, for a sample of matched limit orders placed on high fee and low fee venues, high fee venues have a fill rate of approximately 73%, while low fee venues have a fill rate of approximately 99% (Table V). Further, in a multiple regression analysis (Table VI), the study shows that the probability of filling an order is decreasing as the take fee increases, while the time to execution increases. The limitations of the Battalio Equity Market Study are discussed below in Section V.B.1.b, *infra.*

because orders are either less likely or take longer to execute.

Maker-taker exchanges with high rebates tend to have high access fees, which increase the cost to broker-dealers to execute marketable orders. These high access fees may lead broker-dealers to route marketable orders to exchanges with lower access fees, even though there may be a significant number of standing non-marketable limit orders on exchanges with higher access fees.[242] As the broker-dealers route marketable orders to exchanges with lower access fees, execution quality for the non-marketable limit orders is likely to deteriorate because the non-marketable limit orders are likely to have lower probability of execution and longer times to execution for orders that do execute. High rebates may also limit the ability of an exchange to generate a liquidity externality because these high rebates could draw order flow to exchanges with low execution quality, despite the availability of higher execution quality on other trading centers.[243] This behavior may fragment order flow. In contrast, if exchanges did not provide high rebates, broker-dealers may be more likely to route orders to exchanges that quote the best price and have the best overall execution quality,[244] permitting order flow to consolidate on those venues.

In general, customer orders routed to exchanges that remit high rebates are also more likely to face adverse selection when executed.[245] Adverse selection occurs when one party to a transaction has less information about the value of an asset than the other party to the transaction, resulting in the possibility that the less informed party only transacts when it is disadvantageous to do so. In the context of order execution, adverse selection is likely to occur because some fraction of market participants is likely to possess more precise information about the value of a security.[246] Order flow from these ''informed traders'' is generally routed to exchanges. In order for the exchanges to draw sufficient liquidity to satisfy the orders placed by informed traders, they may offer high rebates to broker-dealers to attract non-marketable limit orders, which are likely to be placed by uninformed traders, to satisfy the demands of informed traders' order flow.[247] Under such circumstances, these non-marketable limit orders face an adverse selection problem because they execute against marketable orders that likely were placed by informed traders.[248] As adverse selection increases at high rebate/high fee exchanges, informed traders will always execute orders to the detriment of uninformed traders (retail customers), *i.e.,* the orders will more likely be executed at disadvantageous prices for the uniformed traders relative to customer orders routed to low rebate/low fee exchanges, where the likelihood of facing an informed trader is less.[249] In these situations, the broker-dealers thus face a potential conflict of interest when they receive high rebates from the exchanges seeking to attract liquidity while their customers bear costs of the disadvantageous prices resulting from the adverse selection.

Given the competitive nature of the broker-dealer industry,[250] the Commission considered whether competition could alleviate potential conflicts of interest between investors and broker-dealers, as investors choose between broker-dealers that offer to place orders on their behalf. To the extent that investors are able to identify broker-dealers that do not act on potential conflicts of interest, investors could discourage broker-dealers from acting on such conflicts of interest. The Commission preliminarily believes, however, that competition between broker-dealers may not resolve this issue because of a combination of three reasons: Asymmetric information, switching costs and a lack of collective action.

First, asymmetric information between broker-dealers and their customers limits the ability of customers to identify broker-dealers that do not act on potential conflicts of interest. For example, customers do not generally have access to information about broker-dealers' individual sources of revenue.[251] As discussed below in more detail, although disclosures required pursuant to Rule 606 provide information about material conflicts of interest related to payment for order flow, these disclosures do not provide information on the effect of transaction-based fees on order routing decisions. Moreover, while under Rule 606, a customer may request information about the venues to which her orders were routed in the prior six months, a customer cannot necessarily use this information to compare how these orders would have been treated by other broker-dealers. Further, these

[242] *See,* Angel, Harris, and Spatt, *supra* note 106.

[243] A liquidity externality occurs when a given trading center becomes the preferred trading destination for both marketable and non-marketable orders.

[244] *See* Battalio Equity Market Study, *supra* note 22, at 2232 (''[O]ur results suggest that . . . routing decisions based primarily on rebates/fees are inconsistent with best execution. For limit order traders, there are significant opportunity costs [with respect to execution quality] with routing all nonmarketable limit orders to a single venue offering the highest liquidity rebates.'').

[245] *See,* Angel, Harris, and Spatt, *supra* note 106. *See also* Peter Hoffman, ''Adverse Selection, Market Access and Inter-market Competition,'' Journal of Banking & Finance 65, 108–119 (2016), *available at https://www.sciencedirect.com/science/article/pii/S0378426615002976;* Sviatoslav Rosov, ''HFT, Price Improvement, Adverse Selection: An Expensive Way to Get Tighter Spreads?'', CFA Institute (2014) *available at https://blogs.cfainstitute.org/marketintegrity/2014/12/18/hft-price-improvement-adverse-selection-an-expensive-way-to-get-tighter-spreads/* (''Rosov'').

[246] Some market participants may know more about the value of a security because some investors, such as some professional traders, could just be better at processing public information. *See, e.g.,* Michael Brennan and Avanidhar Subrahmanyam, ''Market Microstructure and Asset Pricing: On the Compensation for Illiquidity in Stock Returns,'' *Journal of Financial Economics* 41, 441–464 (1996), *available at http://www.sciencedirect.com/science/article/pii/0304405X9500870K*; David Easley and Maureen O'Hara, ''Information and the Cost of Capital,'' *Journal of Finance* 59, 1553–1583 (2004), *available at http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6261.2004.00672.x/pdf.*

[247] Exchanges do not have sufficient liquidity from retail marketable orders because they are generally internalized or routed to wholesalers to avoid access fees. Several studies indicate that internalizers are unlikely to accept marketable orders from market participants that are likely to be informed. *See* Angel, Harris, and Spatt, *supra* note 216; Rosov, *supra* note 245.

[248] *See, e.g.,* Dolgopolov, *supra* note 21. For example, if an investor had a non-marketable limit buy order at $10, when the current market price was $10.25, that standing limit order to buy at $10 is likely to only get executed when prices are declining.

[249] *See* Katya Malinova and Andreas Park, ''Subsidizing Liquidity; the Impact of Make/Take Fees on Market Quality,'' *Journal of Finance* 70, 509–536 (2015), *available at http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6261.2004.00672.x/pdf* (examining the introduction of maker rebates on the Toronto Stock Exchange); Yiping Lin, Peter Swan, and Frederick H. deB. Harris, ''Maker-Taker Fees, Liquidity Competition, and High Frequency Trading,'' Working Paper, University of New South Wales (2017) (examining the Nasdaq pilot, described above in Section II.B). In analyses of markets where exchanges conducted pilots altering the access fees and rebates paid on subsets of stocks, results indicate that markets with lower access fees (and rebates) had reduced adverse selection costs. Venues with lower access fees could draw increased order flow from both informed and uninformed traders. If the proportion of informed traders is unlikely to change due to fees and rebates changes, as overall order flow increases due to lower access fees, then the likeihood of transacting with an informed trader declines, thereby reducing the adverse selection costs to traders.

[250] *See* Section V.B.2.a *infra.*

[251] While consolidated revenues may be available from Form 10–K filings for broker-dealers that are public reporting companies, broker-dealers do not report revenues attributable to specific sources, such as rebates from a particular exchange or payments for order flow from a particular venue. For instance, revenues derived from commissions and fees are often just reported in aggregate as ''Commissions and Fees.'' Therefore, even though aggregate revenues for some broker-dealers are publicly available, customers do not have access to the information on individual sources of revenue that could reveal potential conflicts of interest.

disclosures do not provide customers with information about the payment and collection of transaction-based fees and rebates by broker-dealers.

Second, even if investors had sufficient information to conclude they would be better served by a different broker-dealer, investors may face costs in switching broker-dealers.[252] If these switching costs are high relative to the costs that investors anticipate may arise from potential conflicts of interest, investors may not switch broker-dealers even if it appears that their broker-dealer may have acted on conflicts of interest.

The presence of switching costs also may exacerbate a collective action problem among investors.[253] While investors could provide incentives to broker-dealers to eliminate potential conflicts of interest by threatening to move accounts away from broker-dealers known to act on conflicts of interest, switching costs may undermine the credibility of such a threat. This is because, although each customer individually bears a cost to switch accounts, the benefits of a successful threat, while conditional on a sufficient number of customers agreeing to switch, are available to all customers whether they would switch or not. If the switching costs are high relative to the proportion of customer defections necessary to threaten a broker-dealer, customers are unlikely to generate enough of a threat to alter broker-dealers' behavior.

B. Baseline

We compare the economic effects of the proposed rule, including benefits, costs, and effects on efficiency, competition, and capital formation, to a baseline that consists of the existing regulatory framework and market structure. As explained above, by temporarily altering the fee and rebate structure for certain NMS stocks (including ETPs), the proposed Pilot is designed to produce information on order routing behavior that would not otherwise be available. The baseline discusses the existing set of information, as well as the exchanges' current practices with respect to fees and rebates and the regulations governing those fees and rebates.

1. Current Information Baseline

While the studies cited above discuss the potential issues for investors associated with transaction-based fee models,[254] limited empirical evidence exists to date about the extent that potential conflicts of interest arise from maker-taker and taker-maker pricing models and how transaction-based fees affect the integrity and structure of the U.S. equity markets. Below, we discuss the existing information currently available to the Commission or the public that concerns the relationship between transaction-based fees and order routing decisions and describe the limitations of this information for use in policy discussions regarding transaction-based fees and potential conflicts of interest.

a. Existing Information

The existing empirical studies available regarding the relation between transaction-based fees, order routing decisions, and execution quality consists of two studies: One academic study and a study conducted by Nasdaq.[255] According to the Battalio Equity Market Study, broker-dealers appear to trade execution quality of customer orders, as measured by the likelihood of and time to execution (and not price), for the rebates obtained by providing liquidity to maker-taker venues.[256] By routing orders to exchanges that pay high rebates, broker-dealers may engage in rebate capture at the expense of client execution.[257] Using data obtained from mandatory Rule 606 disclosures over a two-month window,[258] the Battalio Equity Market Study also identified that four of the ten broker-dealers included in the analysis route limit orders exclusively to market makers or to exchanges that offered the largest liquidity rebates (and charging the highest access fees).[259] A number of tests in the Battalio Equity Market Study also show that low-fee venues provide better execution quality for limit orders, as measured by the likelihood of an order fill, the speed of execution, and higher average realized spreads, relative to high-fee venues, suggesting that order routing decisions to high rebate venues are likely to be suboptimal from a customer's perspective, and may be indicative of potential conflicts of interest.

Separately, and as discussed in Section II.B,[260] Nasdaq independently conducted a study, whereby it lowered access fees and rebates for a sample of 14 stocks over a period of four months in 2015, providing an exogenous shock to the transaction-based pricing model on the exchange. The Nasdaq experiment lowered both the access fees charged and the liquidity rebates paid on the securities included in their study.[261] Nasdaq's analysis indicated that Nasdaq's reduction in access fees and liquidity rebates reduced Nasdaq's market share and Nasdaq's incidence of providing the NBBO, suggesting that Nasdaq experienced a decline in some measures of market quality as a result of the changes to access fees and rebates.[262] Further, Nasdaq found that

[252] These switching costs may be monetary, but may also have a time and effort component.

[253] Collective action occurs when a number of individuals or entities work together to achieve a common objective, such as investors acting to reduce the potential conflicts of interest in order routing decisions by broker-dealers.

[254] *See supra* note 216.

[255] Although a number of studies theoretically suggest that the transaction-based pricing structure coupled with discretion by broker-dealers over order routing decisions could lead to potential conflicts of interest with their customers, only the Battalio Equity Market Study provides empirical evidence on the effect of fees and rebates on order routing. Battalio Equity Market Study, *supra* note 22. As discussed more thoroughly below in Section V.B.1.b, the Battalio Equity Market Study, while enlightening, has a number of limitations that inhibit the ability to draw causal inferences from it about potential conflicts of interest. *See, e.g.,* Angel, Harris, and Spatt, *supra* notes 106 and 216; Dolgopolov, *supra* note 21; Harris, *supra* note 23.

[256] The Battalio Equity Market Study's abstract of the paper states: ''We identify retail brokers that seemingly route orders to maximize order flow payments by selling market orders and sending limit order to venues paying large liquidity rebates. . . . [W]e document a negative relation between limit order execution quality and rebate/fee level. This finding suggests that order routing designed to maximize liquidity rebates does not maximize limit order execution quality. . . .'' *See* Battalio Equity Market Study, *supra* note 22, at 2193.

[257] *See* Battalio Equity Market Study, *supra* note 22. *See* also Section V.A.2 *supra,* for an overview of the potential conflicts of interest that emerge.

[258] Rule 606 requires broker-dealers to provide quarterly reports that provide an overview of their routing practices. *See* Securities Exchange Act Release No. 51808 (November 27, 2000), 65 FR 75414, (December 1, 2000) (''Disclosure or Order Execution and Routing Practices''). Rule 606 disclosures require broker-dealers to disclose material aspects of their relationships with certain trading venues, including a description of payment for order flow. The reports, however, do not require broker-dealers to disclose the amounts of payment for order flow, or the rebates received or access fees paid.

[259] *See* Battalio Equity Market Study, *supra* note 22. The Battalio Equity Market Study, however, does not specify whether the limit orders are marketable or non-marketable limit orders, as Rule 606 disclosures do not segment these orders.

[260] *See supra* notes 31 and 32 and corresponding text.

[261] The Nasdaq study lowered access fees to \$0.0005 and rebates to \$0.0004 simultaneously for a set of 14 securities, half of which identified Nasdaq as the primary listing exchange, the other half which identified the NYSE as the primary listing exchange. The Nasdaq released two reports (*see supra* note 31) examining the changes to a number of metrics related to market quality.

[262] Although the 14 stocks experienced a decline in market share on Nasdaq and their incidence of time at the NBBO, there was no statistically significant change in the level of liquidity taking, variance ratio, realized spread, return autocorrelation, effective spread, relative effective

Continued

there was a shift in the composition of the top five liquidity providers for the securities that occurred as a result of the experiment.[263]

Two studies have examined exogenous shifts between maker-taker and payment for order flow pricing models on U.S. options exchanges.[264] These studies found that the movement from a payment for order flow model to a maker-taker model led to a decrease in execution costs for option classes affected by the shift, improved quoted spreads, and altered broker-dealer order routing behavior to account for the fees.[265] However, the change to a payment for order flow model from a maker-taker model yielded better execution quality, but a reduction in the number of orders and order volume.[266]

A number of existing data sources could be used independently or in combination to relate transaction-based fees to order routing and execution quality. For instance, in the Battalio Equity Market Study and the Nasdaq Study discussed above, researchers employed some combination of Rule 606 data, proprietary broker-dealer data, the Trade and Quote (TAQ) database,[267] and proprietary exchange data. In addition, while not employed in previous studies, CAT data, Rule 605 data, and exchanges' Form 19b–4 fee filings and fee schedules available from each exchange's website, could provide insights into the relation between transaction-based fees, order routing, and execution quality.

Rule 606 requires broker-dealers to make publicly available quarterly reports that provide an overview of their routing practices for non-directed retail orders in NMS securities. As a further requirement of Rule 606, broker-dealers must disclose the identities of the ten venues to which the largest number of orders were routed for execution. Rule 606 disclosures additionally require broker-dealers to disclose material aspects of their relationships with trading venues to which they route orders, including a description of payment for order flow and any profit sharing relationships, which, like rebates, could lead to potential conflicts of interest for broker-dealers when routing orders.[268] Researchers and other analysts interested in order routing data can download these forms quarterly directly from broker-dealer websites.

Proprietary data from broker-dealers or exchanges could also provide information about order routing and execution quality. Broker-dealer data include information on the orders received and routed by that broker-dealer, including where the broker-dealer routed orders, whether the orders execute, and the price, size, and time of execution. Exchange data include information on the order received by an exchange, including which members routed orders to the exchange, whether the orders execute, and the price, size, and time of execution. As these data include commercially sensitive information, they are not broadly available.

Once the CAT Phase 1 becomes operational,[269] the Commission and SROs will have information on all exchange routing and exchange executions for all NMS securities. In CAT Phase 1, exchanges would record and report order events on every order they receive for NMS securities. Order events include order receipt, order routes, order modifications, order cancelations, and order executions.

Rule 605 data provides information about execution quality by market center, including exchanges, ATSs, and broker-dealers that execute orders, by requiring standardized reports of statistical information regarding order execution, and was designed to improve the public disclosure of order execution practices by exchanges.[270] These data are available monthly from market center websites or data vendors, and provide information on execution quality statistics such as transaction costs, execution speed, and fill rates reported separately for marketable and non-marketable orders.

Beyond Rule 605 data, researchers could also use the TAQ database as a means of measuring order execution quality. The TAQ database is publicly available (for a fee) from the NYSE and provides access to all trades and quotes for NMS securities, from which researchers and other analysts can estimate trade-based measures of execution quality.

Finally, researchers and other analysts can manually create datasets of exchange fees and rebates from the information that exchanges provide on their websites and release in their Notice of Filing of Proposed Rule Changes, which would capture information contained in exchanges' Form 19b–4 fee filings. The Form 19b–4 fee filings record changes to the existing exchange fee schedules with the Commission. At any point that an exchange chooses to make a change to any aspect of its access fees and rebates, the exchange must provide notice to the Commission that it is filing a proposed rule change to amend its existing fee and rebate schedule. Exchanges may file their revisions to fees and rebates for immediate effectiveness upon submitting the Form 19b–4 fee filings with the Commission.

b. Limitations of Existing Information

Existing studies and available data sources are limited in ways that are likely to reduce the strength of conclusions that relate to the impact of transaction-based fees and rebates on order routing decisions and the existence or magnitude of potential conflicts of interest between broker-dealers and their customers. The limitations of existing studies fall primarily into two categories: (1) The results of the studies may not be representative, and (2) the results of the

spread, quoted spread, relative quoted spread, displayed dollar depth at the NBBO, or time between either quote updates or price changes in the NBBO. *See* Nasdaq May Report, *supra* note 31.

[263] The top five liquidity providers prior to the start of the pilot significantly reduced their liquidity provision from 44.5% of the liquidity provided pre-pilot to 28.7% in the pilot period. However, the top five liquidity providers from the pilot period had a significant increase in their liquidity provision from 29.7% pre-pilot to 41.5% in the pilot period. *See* Nasdaq May Report, *supra* note 31.

[264] *See* Amber Anand, Jian Hua, and Tim McCormick, "Make-Take Structure and Market Quality: Evidence from the U.S. Options Markets," *Management Science* 62, 3217–3290 (2016), *available at: https://pubsonline.informs.org/doi/abs/10.1287/mnsc.2015.2274* ("Anand, Hua, and McCormick"); Robert Battalio, Todd Griffith, and Robert Van Ness, "Make-Take Fees versus Order Flow Inducements: Evidence from the NASDAQ OMX PHLX Exchange," Working Paper, University of Notre Dame (2017), *available at: http://www1.villanova.edu/content/dam/villanova/VSB/assets/marc/marc2017/SSRN-id2870000.pdf* ("Battalio, Griffith, and Van Ness"). Anand, Hua, and McCormick explores the transition from a payment for order flow model to a maker-taker model on NYSE ARCA, while Battalio, Griffith, and Van Ness examines the shift on NASDAQ OMX PHLX ("PHLX") from a maker-taker model to a payment for order flow model.

[265] *See* Anand, Hua, and McCormick, *supra* note 264.

[266] *See* Battalio, Griffith, and Van Ness, *supra* note 264.

[267] The Battalio Equity Market Study, *supra* note 22, relies on Rule 606 disclosures to identify order routing for a small sample of broker-dealers, proprietary broker-dealer data from a single smart-order routing system to capture limit order execution quality for this broker-dealer's orders, and the TAQ data to measure execution quality as a function of each venue's taker fee or rebate.

[268] Conflicts of interest for broker-dealers potentially could arise from a number of sources, including affiliations with trading venues, receipt of payment for order flow, receipt of payment from profit-sharing relationships, and rebates. Rule 606, however, requires only descriptions of any arrangements for payment for order flow, but does not require broker-dealers to provide information on the net amount of payment for order flow, payment received from profit-sharing relationships, or disclosure of access fees paid or rebates received. *See* Disclosure of Order Execution and Routing Practice, *supra* note 258, at 75425–28.

[269] *See supra* note 172.

[270] *See* Disclosure of Order Execution and Routing Practice, *supra* note 258, at 75417–25.

studies cannot make a causal connection needed to inform on potential conflicts of interest. This section discusses those limitations as well as separately discussing the limitations associated with existing sources of data mentioned above.

i. Representative Results

The results of both the Battalio Equity Market Study and the Nasdaq study may not be representative of the potential impacts of broad changes in access fees or rebates. Drawing market-wide inferences from the limited samples in these studies could be problematic because the results are predicated on information obtained from a single broker-dealer or trading venue. First, the Battalio Equity Market Study uses order level data from a single broker-dealer to determine the relation between maker-taker fees and limit order execution quality. Analysis based on observation of a single broker-dealer may not provide representative results because the relation between transaction-based fees and potential conflicts of interest may not be generalizable to other broker-dealers. For example, over 400 broker-dealers maintain membership with at least one U.S. equities exchange.[271] If the single broker-dealer examined in the Battalio Equity Market Study has significantly different order routing behavior than the average broker-dealer that routes orders to exchanges, the information obtained from examining the relation between transaction-based fees and order routing decisions of that broker-dealer would not be representative of the entire market and therefore would provide an incomplete representation of potential conflicts of interest.

The Battalio Equity Market Study also relies on a sample of Rule 606 order routing decisions obtained directly from the reporting entities' websites from a limited sample of ten well-known national retail brokers from a single quarterly reporting cycle (October and November 2012). As discussed above, over 400 broker-dealers are members of at least one national securities exchange. The ten retail brokers analyzed in the Battalio Equity Market Study make up approximately 2.1% of the broker-dealers with exchange memberships, and less than 0.3% of broker-dealers overall. Although these are well-known retail brokers, due to the lack of representativeness of the sample (*e.g.,* the majority of the broker-dealers represented in the Battalio Equity Market Study are online broker-dealers), these broker-dealers may be more (or less) likely than the average broker-dealer to route customer orders in ways that benefit themselves at the expense of their customers. The findings in the Battalio Equity Market Study, therefore, may not be representative of a broader sample of broker-dealers. Moreover, the Commission is unable to determine if the Battalio Equity Market Study's analyses of the Rule 606 disclosure data has statistical power because the authors did not provide any statistical analyses beyond the percentage of market or limit orders routed to a particular exchange.

Similarly, the results of the Nasdaq study may not be representative of the broader market, as the Nasdaq study affected only a very small sample of common stocks and focused on order routing to a single exchange. As discussed in Section II.B, Nasdaq selected 14 stocks to be part of the analysis, which represent only 0.3% of all NMS stocks. The sample is unlikely to be representative of the universe of NMS securities for two reasons: (1) The sample included a small number of stocks (and no ETPs),[272] and (2) less than one-third of these stocks were small or mid-capitalization at the time of the analysis, although most had market capitalizations close to $3 billion immediately prior to the study.[273] Further, the analysis only focused on the effects of changes to transaction-based fees for a single exchange: Nasdaq. As the other equities exchanges did not have similar changes to transaction-based fees and rebates, any inferences drawn from the Nasdaq study may not be valid under different circumstances in which all equities exchanges were subject to consistent revisions to transaction-based fees.

In the spirit of the Nasdaq study, exchanges could coordinate voluntarily to simultaneously implement a pilot similar to the Nasdaq pilot on all exchanges over a broader sample of stocks, to produce more representative results. The Commission preliminarily believes, however, that exchanges would not be likely to coordinate changes to access fees and rebates for the purpose of studying potential conflicts of interest between broker-dealers and their customers because of competitive incentives, such as inducements to draw order flow away from competitors.[274]

Researchers could conduct studies with data sources currently available that provide more representative results than those provided in existing studies. However, the Commission preliminarily believes that data limitations discussed in greater detail below could make such studies difficult. Moreover, the results of such studies would unlikely be able to establish a causal connection between transaction-based fees and order routing decisions by broker-dealers needed to inform policy decisions on potential conflicts of interest. The importance of causal inference is discussed in the next section.

ii. Causality

In addition to limitations in how representative results may be, existing studies are also of limited use for policy decisions because they cannot test for causal relationships between transaction fees and order routing decisions. Because transaction-based fees and order routing decisions could be jointly determined, researchers cannot readily disentangle the direction of causality, and therefore cannot determine the extent that potential conflicts exist. The identification of causal relations between fees and order routing decisions becomes increasingly complex because exchanges have some discretion to modify their fees.[275] In practice, researchers attempt to identify and measure causal relations in two ways: (1) Exogenous shocks, which have been discussed above, and (2) econometric techniques, such as an instrumental variables approach.[276]

Although the Nasdaq study implements an exogenous shock, which could have permitted causal inference regarding the relationships between transaction fees, order routing, and market quality, that study did not analyze the impact of potential conflicts of interest on order routing decisions. Further, even if the Nasdaq study had analyzed a causal relationship between transaction-based fee and rebates and potential conflicts of interest, the

[271] Estimates based on data from Form 1 of the X–17A–5 filings. As of December 31, 2016, 3,972 broker-dealers that filed form X–17A–5. *See* Section V.B.2.a *infra.*

[272] Only common stocks were included in the Nasdaq study, while the proposed Pilot will include NMS stocks, which includes common stocks as well as ETPs.

[273] Market capitalizations are computed from CRSP shares outstanding and stock price, as of December 31, 2014.

[274] With respect to the Nasdaq study, the purpose of revising access fees and rebates was to determine how these changes affected market share and Nasdaq's fraction of time at the NBBO.

[275] Over the last five years, the exchanges, on average, have made 34 revisions, or approximately 6.7 revisions per year, to their transaction-based fees and rebates. *See* Section V.B.2.b *infra.*

[276] The method of instrumental variables is used to estimate causal relationships when controlled experiments or exogenous shocks are not feasible. An ''instrument'' changes the explanatory variable but has no independent effect on the dependent variable, allowing a researcher to uncover the causal effect of the explanatory variables on the dependent variable of interest.

limited representativeness of the Nasdaq sample, would limit the generality of the study.

With respect to the transition between forms of pricing models that occurred on the option exchanges, discussed above, the key limitation is the comparison of maker-taker pricing models with payment for order flow pricing models. Studies that explore these regime shifts between maker-taker to payment for order flow models are not comparing situations in which one regime could theoretically have lower conflicts of interest than the other.[277] Each of these types of models is likely to create potential conflicts of interest that could affect how broker-dealers route their customer orders,[278] although evidence does not suggest that one form of pricing model is more or less prone to conflicts than another. Moreover, the change from one form of pricing model to another could introduce new conflicts of interest that did not previously exist. Therefore, the Commission preliminarily believes that exchange-driven transitions between maker-taker and payment for order flow pricing models are not likely to provide information about potential conflicts of interest driven by the maker-taker and taker-maker models or to inform the Commission about future regulatory decisions regarding transaction-based fees.

The Battalio Equity Market Study attempts to test for causal relationships between liquidity rebates and order routing decisions of broker-dealers using an instrumental variables approach. However, in the absence of an exogenous shock to access fee caps or rebates outside the control of exchanges, the authors are unable to definitively determine the causes of broker-dealers' order routing decisions through the use of econometric techniques. Consequently, the authors are unable to disentangle whether fees and rebates drive broker-dealer order routing decisions or order routing decisions determine fees and rebates chosen by exchanges.

Although exchanges revise their fee schedules frequently, the Commission preliminarily does not believe that studying order routing and execution quality around these fee changes alone can establish causality because fee changes are at the discretion of exchanges and could be caused by changes to order routing behavior. In the absence of an event outside of the control of the exchanges (*e.g.,* an exogenous shock to either fees or rebates), identifying the direction of causality between changes in fees and order routing behavior is nearly impossible. Thus, any discretionary actions by exchanges to revise their fee schedules independently of other exchanges is unlikely to yield information that would be valuable to the Commission for informing any future policy decisions about potential conflicts of interest between broker-dealers and their customers.

iii. Existing Data Sources

As noted above, several data sources provide information on order routing and execution quality. While researchers theoretically could use these data sources to produce representative results regarding the relation between transaction-based fees, order routing, and execution quality, the Commission preliminarily believes that data limitations, would make these studies difficult to produce.

As discussed previously, Rule 606 disclosures provide information on order routing. Rule 606 disclosures are currently the only data publicly available to researchers and others on order routing by broker-dealers; however, limitations in the Rule 606 data reduce the ability of researchers to use the data to produce representative results. The data are cumbersome to collect on a broad scale, as researchers would generally need to access each broker-dealer's web page to manually download the data. The Rule 606 data are also only available at a quarterly frequency, and broker dealers are not required to maintain historical data, which hampers the ability to efficiently produce research on multiple quarters of data, and could lead to short sample periods that may provide relatively limited power for statistical tests.[279] Notably, there currently is no central repository of these data, so any collection of this information by researchers would be a lengthy and labor-intensive process. For example, a researcher that has not already downloaded a time series of Rule 606 reports would need to download one quarter at a time, waiting three months for each quarter's data to create a time series; assembling a single year's worth of data would require nine to twelve months. Such delays could significantly increase the opportunity costs of undertaking such studies and decrease the likelihood of new research on the relation between transaction-based fees and order routing decisions. Moreover, these limitations also could prevent other researchers and other analysts from verifying or replicating analyses if researchers did not concurrently collect the Rule 606 reports across the same periods of observation.

In addition, the quarterly frequency of the Rule 606 reports by broker-dealers is different from the frequency of changes in fee schedules by exchanges (*e.g.,* as presented in Table 2, over a recent five-year measurement period, the average exchange updated its fees schedule approximately 6.7 times per year).[280] Further, while the Rule 606 data provides order routing at the broker-dealer level, such information is not granular enough to thoroughly study potential conflicts of interest.

The value of Rule 606 disclosures for identifying possible conflicts of interest resulting from transaction-based fees would be limited for a number of additional reasons, even if the Commission were to require a historical time series of these disclosures for all broker-dealers.

First, each broker-dealer discloses data for only its top ten order routing venues. Second, because broker-dealers disclose data at a quarterly frequency, a five-year sample of Rule 606 data for a single broker-dealer, would include only 20 observations, limiting statistical power. Third, although Rule 606 reports also provide some disclosure about potential broker-dealer conflicts of interest, they do not include any disclosure of access fees assessed or rebates offered by exchanges to the broker-dealers. Fourth, Rule 606 data do not distinguish between marketable and non-marketable limit orders. Finally, Rule 606 currently covers only retail orders. If institutional orders also are subject to potential conflicts of interest, studying Rule 606 data alone would not inform on such conflicts of interest.

To produce representative results using proprietary broker-dealer or exchange data would require obtaining these data from a sufficient number of diverse broker-dealers and exchanges. However, proprietary data from broker-dealers or exchanges are generally not available to the public. While some researchers have obtained such data

[277] *See supra* note 264.

[278] *See* Robert Battalio, Andriy Shkilko, and Robert Van Ness, ''To Pay or Be Paid? The Impact of Taker Fees and Order Flow Inducements on Trading Costs in U.S. Options Markets,'' *Journal of Financial and Quantitative Analysis* 51, 1637–1662 (2016), *available at: https://www.cambridge.org/core/services/aop-cambridge-core/content/view/0782CE3E9679C29BB910A66192D27201/S00221 09016000582a.pdf/div-class-title-to-pay-or-be-paid-the-impact-of-taker-fees-and-order-flow-inducements-on-trading-costs-in-u-s-options-markets-div.pdf.*

[279] *See supra* note 118.

[280] Not every fee schedule revision pertains to access fees or rebates. To focus only on these revisions, each Form 19b–4 fee filing was evaluated to determine that revisions to fees or rebates were pertinent to this baseline.

from a single broker-dealer or exchange, and some broker-dealers and exchanges employ their own researchers, the Commission preliminarily believes that it would be difficult for researchers to obtain such data from a sufficient number of broker-dealers or exchanges in order to produce representative results.

Regardless of whether researchers would obtain data from Rule 606 disclosures or directly from exchanges, much of the data currently available is either unstructured or in a non-standardized format. For instance, many broker-dealers provide PDF files of Rule 606 disclosures, while exchanges use bespoke terminology to classify their fees and rebates, which likely limits the value of these data for researchers examining the effect of fees and rebates on order routing decisions. This lack of standardization across platforms could make it difficult for researchers to aggregate data and construct representative samples for comparison and analyses.

While Rule 605 and TAQ data are available to researchers and may provide information about execution quality, they too have a number of limitations. For example, Rule 605 data provides execution quality information for both marketable and non-marketable orders; however, the methodologies for estimating measures of the speed of execution of non-marketable orders are outdated.[281] For instance, Rule 605 measures realized spreads based on quotations five minutes after the time of order execution and recent research suggests using quotations that more closely follow a trade, because any temporary price impact of a trade goes away within seconds, not minutes, of the trade.[282] Like Rule 606 data, Rule 605 data also covers smaller retail-sized orders only, and the data are only available at the monthly frequency. Instead, researchers and the Commission could rely on TAQ data, a publicly available dataset provided by the NYSE to subscribers, in order to capture some measures of execution quality. However, the TAQ data has limited information on limit order execution quality that would be valuable to the Commission and others.

To incorporate transaction-based fee information into analyses, researchers would need to manually collect and compile the information from exchanges' websites and their Form 19b–4 fee filings, which notify the Commission of changes to those fee schedules. Although the current fee schedules are posted on exchange websites, in order to identify changes to those fees, researchers would need to search the Commission's website for such Form 19b–4 fee filings to identify when exchanges change their fees and to gather information about those fees, as exchanges do not file their fees on a routine basis, but rather only when making changes. Such information would be cumbersome to compile. Additionally, because of the complexity of exchange fee structures and the lack of standardization of these structures across exchanges, identifying comparable fees across exchanges is unwieldy. For example, identifying the base or top-tier fees across exchanges could be difficult for researchers. As shown in Table 2 below, the average exchange has 24 different access fee categories and 21 different rebate categories. Further, exchanges do not disclose per share average or median fees charged and rebates earned on any report or filing, so such information is unavailable to the public. To add to the impediments to fee data aggregation and comparison, Form 19b–4 fee filings are available only as PDF files downloadable from the Commission's website, thereby increasing the costs of aggregation across exchanges over time by researchers.

Even if limitations to data availability and aggregation were overcome and researchers could construct a representative sample of fee and routing data, researchers would still face obstacles in understanding the relationship between transaction-based fees and rebates and routing decisions. Without an exogenous shock to fees and rebates to infer the causal relation between these transaction-based fees and order routing decisions, researchers would not be able to analyze whether the order routing decisions observed are driven by fees and rebates or vice versa.[283]

2. Current Market Environment

This section provides an overview of the market for trading services, and of the exchanges and ATSs that could be affected as a result of revisions to the transaction-based fee structure required by the proposed Pilot. Where information is currently available to the Commission, a description of the current practices of exchanges along dimensions that are relevant to the proposed Pilot (*e.g.,* summary information on their current fee schedule or the frequency of fee revisions) are included.

a. Market for Trading Services

The market for trading services, which is served by exchanges, ATSs, and other liquidity providers (internalizers and others),[284] relies on competition to supply investors with execution services at efficient prices. These trading venues, which compete to match traders with counterparties, provide a platform for price negotiation and dissemination of trading information. The market for trading services in NMS securities consists of 13 national equity market exchanges and 34 ATSs. Other off-exchange venues include internalizers and wholesalers, which execute a substantial volume of retail order flow. The remainder of this section discusses the current competitive landscape for exchanges and ATSs relevant to our economic analysis of the proposed Pilot.

Since the adoption of Regulation NMS in 2005, the market for trading services has become more fragmented and competitive. As of July 18, 2017, 13 national equity market exchanges operate in the U.S., as shown in Table 1. Of these exchanges, nine are maker-taker exchanges and two are taker-maker pricing exchanges; the EDGA and IEX operate as flat-fee exchanges.[285] Since Regulation NMS was adopted in 2005, the market for trading services has become significantly more competitive as measured by the decline in market share of individual exchanges, discussed in more detail below. The number of U.S. equities exchanges has increased by over 60%, as the number of exchanges increased from eight exchanges in 2005 to 13 exchanges operating today, as shown in Table 1.[286]

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[281] *See* Concept Release, *supra* note 3.

[282] *See, e.g.,* Jennifer Conrad and Sunil Wahal, ''The Term Structure of Liquidity Provision,'' Working Paper, University of North Carolina—Chapel Hill (2017), *available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837111.*

[283] *See* Section V.B.1.b.ii *supra.*

[284] *See supra* note 247.

[285] IEX charges a flat fee of $0.0009 for trades against non-displayed liquidity on both sides of the market, and charges $0.0003 for trade execution against displayed liquidity. *See https://iextrading.com/trading/fees.* As of March 2018, EDGA is no longer operating as a taker-maker market, but is also operating as a flat-fee venue. *See http://markets.cboe.com/us/equities/.*

[286] Although 13 U.S. equities exchanges currently operate as of March 2018, the majority of these exchanges are part of exchange families. For instance, NYSE, NYSE Arca, NYSE American, and NYSE National, are all part of the NYSE Group, which is wholly owned by the Intercontinental Exchange (ICE), while Nasdaq, Phlx, and BX, are owned by Nasdaq. BATS, BATS–Y, EDGA, and EDGX, which all operated as ATSs in 2005, are all subsidiaries of Cboe Global Market, Inc. Although many exchanges belong to exchange groups, the Commission preliminarily believes that each of these exchanges operates independently of the other exchanges owned by the same parent company. IEX became a registered exchange in

Continued

Several studies have suggested that transaction-based fee pricing partially drove the increase in the number of U.S. equities exchanges since 2005.[287]

Execution services are a lucrative business, which encourages new trading centers to enter the market in the hopes of capturing rents associated with order execution.[288] As discussed above, liquidity externalities, where the more liquid venues attract more interest and therefore more liquidity, could result in a single venue (or very limited number of venues) being the preferred trading location for any given stock because all traders could optimally route orders to the venue with the highest liquidity for a given stock.[289] If rebates offered by exchanges are large enough, they provide incentives for market participants to route orders to those venues, in order to capture the rebates. Rebates offered by exchanges, therefore, may ''break'' the liquidityexternality.

TABLE 1—U.S. NATIONAL EQUITIES EXCHANGES AS OF JULY 2017

Exchange	Market fee type	Exchange in 2005?	Market Share [290] (%)
Cboe BZX—*https://markets.cboe.com*	Maker-Taker		5.95
Cboe BYX—*https://markets.cboe.com*	Taker-Maker		4.80
Cboe EDGA [291]—*https://markets.cboe.com*	Taker-Maker		1.64
Cboe EDGX—*https://markets.cboe.com*	Maker-Taker		6.38
BX [292]—*www.nasdaqtrader.com*	Taker-Maker	✓	3.02
Phlx (PSX)—*www.nasdaqtrader.com*	Maker-Taker	✓	0.76
Nasdaq—*www.nasdaqtrader.com*	Maker-Taker	✓	14.51
NYSE Arca—*https://www.nyse.com/markets*	Maker-Taker	✓	9.03
NYSE American [293]—*https://www.nyse.com/markets*	Maker-Taker	✓	0.34
NYSE—*https://www.nyse.com/markets*	Maker-Taker	✓	13.90
NYSE National [294]—*https://www.nyse.com/markets*	Maker-Taker	✓	
CHX—*www.chx.com*	Maker-Taker	✓	0.42
IEX—*www.iextrading.com*			2.14

Table 1 also highlights that market share of trading volume among exchanges is not very concentrated. Although NYSE and Nasdaq have the largest overall total volume market shares of approximately 14% each among the exchanges, as of July 2017, these two exchanges collectively account for less than 30% of the total market share of trading volume for NMS securities, indicating that the market for trading services has become decentralized, and has become more so over time. For instance, between 2004 and 2013, the market share of NYSE-listed stocks on the NYSE declined from approximately 80% to 20%, while market share on other exchanges and off-exchange trading centers has increased.[295] This decentralization provides market participants with a choice among venues when they route orders, and may also encourage exchanges to attract order flow. For instance, transaction-based fees represent one means by which national securities exchanges may compete for order flow, and exchanges may adopt business models that focus on attracting order flow by offering large rebates or charging competitive fees. Exchanges may compete for order flow on other dimensions as well, by offering better execution quality and innovations in order types and other trading mechanisms.

In addition to competing with other U.S. equities exchanges, exchanges also compete for order flow from off-exchange trading centers, including ATSs, internalizers, and others. Broker-dealers may opt to route order flow off-exchange, as they may be able to avoid access fees paid to exchanges for doing so. Off-exchange trading makes up a substantial fraction of total volume, as approximately 37% of all transaction reports are routed using the NYSE and Nasdaq Trade Reporting Facilities as of July 2017.[296] Of that off-exchange NMS share volume, approximately 13% was attributable to ATSs, of which 34 traded NMS securities as of July 2017.[297] The remaining 24% of off-exchange share volume is routed to other off-exchange trading centers, such as internalizers.[298] In aggregate, broker-dealers and other market participants have a large and varied set of options as to where they route orders, whether to exchanges or to

2016. Further, NSX (NYSE National) existed as an exchange in 2005, but halted operations in 2016. It was acquired by NYSE/ICE in January 2017, which indicated at the time of the acquisition that it will operate the exchange as NYSE National. *See* ''NYSE Finalizes Acquisition of National Stock Exchange,'' Press Release, Intercontinental Exchange (January 31, 2017), *available at: http://ir.theice.com/press/press-releases/all-categories/2017/01-31-2017-232800326.* Researchers can adequately control for exchanges that are subsidiaries of the same parent when conducting analyses of the effect of changes in transaction-based fees on order routes.

[287] *See, e.g.,* Angel, Harris, and Spatt, *supra* notes 106 and 216; Harris, *supra* note 23.

[288] *See id.*

[289] Liquidity externalities are discussed in more detail in Section V.A.2, *supra.*

[290] Shares are computed based on share volume. Market shares for the exchanges reported do not add up to 100%, since approximately 37% of share volume trades off-exchange on over-the-counter venues.

[291] As of March 2018, EDGA is no longer operating as a taker-maker exchange and is now operating as a flat-fee venue; however, it was operating as one as of July 2017 when the data for this table was obtained.

[292] In 2005, BX existed as the Boston Stock Exchange.

[293] As of July 2017, NYSE American is no longer a purely maker-taker market as only certain types of market participants (electronic Designated Market Makers) are eligible for rebates. *See* NYSE American Equities Price List, *available at: https://www.nyse.com/publicdocs/nyse/markets/nyse-american/NYSE_America_Equities_Price_List.pdf.*

[294] NYSE acquired NSX in January 2017, and the exchange is now known as NYSE National. Although not currently operational, the Commission has assumed for the purposes of this analysis that it will be operational during the Pilot.

[295] *See* Angel, Harris, and Spatt, *supra* note 216, Figures 2.17 and 2.18. Although less evident than for NYSE-listed securities, the effect is similar for the Nasdaq market.

[296] Data on off-exchange market share are available from the BATS Global Market web page, *available at http://markets.cboe.com/us/equities/market_share/*

[297] 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 calculated in the same manner as in the cited release. *See also* ''OTC (ATS & Non-ATS) Transparency,'' FINRA, *available at: http://www.finra.org/Industry/Compliance/Market Transparency/ATS/.*

[298] Total market share is collected from the BATS Global Market web page, *available at: http://markets.cboe.com/us/equities/market_share/.* ATS weekly market share is collected from FINRA, *available at: https://otctransparency.finra.org.*

off-exchange trading centers. Moreover, empirical evidence suggests that traditional exchanges, such as NYSE and Nasdaq, are losing market share to off-exchange trading centers and newer exchanges,[299] which may provide different incentives to broker-dealers in order to attract this order flow, including access fees and rebates. We discuss the current environment for transaction-based fees in the next section.

The proposed Pilot is also likely to affect competition among broker-dealers that route institutional and retail orders. These broker-dealers compete in a segment of the market for broker-dealer services. The market for broker-dealer services is highly competitive, with most business concentrated among a small set of large broker-dealers and thousands of small broker-dealers competing in niche or regional segments of the market.[300] Large broker-dealers typically enjoy economies of scale over small broker-dealers and compete with each other to service the smaller broker-dealers, who are both their competitors and their customers.[301] As of December 31, 2016, approximately 4,000 broker-dealers filed Form X–17a-5. These firms varied in size, with median assets of approximately $725,000, average assets of nearly $1 billion, and total assets across all broker-dealers of approximately $3.9 trillion. The twenty largest broker-dealers held approximately 75% of the assets of broker-dealers overall, with total assets of $2.93 trillion, indicating the high degree of concentration in the industry. Of the 3,972 broker-dealers that filed Form X–17a–5, 430 are members of U.S. equities exchanges. Broker-dealers that are members of equities exchanges had, on average, higher total assets than other broker-dealers, with median assets of $21 million, average assets of $8.6 billion, and total assets across all broker-dealers that are members of exchanges of $3.6 trillion.

b. Transaction-Based Fees and Rebates

Exchanges are required to disclose their current fee schedules, which include transaction-based fees and rebates, connectivity fees, membership fees, among others.[302] When exchanges update their fees, they are required to file Form 19b–4 with the Commission, which if filed pursuant to Section 19(b)(3)(A) makes fee changes effective upon filing.[303] Although these fee schedules and Form 19b–4 fee filings contain information about fees beyond transaction-based fees and rebates, in this baseline, the discussion is limited to only transaction-based fees and rebates and any changes thereto.

Table 2 reports the range of minimum and maximum access fees and rebates, as well as the number of categories for each (in parentheses below the fee ranges), by exchange, for the most recently available fee schedule.[304] On average, U.S. exchanges have 24 access fee categories and 21 rebate categories associated with these fee schedules. For the maker-taker exchanges, access fees are capped at $0.0030, but are as little as zero in some fee categories for some exchanges; taker-maker exchanges, because they are not restricted in the amount they can charge to non-marketable limit orders, have fees that range as high as $0.0033. Seven exchanges have some categories of rebates that exceed the maximum access fees charged by exchanges.

Table 2 also provides the number of fee revisions for the exchanges as reported in their Form 19b–4 fee filings to the Commission in the last five years (July 16, 2012–July 18, 2017). Exchanges, on average, have changed their fee schedules 34 times in the last five years,[305] indicating that the average exchange revises its transaction-based fee schedules about seven times per year (approximately every 7.4 weeks).

TABLE 2—SUMMARY OF TRANSACTION-BASED FEE SCHEDULES FOR U.S. NATIONAL EQUITIES EXCHANGES AS OF JULY 2017

Exchange	Number of revisions (5 years)	Date of last fee schedule available	Access fees (# of categories)	Rebates (# of categories)
Cboe BZX	40	7/15/2017	$0.0000–$0.0030 (31)	$0.0010–$0.0032 (16)
Cboe BYX	45	7/15/2017	$0.0000–$0.0033 (36)	$0.0010–$0.0025 (12)
Cboe EDGA	47	7/15/2017	$0.0000–$0.0032 (48)	$0.0011–$0.0027 (10)
Cboe EDGX	64	7/15/2017	$0.0000–$0.0030 (37)	$0.0011–$0.0034 (19)
BX	31	7/13/2017	$0.0005–$0.0030 (10)	$0.0000–$0.0025 (8)
Phlx (PSX)	26	7/15/2017	$0.0026–$0.0030 (5)	$0.0023–$0.0031 (7)
Nasdaq	59	7/20/2017	$0.0030 (2)	$0.0000–$0.0034 (36)
NYSE Arca	51	7/3/2017	$0.0006–$0.0030 (68)	$0.0002–$0.0033 (61)
NYSE American	9	7/24/2017	$0.0003–$0.0030 (34)	$0.0000–$0.0045 (41)
NYSE	38	7/1/2017	$0.0003–$0.0030 (14)	$0.0000–$0.0045 (40)
NYSE National[306]	19	9/20/2016	$0.0003–$0.0030 (2)	$0.0000 (1)
CHX	8	5/3/2017	$0.0030 (1)	$0.0020 (1)
IEX	1	8/19/2016	$0.0009	−$0.0009

Forseveral of the exchange families, information about revenues and costs attributed to transaction-based fees and rebates is available in aggregate from Form 10–K filings. Using the statements of income from Form 10–K filings for 2016 capturing the net (of rebates) transactions-based revenues, the Nasdaq exchanges (Nasdaq, BX, and PSX)

[299] *See* Angel, Harris, and Spatt, *supra* note 216.

[300] *See* Securities Exchange Act Release No. 63241 (November 3, 2010), 75 FR 69791, 69822 (November 15, 2010) (''Risk Management Controls for Brokers or Dealers with Market Access'').

[301] *See id.*

[302] *See* 17 CFR 240.19b–4(m)(1), which requires each SRO to post and maintain a current and complete version of its rules, including those related to transaction-based fees and rebates, on its website.

[303] As discussed in Section V.B.1.b.iii *supra,* fee information, such as that included in exchange fee schedules or Form 19b–4 fee filings, does not have standardization or formatting requirements.

[304] The access fee and rebate ranges in Table 2 are collected from recent fee schedules (as of July 18, 2017) available from each individual exchange's website (listed in Table 1). Table 2 provides the date from which these fee schedules were reported. The ranges in fees are the minimum and maximum fees and rebates reported by each exchange.

[305] The median number of revisions to fee and rebate schedules by exchanges is 38 over the five-year period.

[306] NYSE acquired NSX in January 2017, and the exchange is now known as NYSE National. As of March 2018, the exchange currently has not submitted new fee schedules nor has it reported any trading volume in recent months.

earned $564 million.[307] Based on the same measure the NYSE-affiliated exchanges (NYSE, NYSE Arca, NYSE American, and NYSE National) earned $223 million in transaction-based fees net of rebates,[308] while the BATS Global Markets (now, Cboe BZX, Cboe BYX, Cboe EDGA, and Cboe EGDX), for the nine months ended September 30, 2016, earned $177 million in transaction-based fees net of rebates.[309] Neither CHX nor IEX or their affiliates are publicly traded, meaning that these exchanges do not file an annual Form 10–K with the Commission. As a result, public information regarding the revenues or profits associated with transaction-based fees does not exist for these exchanges.

Information on the net transactions-based revenues for each individual exchange, as opposed to the amounts reported for exchange groups in Form 10–K filings, is not currently publicly available, making it difficult to analyze the fees and rebates for an individual exchange. To estimate the net transactions-based revenues for each individual exchange, Table 3 reports the maximum and median net transaction-based fees based on each exchange's most recently reported fee schedule and the share volume of each exchange for June 16, 2017 through July 18, 2017.[310] As evidenced by the significant differences between the sum of net of rebate revenues for entities reporting to the same exchange group obtained from Table 3 and the total net of rebate revenues for each exchange family reported on the Form 10–K or 10–Q filings, this approach does not yield reliable results, highlighting the limitations on the data currently available to researchers.

TABLE 3—ESTIMATES OF ANNUALIZED PER-EXCHANGE NET TRANSACTION-BASED FEE REVENUES FROM TRANSACTION-BASED FEES AND MONTHLY EXCHANGE SHARE VOLUME

[for June 16, 2017–July 18, 2017]

[in millions]

Exchanges	Share volume [311]	Annualized midpoint difference	Per share profit (median)	Annualized maximum difference	Per share profit (maximum)
Cboe BZX	8,677	($62.5)	($0.0006)	$208.2	$0.0020
Cboe BYX	7,003	(8.4)	(0.0001)	193.3	0.0023
Cboe EDGA	2,388	(8.6)	(0.0003)	60.2	0.0021
Cboe EDGX	9,310	(83.8)	(0.0008)	212.3	0.0019
BX	4,411	24.5	0.0005	158.8	0.0030
Phlx (PSX)	1,115	1.3	0.0001	9.4	0.0007
Nasdaq	21,171	330.3	0.0013	762.2	0.0030
NYSE Arca	13,175	7.9	0.0001	442.7	0.0028
NYSE American	494	(3.6)	(0.0006)	17.8	0.0030
NYSE	20,277	(146)	(0.0006)	730	0.0030
NYSE National	....	....	....	....	....
CHX	609	7.3	0.0010	7.3	0.0010
IEX	3,117	N/A	$0.0000	N/A	0.0000

C. Analysis of Benefits and Costs of Proposed Transaction Fee Pilot

1. Benefits of Proposed Transaction Fee Pilot

The Commission expects that the benefits of the proposed Transaction Fee Pilot would fall into two categories: More informed policy decisions, including more information about potential conflicts of interest between broker-dealers and their customers (primary benefits) and more information on other issues important to the Commission (ancillary benefits), as well as other benefits that may accrue to market participants for the duration of the proposed Pilot. In this section we discuss each of the categories of benefits as well as potential limitations to those benefits.

a. Benefits of More Informed Policy Decisions

i. Benefits of Studying Potential Conflicts of Interest

The Commission preliminarily believes that the proposed Transaction Fee Pilot would lead to a more thorough understanding of issues related to potential conflicts of interest arising from transaction-based pricing models, which would ultimately inform the Commission's policy decisions. This increased understanding would derive from design elements of the proposed Transaction Fee Pilot that address the limitations of currently available information described in the baseline: Lack of representative results, inability to identify causality, and insufficient publicly available data. The data obtained will improve the quality of research and analysis by the Commission and others, which will provide additional data about the effect of transaction-based fees on order routing decisions of broker-dealers in ways that reflect potential conflicts of interest with their clients. The Commission believes that these additional data, which would be unavailable in the absence of the proposed Pilot, would help the

[307] *See* the Nasdaq 2016 Form 10–K filings, *available at: https://www.sec.gov/Archives/edgar/data/1120193/000112019317000003/ndaq1231201610-k.htm.* Net transaction-based revenues for equity securities were approximately 25% of total operating margin.

[308] *See* the Intercontinental Exchange 2016 Form 10–K filings, *available at: http://otp.investis.com/clients/us/intercontinental_exchange_group2/SEC/sec-show.aspx?Type=html&FilingId=11827791&Cik=0001571949.* For the Intercontinental Exchange, net transaction-based revenues were approximately 10% of operating income for 2016.

[309] *See* the Bats Global Markets Form 10–Q filings (September 30, 2016), *available at: http://www.snl.com/Cache/36600023.pdf.* Cboe announced its intent to acquire BATS Global Markets in September 2016, and the acquisition became effective on March 1, 2017. For the nine-month ending September 30, 2016, the net transaction-based revenues were 62% of BATS operating profits over the same time period.

[310] The share volume is obtained from the Cboe website, *available at http://markets.cboe.com/us/equities/market_share/.* To compute the maximum profit attainable, staff took the difference between the highest possible access fee and the lowest possible rebate and multiplied it by the monthly share volume. For a midpoint profit, the median of the access fees less the median of the rebates is computed and multiplied it by share volume. In order to make the results comparable to those reported above from Form 10–K filings, the monthly profits are annualized by multiplying each monthly profit amount by 12.

[311] Monthly share volume obtained from Cboe for June 16, 2017 through July 18, 2017, *available at http://markets.cboe.com/us/equities/market_share/.*

Commission make more informed and effective future policy decisions to the ultimate benefit of investors.

To obtain the additional data to understand the relationship between fees and rebates and order routing decisions, the proposed Transaction Fee Pilot would simultaneously create several different fee environments, each of which restricts transaction-based fees differently, and would make available data that allows researchers to compare order routing, execution quality, and market quality in these fee environments to the current fee environment. The study of these comparisons would inform the Commission and the public about any possible conflicts of interest that arise as a result of transaction-based fees. The Commission preliminarily believes that the different fee environments created by the proposed Pilot, even though implemented temporarily and over representative subsamples NMS securities, would produce effects on order routing decisions by broker-dealers that are identical or similar to those that would arise under a similar permanent change to our regulatory environment. Therefore, the Commission preliminarily believes that the information obtained from the Pilot will help inform our consideration of any future proposals.

As noted, three distinct features of the proposed Pilot's design would facilitate analyses of the relationship, if any, between fees and potential conflicts of interest. Specifically, the proposed Pilot is designed to provide (1) representative results; (2) sufficient information to determine causality; and (3) more direct access to data that is currently unavailable or requires lengthy and labor-intensive effort to compile and process. The following sections discuss in detail each of these aspects of the proposed Pilot and how they could improve upon the information currently available.

A. Representative Results

In the context of the proposed Transaction Fee Pilot, representativeness of results means that the impact of the proposed Pilot's terms on a Test Group during the Pilot Period is likely to be consistent with the impact of the results on the Test Group if the Pilot's terms were permanent (as opposed to temporary). Representativeness is desirable for researchers and policy makers because it ensures that inferences drawn from the results of analysis of Pilot data are likely to be similar to those that would emerge if the terms were permanent. As discussed in the baseline, current analyses are limited in their ability to broadly inform policy choices by some combination of the following: Order routing data from a single broker-dealer, a small sample of securities, a single exchange, or a short sample period. By contrast, the Commission preliminarily believes that the proposed Pilot, as designed, would produce more representative results. Specifically, as discussed in detail below, the proposed Pilot would cover a large stratified sample of nearly all NMS stocks (including ETPs), both maker-taker and taker-maker exchanges, and access fee caps as well as a prohibition on rebates or Linked Pricing, and would have a two-year duration with an automatic sunset at the end of the first year unless the Commission determines, at its discretion, that the proposed Pilot shall continue for up to another year.[312] The proposed Pilot also would capture and make available to the public for research and analysis, a comprehensive database of the order routing decisions of all broker-dealers that route orders to U.S. equities exchanges. As detailed in the baseline, it would be infeasible for researchers to compile current data sources across all broker-dealers.

The Commission preliminarily believes that the proposed Pilot would produce representative results, presenting a significant improvement on existing studies, because the proposed Pilot applies to a large stratified sample of NMS stocks (including ETPs) with prices of at least $2.00 per share at the date of the Pilot Securities selection, and with no restrictions on market capitalization. In particular, the Commission recognizes that any possible conflicts of interest related to transaction-based fees could vary across securities such that the results of a pilot focused only on large capitalization stocks may not provide information relevant to small capitalization stocks or ETPs.[313] Including nearly all NMS securities allows the results to inform policy choices across any subset of these securities. The stratification of the stocks selected for each test group is designed to ensure that each test group and the control group have a similar composition, facilitating a comparison across groups, which further supports the representativeness of results. If, for instance, the test groups and control group had a different composition, researchers might not be able to distinguish whether differences across test groups and the control group stem from different fee environments or different sample composition, rendering the results less representative. In addition, the Commission preliminarily believes that the sample sizes in the test groups are sufficient to provide the statistical power necessary to identify differences across the samples.

Representativeness of results of the Pilot would also be promoted by the choice of the Pilot Security selection date. The proposed rule would allow the Commission to select the Pilot Securities at any point in time up to Pilot start date. As noted in Section III.E.1, the Commission anticipates that it would assign and designate by notice each Pilot Security to one Test Group or the Control Group approximately one month prior to the start of the Pilot. By assigning securities close to the start of the Pilot, each Test Group and the Control Group are likely to be more comparable during the Pilot. Because stratification criteria (*e.g.,* market capitalization and liquidity) vary naturally over time, the closer the assignments occurs to the proposed Pilot effective date, the more comparable the Test Groups would be during the proposed Pilot. Selection of securities close to the start of the proposed Pilot would also be more likely to include the intended universe of securities, by capturing securities that enter the market between the possible adoption of the rule and the start of the proposed Pilot, while avoiding securities that exit during this period. Further, to the extent that market participants would change their behavior in anticipation of the proposed Pilot, setting the selection period close to the proposed Pilot effective date could reduce the effect of such behavior on pre-Pilot data.

The results of the proposed Pilot would be further representative because the proposed Pilot applies to all U.S. equities exchanges regardless of fee structure. Broker-dealers potentially face transaction-fee related conflicts of interest regardless of whether those fees are on maker-taker exchanges or taker-maker exchanges. Further, a pilot that addresses only a single fee structure would not produce results relevant for policy choices that also would apply to another fee structure.

Applying the proposed Pilot to all exchanges also improves upon the existing analysis of the limited fee experiment conducted by Nasdaq, which only covered a single exchange, as explained in Section V.B.1. While the results from that study are suggestive

[312] As designed, the proposed Pilot will only exclude NMS securities that have prices below $2.00 per share as of the date of pilot selection. As detailed above, the data would also be produced for a six-month pre-Pilot Period and a six-month post-Pilot Period.

[313] *See, e.g.,* Battalio Equity Market Study, *supra* note 22.

that broker-dealers routed customer orders to other exchanges that did not change their transaction-based fees, reasons other than potential conflicts of interest could have impacted the changes in order routing decisions. The Commission believes that the proposed Pilot would achieve representativeness by requiring transaction-fee changes for all U.S. equities exchanges, which would allow researchers to identify how these revisions affect order routing decisions across exchanges. Further, the proposed Pilot would require that changes to fees or rebates would be applied at the security level, which means that for any given security, the limitation on access fees or rebates would be ubiquitous across all exchanges.

In addition, the proposed Pilot achieves representativeness by imposing access fee caps and a prohibition on rebates or Linked Pricing. The existing literature suggests that the potential conflicts of interest arising from access fees could induce behavior that would be different from the behavior induced from conflicts arising from rebates or Linked Pricing. Therefore, the inclusion of caps on both access fees and rebates or Linked Pricing allows for a more comprehensive analysis of any possible conflicts of interest than could be achieved by focusing solely on access fees or rebates. For example, Test Group 2 limits access fees to $0.0005, which could feasibly limit rebates paid on displayed liquidity, while Test Group 3 strictly prohibits rebates or Linked Pricing across the entire depth of book for displayed and non-displayed liquidity. On the surface, it appears that Test Groups 2 and 3 both could eliminate rebates paid to broker-dealers; however, these categories are not equal in their ability to reduce rebates.[314]

Test Group 3 would completely prohibit rebates or Linked Pricing, which could provide information on how exchanges compete for order flow when rebates are not an option for exchanges, and could provide insight into the equilibrium level of access fees in the absence of rebates or Linked Pricing.[315] Prohibiting exchanges from offering rebates or Linked Pricing in Test Group 3 is necessary to maintain the economic integrity of Test Group 3 and to provide information about Test Group 3 consistent with its objective to test the impact of eliminating rebates on the natural equilibrium level of fees, within the current regulatory structure, and the potential conflicts of interest that rebates may cause.[316] Although Rule 610(c) of Regulation NMS caps the maximum access fee for exchanges at $0.0030, in the absence of rebates or Linked Pricing, competition among exchanges could drive the average access fee to an amount substantially below $0.0030.[317] In other words, Test Group 3 would allow competition among exchanges, in the absence of rebates or Linked Pricing, to determine the level of access fees from which exchanges have no incentive to move away.

The Commission further preliminarily believes that the duration of the proposed Pilot would produce sufficiently representative results. If broker-dealers incorporate transaction fees and rebates into their order routing decisions, a two-year duration for the proposed Pilot, with an automatic sunset at the end of the first year, unless the Commission publishes a notice determining that the proposed Pilot shall continue for up to a second year, would likely make it economically worthwhile for broker-dealers to change their routing behavior during the Pilot by making it costly to avoid the proposed Pilot. Specifically, as discussed below, the Commission recognizes that broker-dealers would incur costs to incorporate new fee schedules that are consistent with the proposed Pilot's requirements into their order routing decisions. Broker-dealers could ignore the Pilot to avoid these costs. If enough broker-dealers ignore the Pilot, the Pilot might not produce results that provide the Commission and the public a sense of the likely impact of permanent changes to fee caps or rebates. However, to the extent that broker-dealers incorporate transaction-based fees and rebates into their order routing decisions, ignoring the proposed Pilot would also be costly for broker-dealers, and these costs increase with the duration of the Pilot. The Commission preliminarily believes that the proposed Pilot duration, even with a one-year sunset, is long enough to produce representative results because, as discussed below in Section V.C.2.b, broker-dealers that incorporate transaction-based fees and rebates into their routing decisions would find it economically worthwhile to adapt their behavior in response to the Pilot.

Further, the provision for an automatic sunset facilitates representative results because it provides the Commission with flexibility as the data from the proposed Pilot develops. For example, the Commission could suspend the sunset if, for example, it believed that additional time would help ensure that market developments are fully reflected in the data with sufficient statistical power for analysis, recognizing that such market developments are uncertain. Therefore, the sunset provides flexibility to the Commission to observe developments during the proposed Pilot to determine whether to allow the sunset to occur.

The Commission preliminarily believes that the inclusion of a broad sample of NMS securities, including small and mid-capitalization stocks, ensures representative results from the proposed Pilot. Although previous studies, as discussed above, suggest that any possible conflicts of interest are likely to be the greatest for small-capitalization securities,[318] the Commission believes that it is important to the design of the proposed Transaction Fee Pilot to include these small and mid-capitalization stocks (including ETPs).

As a result, small and mid-capitalization securities could be subject to both the Transaction Fee Pilot and the Tick Size Pilot for some period of time. However, the Commission preliminarily believes that any overlap between the pilots is unlikely. If the pilots do overlap, the proposed Pilot selection process facilitates the overlap with the Tick Size Pilot while maintaining representative results. In particular, the selection process for the proposed Pilot would result in similar proportions of stocks impacted by the proposed Transaction Fee Pilot in each

[314] The Commission preliminarily believes that applying the top of book and depth of book restriction to Test Group 3, but not in Test Group 2, is not an area of significant difference between the two test groups. Section III.C.3, *supra,* provides discussion for why Test Groups 1 and 2 do not have requirements to access fees for non-displayed or depth-of-book liquidity.

[315] Equilibrium refers to conditions of a system in which all competing influences are balanced. For instance, with respect to the Test Group 3, this could be the level of access fee charged by exchanges from which no exchange has any incentive to increase or decrease that fee. This would be the equilibrium access fee.

[316] If Linked Pricing were not prohibited, market participants could potentially circumvent the prohibition on rebates through Linked Pricing mechanisms. Therefore, including prohibitions on rebates or Linked Pricing could provide information to the Commission and the public about potential conflicts of interest associated with rebates or substitutes for rebates, such as Linked Pricing, as well as the equilibrium fee that emerges in the absence of rebates or Linked Pricing.

[317] In addition to removing rebates or Linked Pricing in Test Group 3, the Commission could also temporarily suspend limitations on access fee caps imposed by Rule 610(c) of Regulation NMS. However, implementing multiple changes within a single test group may prevent researchers and others from clearly determining the effect of the prohibition of rebates on order routing decisions of broker-dealers from the effect resulting from the removal of access fee caps.

[318] *See* Battalio Equity Market Study, *supra* note 22; Harris, *supra* note 23.

Tick Size Pilot test and control groups. Specifically, each of the proposed Transaction Fee Pilot's three test groups would be divided into two subgroups—one that overlaps with the Tick Size Pilot and one that does not overlap.[319] Assuming each pilot test group affects the other pilot's test and control groups similarly, this design safeguards the results of each pilot by ensuring that Tick Size Pilot effects are uniform across the proposed Transaction Fee Pilot and vice versa, such that researchers are able to control for effects of the Tick Size Pilot on the proposed Transaction Fee Pilot and vice versa.

B. Causality

In addition to providing representative results, the Commission expects the proposed Transaction Fee Pilot to achieve the benefits identified above because it would, among other things, provide insight into the degree to which transaction-based fees result in potential conflicts of interest that alter broker-dealer routing decisions to the detriment of investors. Such causal information is necessary when considering policy choices aimed at reducing any possible distortions related to potential conflicts of interest. As detailed in the baseline, exogenous shocks are a means by which researchers may establish the existence of a causal relationship between changes to transaction-based fees and changes to order routing decisions of broker-dealers and infer whether these decisions are related to possible conflicts of interest.[320] This proposed Pilot facilitates the establishment of causality through an exogenous shock that simultaneously creates several distinct fee environments, each of which restricts transaction-based fees or rebates differently, enabling synchronized comparisons to the current environment.

The Commission preliminarily believes that the proposed Pilot is able to facilitate the examination of causality because the proposed Pilot would produce a single exogenous shock that differentially impacts either fees or rebates on both maker-taker and taker-maker exchanges. Although exchanges adjust their fee schedules frequently, which could affect the order routing decisions of broker-dealers, researchers have, to date, been unable to determine whether these discretionary changes to fees cause order routing decisions or whether order routing decisions cause the changes in fees. With the exception of the Nasdaq study, which lacks representative results, prior analyses lacked an exogenous shock to fees, thus any conclusions about causality that are drawn from these studies may not provide reliable information about possible conflicts of interest.[321] Exogenous shocks, such as those in the proposed Transaction Fee Pilot provide researchers a clear means of analyzing the direction of causality.[322]

As discussed above, the proposed Pilot would produce a single exogenous shock that differentially affects multiple test groups. The simultaneity of the exogenous shocks across test groups also facilitates examination of causality. If some market-wide event were to result in deviations in order routing behavior during the proposed Transaction Fee Pilot, the event would likely affect stocks in each test group as well as the control group. Researchers can easily control for the impact of the market-wide event, because the impact of the market-wide event would likely affect test groups and the control group similarly, and therefore, would be unlikely to appear in the comparisons of the test groups to the control group. By contrast, if the exogenous shocks were not simultaneous, the market-wide event may impact only one test group, complicating the comparisons of that test group to the baseline period or to the other test groups.

The design of the proposed Pilot further enhances researchers' ability to identify causal relationships. The Commission preliminarily believes that publishing daily updates to the List of Pilot Securities facilitates the identification of causal relations between transaction-based fees and order routing decisions. By requiring daily updates to the List of Pilot Securities, the proposed Pilot would provide broker-dealers with the information they need to track the exact securities in each test group in real-time and when securities exit the Pilot. This information may be crucial for broker-dealers that choose to adjust their routing behavior during the pilot. If broker-dealers are unable to track which securities are in which test groups, the Pilot results could provide misleading causal information.

C. Expansion of Publicly Available Data

The Commission also expects the Transaction Fee Pilot to attain the benefits identified above because it would provide access to data that would either not be available to the public or that would require lengthy and labor-intensive collection. Having a representative source of data available to the public is critical for the production of research and analyses about the effect of transaction-based fees on broker-dealer order routing decisions. If more research and analyses become available, that research is more likely to provide increased depth and perspective on potential conflicts of interest to the Commission. Making the data available to the public also provides transparency and allows others to replicate, validate, and confirm the information that the Commission considers in connection with policy choices.

The Commission preliminarily believes that the proposed data requirements improve upon existing data, as is discussed in more detail below; thus, any inferences drawn from existing data sources prior to the proposed pilot would likely have limited value in providing information about the effect of transaction-based fees on order routing decisions. The Pilot's characteristics would enable representative results and a means to examine the exogenous shocks to transaction-based fees. The public availability of the Pilot data would facilitate study of whether the exogenous shocks to transaction-based fees affect order routing and are related to potential conflicts of interest between broker-dealers and their customers. The proposed Pilot would make information on order routing decisions available on a more granular level and would reduce the cumbersome nature of data collection associated with existing order routing data and fee data.

The Transaction Fee Pilot would enable the public to gain access to order routing data not currently available to them and would provide access to fee data in a simplified and standardized form, which would improve the quality of the analyses produced as a result of the Pilot. Although order routing data

[319] Each test group would contain 270 common stocks that overlap with the Tick Size Pilot, with 45 stocks selected from each of the three Tick Size Pilot test groups (45 stocks × 3 Tick Size Pilot groups = 135 total) with the remaining 135 stocks coming from the Tick Size Pilot's control group. *See supra* note 117 and accompanying text.

[320] As discussed in the baseline, establishing causality can be accomplished through either exogenous shocks or econometric methods, such as instrumental variable analysis. As noted above, the Battalio Equity Market Study, *supra* note 22, which employed an instrumental variables approach, was unable to definitely establish causal relations between transaction-based fees and rebates and order routing decisions.

[321] Although the Nasdaq study provides an exogenous shock to both access fees and rebates simultaneously for a subset of securities, the value of the results are impeded by (1) the small sample size of the study and (2) the limit of the shock to a single exchange, as broker-dealers could just route order flow to a different exchange. *See supra* note 31.

[322] Other econometric techniques, such as instrumental variables methodology, are used only when an exogenous shock (or other controlled experiment) cannot be established.

and fee schedules are publicly available through a combination of Rule 606 disclosures and exchange websites, respectively, the Transaction Fee Pilot would resolve a number of limitations associated with using currently available data to study the effect of transaction-based fees on potential conflicts of interest. Further, the proposed Pilot would make available broker-dealer order routing data for all exchange-member broker-dealers for the Pilot duration, which substantially expands the data that would be available to researchers in the absence of the Pilot.

The Transaction Fee Pilot would make available to the public new data on order routing decisions anonymized and aggregated by day, by security, by broker-dealer, and by exchange. This data would facilitate the analyses of aggregated daily order-routing decisions for a comprehensive sample of broker-dealers, which are likely to provide representative results of how changes in transaction fees and rebates affect these decisions. Even if the Commission were to require a historical time series of a complete set of broker-dealer Rule 606 disclosures to be made publicly available, the limitations presented in Section V.B.1 would still exist, namely data frequency, which likely would limit any statistical power associated with analyses of the data, non-disclosure of potential conflicts of interest related to transaction-based fees, and the focus on retail orders.

The order routing data obtained as a result of the proposed Pilot would instead provide superior information to that currently available. Data would be available for a representative sample of NMS securities, across all broker-dealers, and exchanges, at the daily frequency, which would provide sufficient data for analyses, while solving the issue of statistical power. Relative to the data that some studies acquire from broker-dealers and exchanges,[323] the order routing data released during the Transaction Fee Pilot would also allow researchers to observe a time series of data across broker-dealers and exchanges. The reduction in the start-up costs of examining order routing data, where start-up costs could include hand-collection of data over long time series, would likely encourage more research that would utilize data from the Transaction Fee Pilot. Further, more granular order routing data (*e.g.,* daily order routing statistics by anonymized broker-dealer) would facilitate more targeted analysis. Together, these effects would facilitate higher quality research on issues such as potential conflicts of interest, which would improve the quality of the information available to the Commission for policy decisions.

An additional requirement of the proposed Pilot is that the exchanges would be required to provide a standardized dataset of fees, the Exchange Transaction Fee Summary. Although researchers could identify some of the effects of changes to transaction-based fees and rebates on order routing decisions directly from knowing which securities are in a given test group, these data could improve the quality of tests of the Pilot by allowing researchers to incorporate information on how exchanges vary cross-sectionally in their fee and rebate structures, even within the various test groups. In particular, this information would allow researchers to create proxies for which exchanges are likely to be more or less expensive for marketable or marketable limit orders. For instance, within Test Group 1, the maximum allowable access fee is $0.0015; however, each exchange may have different base and top-tier fees. Thus, only knowing that a security is in Test Group 1 would be incomplete information about how orders might be routed by broker-dealers to different exchanges, and the Exchange Transaction Fee Summary would provide that information. Moreover, the Exchange Transaction Fee Summary would provide researchers with historical (realized) average and median per share fees and rebates to provide an ex post analysis of how actual fees affected order routing decisions from the prior period, which is not available from any data source today. This information provides another avenue for researchers to identify exchanges that are more expensive or less expensive using actual past fees instead of a fee schedule that varies widely across participants.

Exchanges would construct Exchange Transaction Fee Summaries according to an XML schema to be published on the Commission's website, and exchanges would update this information monthly.[324] These data would be standardized and consistently formatted, which would ease the use of these data for researchers, as each exchange would have to report the base, top-tier, average, and median fees, as detailed above in Section III.E.2. Each month, exchanges would be required to report realized average and median per share fees, as well as any ''spot'' revisions to fees associated with Form 19b-4 fee filings to the Commission. These fee data would be publicly posted on each exchange's website.[325]

The Exchange Transaction Fee Summary released during the Pilot would: (1) Ease aggregation across exchanges, which affords researchers an opportunity to obtain representative results; (2) replicate across studies, which would provide validation of findings; and (3) reduce burdens associated with fee data collection, which could encourage more research on the impact of fees and rebates on routing behavior. Because each exchange would be required to provide its Exchange Transaction Fee Summary using the Commission's XML schema, data on fees and rebates would be produced in a structured and standardized format, allowing researchers to easily aggregate and compile the data across all of the U.S. equities exchanges. The format of the data would facilitate the ability of a researcher to obtain representativeness in her results, which could enhance current views on possible conflicts of interest related to transaction-based fees.

Moreover, because all researchers would have access to the same set of data on transaction-based fees and rebates, they would be able to replicate, validate, and confirm the analyses of one another, which would be difficult to do with existing data sources. Unlike currently available fee data, downloadable files containing the Exchange Transaction Fee Summary would be publicly posted on each exchange's website and would provide researchers with consistent measures of various categories of fees and rebates, described in Section III.E.2, thereby reducing costs to researchers to collect and analyze the data provided. Thus, the Commission preliminarily believes that a standardized reporting of summary data on fees by the exchanges would facilitate analysis of the effect of transaction-based fees on order routing decisions by broker-dealers.

The proposed rule would require that the Exchange Transaction Fee Summary be structured using an XML schema to be published on the Commission's

[323] *See, e.g.,* Battalio Equity Market Study, *supra* note 22.

[324] The standardized fee data, as would be required by the proposed Pilot, is discussed in Section III.E.2, *supra.*

[325] Proposed Rule 610(T) requires each exchange to publicly post on its website downloadable files containing the Exchange Transaction Fee Summary and update them on a monthly basis. Similarly, each exchange would be required to publicly post on its website downloadable files containing daily aggregated and anonymized order routing statistics, updated monthly. Each exchange would also be required to provide daily on its website downloadable files containing the List of Pilot Securities and the Pilot Securities Change List.

website. Data that are structured in a standard format can result in lower costs to analysts and higher quality data. An additional key benefit of structured data is increased usability. If, for instance, the Exchange Transaction Fee Summary were not standardized across the exchanges, researchers would have to manually rekey the data, a time-consuming process which has the potential to introduce a variety of errors, such as inadvertently keying in the wrong data or interpreting the filings inconsistently, thereby reducing comparability. With the data in the reports structured in XML, researchers could immediately download the information directly into databases and use various software packages for viewing, manipulation, aggregation, comparison, and analysis. This would enhance their ability to conduct large-scale analysis and immediate comparison of the fee structures of exchanges. The Commission preliminarily believes that requiring these reports to be made available in an XML format would provide flexibility to researchers and would facilitate statistical and comparative analyses across exchanges, test groups, and date ranges.

Moreover, as an open standard, XML is widely available to the public at no cost. As an open standard, XML is maintained by an industry consensus-based organization, rather than the Commission, and undergoes constant review. As updates to XML or industry practice develop, the Commission's XML schema may also have to be updated to reflect the updates in technology. In those cases, the supported version of the XML schema would be published on the Commission's website and the outdated version of the schema would be removed in order to maintain data quality and consistency with the XML standard.

The Commission's proposed XML schema would also incorporate certain validations to help ensure data quality. Validations are restrictions placed on the formatting for each data element so that comparable data are presented comparably. Complete and appropriately formatted data enhances data users' abilities to normalize and aggregate the data for review and analysis. The validations incorporated into the schema would be effective for checking data completeness and appropriate formatting, and would help the exchanges ensure that the data they post adheres to the Commission's XML schema in completeness and formatting.[326] Accordingly, the Exchange Transaction Fee Summary reports made available by exchanges in XML format pursuant to the proposed rule would have to be validated against the most recent XML schema published on the Commission's website.

ii. Benefits of Studying Other Economic Effects

In addition to potential conflicts of interest, a number of studies have expressed other concerns related to transaction-based fees. For example, studies predict that transaction-based fee pricing has led to increased market fragmentation and complexity.[327] As an ancillary benefit to the Transaction Fee Pilot, the Commission and the public possibly could obtain data to facilitate analyses and research relating to the effects of fees and rebates on market fragmentation and market complexity in addition to those designed to study the potential conflicts of interest. These analyses are likely to be informative to the Commission as it evaluates future policy decisions.

Through the use of the order routing data from the Transaction Fee Pilot, researchers would be able to study order flow among different venues, which could provide insights into whether changes in transaction-based fees affect the current baseline of competition between exchanges and off-exchange trading centers, even in the absence of potential conflicts of interest. Existing literature suggests that transaction-based pricing has contributed to an increase in the number of venues competing for order flow over time.[328] By offering rebates or Linked Pricing, start-up maker-taker and taker-maker trading centers have been able to attract order flow from exchanges such as NYSE and Nasdaq, thereby reducing liquidity externalities, or concentration of order flow to a preferred venue, and leading to increased fragmentation of the market for trading services. By altering the access fee and rebate structures for exchanges, researchers may be able to identify whether these changes lead to more (or less) concentration of liquidity and how they affect competition for order flow among exchanges, which could lead to less (or more) market fragmentation. The effect of transaction-based fees on market fragmentation could not be examined in the absence of the Pilot.

By design, the Transaction Fee Pilot would alter access fees and rebates in some test groups, also providing researchers with information on how these revisions affect the quoted spreads (*e.g.,* whether the spreads widen or narrow). The width of the quoted spread is considered to be an indicator of a stock's liquidity, with narrower spreads generally indicating more liquid securities. The proposed Pilot could provide information on whether fees and rebates affect the liquidity of securities, as measured by the quoted spreads, across different test groups. Existing studies suggest that quoted spreads appear to decline as liquidity rebates increase;[329] thus, rebates appear to decrease the cost of trading (and narrow the NBBO), thereby potentially improving investor and market welfare.[330] For some marketable orders, the net spread (the quoted spread plus the cost of access fees) is wider than the quoted spread, thereby potentially reducing transparency because quoted spreads (for at least some orders) are different from the net spread, yet most retail customers are unaware of the difference.[331] Without transparency of the fees and rebates assessed to traders, the true costs of trading may be concealed, thereby creating a distortion between the quoted spread and the net cost of trading. Additional distortions between the quoted spread and the net costs for customers arise because orders are priced on different schedules in

[326] These validations, however, will not test for the underlying accuracy of the data.

[327] *See, e.g.,* Thierry Foucault, Ohad Kadan, and Eugene Kandel, ''Limit Order Book as a Market for Liquidity,'' *Review of Financial Studies* 18, 1171–1217 (2005), *available at: https://academic.oup.com/rfs/article/18/4/1171/1595760* (''Foucault et al. (2005)''); Marios Panayides, Barbara Rindi, and Ingrid Werner, ''Trading Fees and Intermarket Competition,'' Working Paper, University of Pittsburgh (2017) *available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2910438* (''Panayides et al. (2017)''). Panayides et al. (2017) builds on the theoretical model of Foucault et al. (2005) and finds a decline in market quality and fraction of order flow to an exchange as its relative rebate declines or the take fee increases.

[328] As discussed in the baseline, the number of exchanges has increased since 2005, and market share has become less concentrated over the same time period. These exchanges are not fully independent; the majority of the U.S. equities exchanges belong to three exchange groups. The Commission preliminarily believes that any analyses of the effects of transaction-based fees on order routing decisions can appropriately control for exchange groups.

[329] *See* Angel, Harris, and Spatt, *supra* notes 106 and 216; Brolley and Malinova, *supra* note 24; Harris, *supra* note 23; O'Donoghue, *supra* note 24.

[330] *See* Brolley and Malinova, *supra* note 24. Academic studies suggest that the majority of retail orders are executed off-exchange at prices based on the NBBO, thereby providing retail investors with better prices in the presence of rebates. If, however, large rebates provide incentives for broker-dealers to route retail orders to these exchanges instead of to off-exchange venues, retail customers may not be fully aware of the total cost associated with their orders. *See e.g.,* Angel, Harris, and Spatt, *supra* notes 106 and 216.

[331] *See* Harris, *supra* note 23.

different markets.[332] Even if several trading centers match the NBBO, the magnitude of the access fees and liquidity rebates could significantly affect the net price paid by customers.[333]

iii. Potential Limitations on the Benefits

The Commission recognizes that pilots are unpredictable and as such considered whether possible limitations associated with pilots generally, as well as certain issues presented by the design of this pilot in particular, would limit the benefits of the Transaction Fee Pilot. The Commission preliminarily believes that the limitations of pilots, some of which may affect the Transaction Fee Pilot as discussed below, should not impede its success. This section discusses, in greater detail below, issues associated with pilots in general and the potential concerns with resultant research and analyses, as well as overlap with the Tick Size Pilot.

Pilots may face limitations related to the unpredictable nature of market conditions and confounding events. Even if a pilot lasted several years, not all of the market conditions of interest could be experienced. Depending on the requirements of pilots, such limitations might reduce the usefulness of the information obtained.[334] The Commission preliminarily believes, however, that the value of the information obtained from the proposed Transaction Fee Pilot is not dependent upon having variation in market conditions over time, and that the duration of the proposed Pilot would provide sufficient information for future analyses.

In addition, pilots also face the limitation that market participants, knowing that a pilot is underway, may not act as they would in a permanent regime.[335] In the context of this pilot, broker-dealers could choose to retain their current order-routing decisions for the duration of the proposed Pilot, which could be costly to such broker-dealers.[336] Broker-dealers, when deciding whether to adjust any order routing behavior that currently depends on fees and rebates, would likely trade off the costs of retaining strategies that are no longer profitable because of the restrictions imposed by the proposed Pilot against the costs of adjusting the algorithms for their smart order routing systems, as explained below Section V.C.2. The costs of ''waiting out'' the pilot increase with the duration of the pilot, whereas the costs of adjusting the algorithms of the smart order routers do not. Alternatively, broker-dealers could substantially change their business model in order to avoid the Pilot.[337] Either of these outcomes could lead to results that would not represent the effects of a permanent rule change. The Commission preliminarily believes that it is unlikely that broker-dealers would maintain existing order routing decisions or alter their business models to avoid the Pilot. In particular, the Commission preliminarily believes that the proposed Pilot duration is likely to make it economically worthwhile for broker-dealers to adjust their order routing behavior, as the total costs of changes to order routing systems are estimated to be on average approximately $42,900 per broker-dealer, if the Pilot were to automatically sunset at the end of the first year.[338] Further, although the proposed Pilot could automatically sunset at the end of the first year, the Commission retains the flexibility to suspend the sunset to continue the proposed Pilot for up to an additional year, at its discretion, if the Commission believes that it needs additional data for any reason.

In order to facilitate analysis of data during the Pilot Period, the Commission believes that it is important to collect sufficient data during a pre-Pilot Period. The pre-Pilot data can then be compared with the data that would be produced during the Pilot Period, which would permit analysis of any changes to order routing behavior, execution quality, and market quality between the two for the Pilot Securities in each of the Test Groups. To make this comparison informative, the length of the pre-Pilot Period needs to be long enough to obtain sufficient statistical power to permit analysis of the stocks and ETP Pilot Securities. In turn, sufficient statistical power in tests that compare the pre-Pilot data to the Pilot data would allow the Commission and others to more easily use the information obtained from the Pilot to inform future regulatory consideration of exchange transaction fees and their impact on the markets.[339] The Commission preliminarily believes that at least six months of pre-Pilot data may be required to obtain the necessary statistical power to permit analysis of the Pilot Securities during the Pilot, particularly ETPs.[340] Without sufficient statistical power, researchers cannot use statistical techniques to distinguish between a pilot that has no effect and pilot data that do not provide enough power to detect an effect. In such situations, in order to have sufficient data to obtain statistical power, researchers would have to wait until the conclusion of the post-Pilot period to gather additional data, likely delaying the initial results of the proposed Pilot and the Commission's consideration thereof.

Furthermore, a short pre-Pilot Period introduces additional risk that analysis of certain Pilot data may be uninformative. Even if researchers were to wait until the conclusion of the post-Pilot period to begin analysis, they may not be able to identify the effects of the Pilot because data obtained from the post-Pilot period could be confounded by information about the Pilot. For example, if exchanges alter their fee structures in the post-Pilot period as a result of the Pilot (rather than revert back to their fee models in effect prior

[332] *See* Angel, Harris, and Spatt, *supra* notes 106.

[333] *See* Battalio Equity Market Study, *supra* note 22.

[334] For instance, a pilot could be designed where the information obtained from the proposed Pilot would only be valuable if certain market conditions, such as high market volatility or a recessionary period occurred. If, however, markets experience low volatility or are in an expansionary period, the proposed Pilot may either not be sufficiently long enough to capture the events that it requires to be useful or would have to be extended to ensure that those market conditions could occur.

[335] For example, one study provided evidence suggesting that trading behavior may not have completely adjusted to the Regulation SHO pilot. *See,* Ekkehart Boehmer, Charles Jones, and Xiaoyun Zhang, ''Unshackling Short Sellers: The Repeal of the Uptick Rule,'' Working Paper, Columbia University (2008), *available at: https://www0.gsb.columbia.edu/faculty/cjones/UptickRepealDec11.pdf.* Despite this effect, the study found evidence consistent with the evidence gathered from the Regulation SHO pilot. *See* Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008 (August 6, 2004) (''Regulation SHO'').

[336] If broker-dealers have smart order routing systems that use algorithms that maximize rebate capture, as suggested in the Battalio Equity Market Study, *supra* note 22, then for at least some subset of securities, broker-dealers would not be able to pursue rebates from those exchanges, so it would be suboptimal for broker-dealers to not reconsider their order routing choices. If broker-dealers, however, already have order routing decisions that are optimal from a customer's perspective (*i.e.,* based on execution quality) and are not driven by potential conflicts of interest (*i.e.,* maximizing rebates), then for at least some broker-dealers, their order routing decisions may be unchanged, particularly if execution quality does not migrate between exchanges as a result of the implementation of the proposed Pilot.

[337] It could be costly for broker-dealers to completely alter their business models because they may not find it worthwhile to do so for a temporary pilot. Further, if a broker-dealer has discretionary control over a customer's account, the broker-dealer could alter their business model by overweighting stocks in the control group and underweighting stocks in Test Group 3, if the objective of the broker-dealer is to continue to capture rebates.

[338] The costs for broker-dealers to update their order routing systems are detailed in Section V.C.2.f. If the proposed Pilot were extended for up to an additional year, the total costs to broker-dealers would be approximately $67,000 per broker-dealer.

[339] *See supra* note 118.

[340] *See supra* note 430.

to the Pilot), data from the post-Pilot period likely would be unable to supplement or substitute for data obtained from a shorter pre-Pilot Period, underscoring the importance of a longer pre-Pilot Period. Thus, the value of any analyses obtained from the Pilot may be limited, thereby reducing the information obtained from such analyses for any potential regulatory recommendations.

The Commission preliminarily does not believe that the benefits of the proposed Transaction Fee Pilot would be limited by the potential overlap with the Tick Size Pilot. For at least some portion of the proposed Transaction Fee Pilot's pre-period or Pilot Period, a sample of small and mid-capitalization stocks could simultaneously be subject to two pilots.[341] Two potential issues associated with the overlap between the pilots could lead to incorrect inferences in any analyses of the data produced by the proposed Pilot.[342] First, researchers would have to create additional control groups to account for the overlap with the Tick Size Pilot, which potentially increases the costs for researchers to study the proposed Transaction Fee Pilot. Second, the interaction between the test groups arising from the overlap may not be consistent across test groups.[343] However, the Commission preliminarily believes that researchers could appropriately control for such interaction in their analyses of either pilot.

The Commission recognizes that the data obtained from the Transaction Fee Pilot would not be straightforward to study. Specifically, the changes in fees or rebates imposed by the proposed Pilot may change transaction costs in a way that results in changes to order routing decisions by broker-dealers, even absent potential conflicts of interest. Studying how order routing changes during the proposed Pilot, without jointly studying why it changes, would not be sufficient to understand any possible conflicts of interest. Researchers can carefully select and apply sophisticated econometric techniques to distinguish the proportion of changes in order routing decisions resulting from execution quality considerations from those resulting from potential conflicts of interest. Nonetheless, this complication could reduce the number and/or quality of studies of the proposed Transaction Fee Pilot.

b. Other Benefits of the Proposed Transaction Fee Pilot

Other benefits may emerge that would affect markets and market participants for the duration of the proposed Pilot, such as reduced conflicts of interest for some test groups or lower all-in costs of trading. As discussed in further detail below, the Commission preliminarily believes that other likely benefits of this proposal would be temporary in nature and affect markets and market participants only for the duration of the proposed Pilot.

The potential conflicts of interest discussed above could be mitigated during the duration of the proposed Pilot for investors in at least some subset of securities. For instance, in Test Group 2 where access fees are lowered or Test Group 3 where rebates or Linked Pricing are prohibited, broker-dealers may alter their order routing behavior because the incentives to capture rebates or Linked Pricing are lessened or removed from this subset of securities. The Commission notes, as discussed in the baseline section, that it lacks sufficient evidence of these potential conflicts of interest to ascertain the harm to investors from the conflicts; instead, the proposal itself would be a mechanism for ascertaining the magnitude of any such benefits. Therefore, the Commission at this time is uncertain of the magnitude of these benefits.

For at least some subsets of securities where rebates are likely to be reduced to *de minimis* levels or eliminated entirely for the duration of the proposed Pilot, broker-dealers could increase the routing of customer orders to off-exchange trading centers, such as ATSs. When broker-dealers can no longer capture rebates or Linked Pricing for some subsets of securities, they could change their order routing to off-exchange trading centers, because this would allow these broker-dealers to avoid access fees for marketable orders. Off-exchange trading centers are required to match the prevailing NBBO, and the Commission understands that most ATSs do not charge access fees or pay rebates and could temporarily reduce the all-in costs of trading for orders routed off-exchange.[344]

As an additional temporary benefit resulting from the proposed Pilot, lower access fees or eliminated rebates or Linked Pricing in some test groups could drive down the cost of routing orders to exchanges, which could draw order flow away from ATSs and back to exchanges, potentially resulting in an improvement in exchange execution quality. A reduction in access fees in proposed Transaction Fee Pilot test groups could induce broker-dealers to route more marketable orders to maker-taker exchanges. As marketable orders increase on maker-taker exchanges, under the assumption that broker-dealers route orders in their customer's best interest, non-marketable orders could also be routed to the same exchanges, because the likelihood of execution and possibly the speed of execution improve for non-marketable orders with an increase in marketable orders. Thus, as a by-product of the proposed Pilot, exchanges temporarily may see improvements in their overall execution quality and may see an increase in routing of order flow by broker-dealers even in the absence of large rebates. This could benefit investors as they may temporarily obtain better execution quality or price improvement for some securities that they would not otherwise obtain in the absence of the proposed Pilot.

The exogenous shock to fees and rebates also could temporarily affect the transparency of quoted spreads. Several studies suggest that access fees and rebates, while narrowing the quoted spread, increase the net cost of trading but in a way that is not transparent to investors.[345] Reductions to access fees and rebates could increase the transparency of the all-in costs of trading for investors. Although the proposed Pilot is not designed to provide investors with full transparency of the net costs of trading, for at least

[341] Sections V.C.2.b and V.D.3, *infra,* discuss more thoroughly the implications for small and mid-capitalization issuers.

[342] In addition to these two issues, there may not be sufficient statistical power to jointly test the impact of being in test groups of both pilots. Given the limited number of securities that would, for example, be part of Test Group 1 of the Transaction Fee Pilot and Test Group 1 of the Tick Size Pilot (45 stocks), a substantial number of time series observations would likely be necessary to achieve statistical power. Depending on when the Transaction Fee Pilot becomes effective, there may only be limited overlap between the two pilots, if any. However, understanding the joint impact is not the reason for overlapping the pilots.

[343] The stratification approach that would be used to construct the test groups assumes that the impact of changes to fees and rebates would be the same across all Tick Size Pilot test groups, and that representativeness would be maintained. If the impacts are different, then a researcher might not be able to control for all of the interactions, potentially undermining the reliability of the results.

[344] In addition to the potentially lower all-in costs of trading for orders routed off-exchange, ATSs also reduce the likelihood of price impact associated with large trades, as those investors trading blocks of shares could potentially reduce the price impact of their trades by crossing orders off-exchange, which could reduce the likelihood that other market participants find out about the order ahead of the execution. *See* Jennifer Conrad, Kevin Johnson, and Sunil Wahal, "Institutional Trading and Alternative Trading Systems," *Journal of Financial Economics* 70, 99–114, (2003) *available at https://www.sciencedirect.com/science/article/pii/S0304405X03001430*.

[345] *See* Angel, Harris, and Spatt, *supra* notes 106 and 216.

some test groups, where rebates are likely to be reduced to *de minimis* levels or prohibited outright, investors may obtain partial transparency on how rebates affect quoted spreads and possibly the all-in costs of trading. This effect could be particularly important for small and mid-capitalization securities, where price transparency may be low and which are likely to experience an increase in spreads, and could subsequently reduce liquidity for these securities as a result of the exogenous shocks to fees and rebates. Therefore, for the duration of the proposed Pilot, an unintended benefit to investors in these securities is that prices may be more transparent as the all-in costs of trading are closer to the true economic net cost as reflected in the displayed quotes.

The Commission preliminarily believes that another temporary benefit of the proposal would be that the proposed Transaction Fee Pilot could prevent some traders from indirectly quoting in sub-pennies.[346] Rebates have the practical effect of reducing the minimum tick size by the size of the rebate, and in effect allow trading centers to offer quotations superior to the existing quote. Several studies suggested that the use of fees and rebates to effectively undercut quotations by sub-pennies is particularly severe in taker-maker markets.[347] The proposed Transaction Fee Pilot would, in some test groups, reduce or eliminate rebates, which could stem this indirect reduction of tick sizes, and could provide the Commission and the public with information currently unavailable about the frequency of this issue.

2. Costs of Proposed Transaction Fee Pilot

This section describes the compliance costs associated with the proposed Transaction Fee Pilot, followed by the additional temporary costs that could affect issuers, investors, broker-dealers, exchanges, and other market participants resulting from the proposed Pilot.

a. Exchange Compliance Costs of the Proposed Transaction Fee Pilot

The proposed Pilot would impose costs on exchanges to comply with the Pilot's requirements to collect, calculate, and publicly post data required by the Pilot on their websites, as well as to implement the required fee changes. An overview of the requirements of the proposed Pilot are presented in this section, and are discussed in more detail below. Specifically, exchanges that serve as the primary listing market would be required to publicly post on their websites downloadable files containing the Pilot Securities Exchange List, derived from the initial List of Pilot Securities published on the Commission's website by notice, as well as maintain and update the Pilot Securities Exchange List as necessary prior to the beginning of trading on each trading day. Separately, prior to the beginning of trading on each trading day and throughout the duration of the proposed Pilot, each primary listing exchange shall publicly post on its website a downloadable file containing a Pilot Securities Change List, which lists each separate change applicable to any Pilot Security (*i.e.,* name changes, mergers, or other corporate events) for which the exchange serves or has served as the primary listing exchange.[348]

The proposed Pilot would also require that each exchange provide a monthly standardized Exchange Transaction Fee Summary, detailed in Section III.E.2, which includes information on the initial list of fees and rebates associated with each test group and the control group, as well as changes to those fees and rebates corresponding with Form 19b–4 fee filings made to the Commission. In addition to the base and top-tier fees and rebates required in the Exchange Transaction Fee Summary, exchanges would also be required to calculate and publicly post on their websites the realized monthly average and median per share fees and rebates as part of the Exchange Transaction Fee Summary.

As discussed in more detail in Section III.E.3, equities exchanges would prepare and publicly post on their websites, order routing data, updated on a monthly basis, containing aggregated and anonymized broker-dealer order routing information. The required datasets, detailed in proposed Rule 610T(d), would contain order routing information for liquidity-providing orders and liquidity-taking orders aggregated by day, by security, by broker-dealer, and by exchange on an anonymous basis. The Commission expects that the equities exchanges would compile the required order routing data by utilizing the data they collect pursuant to the CAT.[349] As discussed below, each exchange would need to aggregate at the daily level the order routing statistics detailed in proposed Rule 610T(d) and would need to anonymize that data at the broker-dealer level, using the anonymization key provided by representatives of the Commission at the outset of the proposed Pilot. These data, in pipe-delimited ASCII format, would be publicly posted to each exchange's website, no later than the last day of each month for the prior month.

Although the proposed rule requires that exchanges release order routing data at the anonymized broker-dealer level, market participants or researchers theoretically could reverse engineer proprietary trading strategies of other market participants, which could have implications for the profitability of those strategies going forward if they were revealed or mimicked by other participants. The Commission is sensitive to the potential proprietary nature of the order routing data but preliminarily believes that releasing the order routing data would not affect market participants because the likelihood of being able to reverse engineer broker-dealers' order-level strategies is low because the data would be aggregated by security and day and would anonymize the broker-dealers. The proposal requires the order routing data to be anonymized at the broker-dealer level to limit the degree to which it reveals proprietary information. The order routing data are also aggregated by day, and released with a delay, to limit revealing individual strategies in the event someone was able to reverse engineer broker-dealer identities. The Commission provides estimates of the costs associated with complying with the proposed Transaction Fee Pilot's reporting requirements, discussed in detail below.

[346] Rule 612 of Regulation NMS prohibits traders from submitting sub-penny quotations on securities trading at prices over $1.00. The purpose of the sub-penny quotation prohibition was two-fold: (1) To prevent high frequency traders from front-running standing non-marketable limit orders and (2) to reduce the complexity of trading systems. *See* NMS Adopting Release, *supra* note 1, at 37550–57.

[347] *See, e.g.,* Angel, Harris, and Spatt, *supra* note 216; Harris, *supra* note 23. One study noted that as a result of the Tick Size Pilot test group with the trade-at provision, taker-maker markets have seen a significant increase in market share, in part due to this quotation issue. *See* Carole Comerton-Forde, Vincent Gregoire, and Zhuo Zhong, ''Inverted Fee Venues and Market Quality,'' Working Paper, University of Melbourne (2017), *available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2939012.*

[348] As discussed in Section III.E.1, *supra,* the Commission would publish by notice the initial List of Pilot Securities, which would identify the securities in the proposed Pilot and assign each of them to a designated test group (or the control group).

[349] *See* Section III.E.3 *supra,* which provides a more detailed discussion of the use of the CAT for the collection of order routing data.

b. Updating the Pilot Securities Exchange List and Pilot Securities Change List

As described above, the exchanges would maintain and make public prior to the start of each trading day the Pilot Securities Exchange List of the securities included in each test or control group on its website, in accordance with Rule 610T(b), making relevant adjustments for ticker symbol changes and corporate actions (*i.e.,* mergers or name changes). Further, each exchange would publicly post on its website the updated Pilot Securities Change List prior to the start of each trading day, which would list, separately, changes to applicable Pilot Securities. Additional details of what would be included in each list are provided in Section III.E.1.

From time to time, exchanges update issuers' ticker symbols for various reasons, such as a merger or a corporate reorganization and notify their members when such changes become effective. Given that every exchange has practices in place to update its members about the listed securities and has also adjusted its normal processes to account for the Tick Size Pilot, the Commission preliminarily believes that the costs associated with providing required data for the proposed Transaction Fee Pilot would not place undue cost burdens upon the exchanges. The processes used by exchanges to update the list of pilot securities for the Tick Size Pilot could be used to also track the proposed Transaction Fee Pilot securities, as well as any changes to those securities as detailed above in Section III.E.1.

Upon the initial publication of the List of Pilot Securities by notice by the Commission, the primary listing exchanges [350] would need to determine which securities are listed on their market, compile, and publicly post on their websites downloadable files in pipe-delimited ASCII format a list of those securities. The Commission preliminarily estimates that the costs associated with the initial compilation of the Pilot Securities Exchange List would cost $2,060 per exchange, or $10,300, in aggregate.[351]

The Commission understands that each primary listing exchange has existing systems to monitor and maintain the Pilot Securities Exchange List and the Pilot Securities Change List as a result of certain corporate actions.[352] While these systems can be used to collect the data required to be made public for the Pilot Securities Exchange List and the Pilot Securities Change List, the Commission further understands that these systems would have to be adapted to conform to the requirements of the proposed Pilot. The Commission estimates that it would cost each primary listing exchange approximately $3,720 to develop appropriate systems for the proposed Transaction Fee Pilot, or $18,600 in aggregate across the five U.S. primary listing exchanges.[353] Once these systems are established, the Commission estimates that it would cost each exchange $86,300 for the entire duration of the proposed Pilot, including up to the one-month pre-Pilot Period, a two-year Pilot duration, and the six-month post-Pilot Period, or $431,500 across the five primarily listing exchanges,[354] to publicly post on each exchange's website the Pilot Securities Exchange List and Pilot Securities Change List prior to the start of each trading day in pipe-delimited ASCII format. If the Commission determined that the proposed Pilot shall be automatically sunset at the end of the first year, the Commission estimates that the costs to each exchange would be $52,900 for the one-month pre-Pilot Period, a one-year Pilot duration, and the six-month post-Pilot Period, or $264,500 across the five primarily listing exchanges.[355]

c. Producing the Exchange Transaction Fee Summary in XML Format

In addition to the Pilot Securities Exchange List provided by the primarily listing exchanges, all U.S. equities exchanges would also need to publicly post on their websites the Exchange Transaction Fee Summary, downloadable files containing the initial set of fees at the outset of the proposed Transaction Fee Pilot as well as monthly updates to include both changes to fees and rebates reported in Form 19b-4 fee filings and realized average and median per share fees and rebates, as discussed in Section III.E.2. The Exchange Transaction Fee Summary would need to be updated promptly in response to any changes to its dataset following the beginning of each calendar month from the pre-Pilot Period through the post-Pilot Period. The exchanges would be required to provide information on any transaction-based fee changes, according to Rule 610T(e), that they make during the proposed Pilot, including the effective dates of fee revisions. The proposed rule also requires that each exchange calculates the realized monthly average and median per share fees and rebates, as discussed in more detail in Section III.E.2.

A requirement at the outset of the proposed Pilot is that exchanges would need to report their base and top-tier

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[350] The five primary listing exchanges are NYSE, Nasdaq, NYSE American, NYSE ARCA, and BATS.

[351] This estimate is based on the following: [(Compliance Manager (4 hours) × $298) + (Programmer Analyst (4 hours) × $232)] = $2,060 per exchange, or $2,060 × 5 primary listing exchanges = $10,300 in aggregate. The burden hours are obtained from Section IV.J.1, *supra.* The Commission estimates the wage rate associated with these burden hours based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association (SIFMA). The estimated wage figure for attorneys, for example, is based on published rates for attorneys, modified to account for a 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, yielding an effective hourly rate for 2013 of $380 for attorneys. *See* Securities Industry and Financial Markets Association, Management & Professional Earnings in the Securities Industry—2013, *available at: https://www.sifma.org/resources/research/management-and-professional-earnings-in-the-securities-industry-2013/.* These estimates are adjusted for inflation based on Bureau of Labor Statistics data on CPI–U between January 2013 (230.280) and January 2017 (242.839). Therefore, the 2017 inflation-adjusted effective hourly wage rates for attorneys are estimated at $401 ($380 × 242.839/230.280). The Commission discusses other costs of compliance with the proposed rule below.

[352] *See supra* note 150. As discussed above, primary listing exchanges have experience in producing and maintaining similar lists on their websites with respect to the Tick Size Pilot, which should be adaptable to meet the requirements of the proposed Transaction Fee Pilot.

[353] This estimate is based on the following: [(Attorney (4 hours) × $401) + (Compliance Manager (4 hours) × $298) + (Programmer Analyst (4 hours) × $232)] ≈ $3,720 per exchange, or $3,720 × 5 exchanges ≈ $18,600 in aggregate. The burden hours are obtained from Section IV.J.1, *supra.*

[354] If the proposed Pilot were to automatically sunset at the end of the first year, the total number of days that the exchanges would need to provide the Pilot Securities Exchange List and the Pilot Securities Change Lists would be up to 651 business days (up to 21 business days for the one-month pre-Pilot Period, 504 business days for the two-year Pilot horizon (252 business days per year × 2 years), and 126 business days for the six-month post-Pilot Period). The total number of days in the pre-Pilot Period would be no more than 21 trading days, but could be as short as zero days depending on when the exchanges begin to publish the Lists. The cost estimate for providing these lists for the entire period is based on the following: [(Compliance Manager (0.25 hour × 651 trading days) × $298) + (Programmer Analyst (0.25 hour × 651 trading days) × $232)] ≈ $86,300, or $86,300 × 5 exchanges ≈ $431,500, in aggregate. The burden hours are obtained from Section IV.J.1, *supra.*

[355] If the proposed Pilot were to automatically sunset at the end of the first year, the total number of days that the exchanges would need to provide the Pilot Securities Exchange List and the Pilot Securities Change Lists would be up to 399 business days (up to 21 business days for the one-month pre-Pilot Period, 252 business days for the one-year Pilot horizon, and 126 business days for the six-month post-Pilot Period). The total number of days in the pre-Pilot Period would be no more than 21 trading days, but could be as short as zero days depending on when the exchanges begin to publish the Lists. The cost estimate for providing these Lists for the entire period is based on the following: [(Compliance Manager (0.25 hour × 399 trading days) × $298) + (Programmer Analyst (0.25 hour × 399 trading days) × $232)] ≈ $52,900, or $52,900 × 5 exchanges ≈ $264,500, in aggregate. The burden hours are obtained from Section IV.J.1, *supra.*

fees and rebates, which the Commission estimates would cost each exchange $1,130, or $14,700, in aggregate across the 13 U.S. equities exchanges.[356] The reported base and top-tier fees and rebates would be mandatory elements of the Exchange Transaction Fee Summary. Concurrent with the submission of the Form 19b–4 fee filings to the Commission at the outset of the proposed Transaction Fee Pilot, the exchanges would also be required to publicly post on their websites downloadable files containing the initial Exchange Transaction Fee Summary, using an XML schema to be published on the Commission's website. The Commission estimates that it would cost exchanges $530 each to post this summary dataset to their websites, or $6,900 in aggregate across the 13 U.S. equities exchanges, using an XML schema to be published on the Commission's website.[357]

The proposed rule would also require that exchanges compute the monthly average and median realized per share fees and rebates, as detailed in Section III.E.2. These data would provide the Commission and the public aggregated data on the actual per share levels of fees and rebates assessed in the prior month, which the Commission believes is critical for estimating the effects of fees and rebates on order routing decisions. The Commission preliminarily believes that the costs associated with computing these summary data on fees and rebates are likely to be larger than the costs associated with updating the Exchange Transaction Fee Summary, discussed in detail below, and would likely require new systems by the exchanges to track the average and median fees.

The Commission estimates that each exchange would have a one-time cost of $24,000, or $312,000 in aggregate across the 13 U.S. equities exchanges, associated with the development and implementation of systems tracking realized monthly average and median per share fees pursuant to the proposed rule.[358] The Commission further anticipates that it would cost an additional $12,000 annually, or $156,000, in aggregate, per year, to ensure that the system technology is up to date and remains in compliance with the proposed rule.[359]

Moreover, as discussed above, exchanges would be required to produce monthly updates to the Exchange Transaction Fee Summary to capture realized average and median per share fees as well as any revisions to fee schedules made by the exchanges, which would be reflected in changes to base or top-tier fees and rebates, detailed in Section III.E.2. The Commission estimates that each month it would cost each exchange $530 to update the dataset of summary fees to reflect the updates to historical realized average and median per share fees and changes to the base and top-tier fees. This would require each exchange to make a total of 36 updates to the Exchange Transaction Fee Summary from the pre-Pilot Period through the post-Pilot Period, if the Commission determined that the proposed Pilot should continue for up to a second year and not automatically sunset at the end of the first year.[360] Each exchange would have total costs of updates to the Exchange Transaction Fee Summary of approximately $19,100 per exchange, or $248,300 among the 13 exchanges over the pilot duration, including pre- and post-periods.[361] If the proposed Pilot were to automatically sunset at the end of the first year, without the Commission determining that an extension for up to an additional year was needed, this would decrease the total number of updates to the Exchange Transaction Fee Summary to 24.[362] Under an automatic sunset at the end of the first year, each exchange would have total costs of updates to the Exchange Transaction Fee Summary of approximately $12,700 per exchange, or $165,100 among the 13 exchanges over the pilot duration, including pre- and post-periods.[363] As detailed above, the Commission preliminarily estimates that the costs associated with the monthly updates to the Exchange Transaction Fee Summary would be a small fraction of the costs associated with the initial allocation of fees required at the outset of the proposed Pilot.

As discussed in Section III, the proposal would require that the Exchange Transaction Fee Summary be published on the exchanges' websites using an XML schema to be published on the Commission's website. The Commission understands that there are varying costs associated with varying degrees of structuring. The Commission preliminarily believes that most of the exchanges already have experience applying the XML format to market data. For example, the exchanges and market participants regularly use the FIX protocol[364] and FpML[365] to exchange information on highly structured financial instruments and related market data.[366]

[356] The estimate is based on the following: [(Compliance Manager (2 hours) × $298) + (Senior Business Analyst (2 hours) × $265)] ≈ $1,130, or $1,130 × 13 equities exchanges ≈ $14,700 in aggregate. The burden hours are obtained from Section IV.J.1, *supra.*

[357] This estimate is based on the following: [(Compliance Manager (1 hours) × $298) + (Programmer Analyst (1 hours) × $232)] = $530 per exchange, or $530 × 13 U.S. equities exchanges ≈ $6,900 in aggregate. The burden hours are obtained from Section IV.J.1, *supra.*

[358] This estimate is based on the following, which reflects the Commission's experience with and burden estimates for SRO systems changes: [(Attorney (20 hours) × $401) + (Compliance Manager (20 hours) × $298) + (Programmer Analyst (20 hours) × $232) + (Senior Business Analyst (20 hours) × $265] ≈ $24,000 per exchange, or $24,000 × 13 exchanges ≈ $312,000 in aggregate. The burden hours are obtained from Section IV.J.1, *supra.*

[359] This estimate is based on the following, which reflects the Commission's experience with and burden estimates for SRO systems changes: [(Attorney (10 hours) × $401) + (Compliance Manager (10 hours) × $298) + (Programmer Analyst (10 hours) × $232) + (Senior Business Analyst (10 hours) × $265] ≈ $12,000 per exchange, or $12,000 × 13 exchanges ≈ $156,000 in aggregate. The burden hours are obtained from Section IV.J.1, *supra.*

[360] This estimate of updates to the Exchange Transaction Fee Summary is the aggregation of updates from the pre-Pilot Period (6), the two-year pilot period if the Commission determines that an extension of up to an additional year was needed (24), and the post-pilot period (6), for a total number of 36 updates.

[361] This estimate is based on the following: [(Compliance Manager (1 hours) × $298) + (Programmer Analyst (1 hours) × $232)] = $530 per exchange, or $530 × 36 fee changes per exchange ≈ $19,100. The 36 fee changes for the exchange encompass six updates during the six-month pre-Pilot Period, 24 updates during the two-year Pilot Period, assuming that the Commission determines that the additional year is required, and six updates during the six-month post-Pilot Period. In aggregate, updates to the Exchange Transaction Fee Summary are estimated to cost $19,100 × 13 U.S. equities exchanges ≈ $248,300. The burden hours are obtained from Section IV.J.1, *supra.*

[362] This estimate of updates to the Exchange Transaction Fee Summary is the aggregation of updates from the pre-Pilot Period (6), the one-year pilot period with an automatic sunset at the end of the first year (12), and the post-pilot period (6), for a total number of 24 updates.

[363] This estimate is based on the following: [(Compliance Manager (1 hours) × $298) + (Programmer Analyst (1 hours) × $232)] = $530 per exchange, or $530 × 24 fee changes per exchange ≈ $12,700. The 24 fee changes for the exchange encompass six updates during the six-month pre-Pilot Period, 12 updates during the one-year Pilot Period, assuming that the Commission determines that the additional year is not required and the Pilot is automatically sunset at the end of the first year, and six updates during the six-month post-Pilot Period. In aggregate, updates to the Exchange Transaction Fee Summary are estimated to cost $12,700 × 13 U.S. equities exchanges ≈ $165,100. The burden hours are obtained from Section IV.J.1, *supra.*

[364] The Financial Information eXchange (FIX) protocol is an electronic communications protocol that provides a non-proprietary, free and open XML standard for international real-time exchange of information related to the securities transactions and markets. *See https://www.fixtrading.org/.*

[365] FpML (Financial products Markup Language) is an open source XML standard for electronic dealing and processing of OTC derivatives. It establishes the industry protocol for sharing information on, and dealing in, financial derivatives and structured products. *See http://www.fpml.org/.*

[366] Most of the exchanges have at least some portion of their data available through XML

The Commission anticipates that implementation of the proposed Pilot's XML schema would draw upon exchange resources and experiences previously used to implement other supply chain information standards, like those discussed above, that were developed by industry consensus-based organizations. Costs generally associated with the implementation may include those for: Identifying the data required by the proposed Pilot within the exchange source systems; mapping the relevant fields in the exchanges' data source systems to the Commission's proposed XML schema; implementing, testing and executing the validation rules; and developing the website posting processes as required by the proposed rule. The initial costs to exchanges of complying with the Commission's proposed XML schema in order to publicly post the Exchange Transaction Fee Summary in this format would be $500 per exchange, or $6,500 in aggregate across the 13 exchanges.[367] For all updates to the Exchange Transaction Fee Summary, the Commission estimates that any burden associated with making those available using the XML schema is included in the costs of the updates discussed above.

d. Producing the Order Routing Data

The proposed rule also would require as part of the proposed Transaction Fee Pilot that exchanges would prepare, in pipe-delimited ASCII format, and publicly post on their websites, order routing data, updated monthly, containing aggregated and anonymized broker-dealer order routing information. As discussed in proposed Rule 610T(d) and in Section III.E.3, the datasets would contain separate order routing data for liquidity-providing and liquidity-taking orders aggregated by day, by security, by anonymized broker-dealer, and by exchange, each month.

The Commission preliminarily believes that as long as the CAT Phase 1 data are available at the implementation of the proposed Transaction Fee Pilot, the exchanges would be able to use that data to construct the order routing data required by the proposed rule. In particular, the CAT Data will include records for every order received by an exchange that indicate the member routing the order to the exchange and details regarding the type of security. The CAT Data will also include other information necessary to create the order routing data such as order type information, special handling instructions, and execution information. In the event that the CAT Phase 1 data were not available, the exchanges would have to use existing systems to collect the required order routing data.[368] Regardless of which system exchanges use for the order routing data, the Commission anticipates they would incur costs in producing the downloadable files containing aggregated and anonymized monthly order routing data to be posted publicly on the exchanges' websites. The proposal would require that the exchanges adhere to using the common broker-dealer anonymization key provided by a representative of the Commission in order to track and analyze the activity of a given broker-dealer across multiple exchanges. As discussed in Section III.E.3, the Commission would construct a broker-dealer anonymization code, which would be an anonymized code common to a broker-dealer across all exchanges using CRD information.

The exchanges would also be required to make public the aggregated, anonymized order routing data described in Section III.E.3. The proposal requires that the exchanges would make public each month a dataset of aggregated, anonymized data on order routing statistics, detailed in proposed Rule 610T(d), by day, by issuer, and by broker-dealer. The Commission estimates that each exchange would have a one-time cost of $24,000, or $312,000 in aggregate across the 13 exchanges, associated with the development and implementation of systems needed to aggregate and anonymize the order routing information, as well as store the data, in the pipe-delimited ASCII format specified by the proposed rule and as detailed in proposed Rule 610T(d).[369] The Commission anticipates that it would cost each exchange an additional $12,000 per year, or $156,000 in aggregate per year, to ensure that the system and storage technology is up to date and remains in compliance with the proposed rule.[370]

The proposed rule would require that exchanges produce monthly updates of the order routing data, and make them publicly available on their websites in pipe-delimited ASCII format by the end of the month, as detailed in Section III.E.3 and proposed Rule 610T(d). The Commission estimates that the publication and updates of the order routing dataset would cost $1,600 each month. This would require each exchange to make a total of 24 updates to the order routing data from the pre-Pilot Period through the post-Pilot Period, if the proposed Pilot were to automatically sunset at the end of the first year. Each exchange would have recurring costs of updates to the order routing data of approximately $57,600 per exchange, or $748,800 among the 13 exchanges over the entire duration of the Pilot, and the pre-Pilot and post-Pilot periods.[371] If the Commission were

formats. For instance, the NYSE Group of exchanges provides daily closing prices, among other data, in XML, Excel, and pipe-delimited ASCII, while the Nasdaq exchanges (Nasdaq, BX, and PHLX) and Cboe exchanges (Cboe BZX, Cboe BYX, Cboe EDGA, and Cboe EDGX), provide daily share volume data, among other data, in XML. Information on the use of XML by exchanges is *available at www.nyse.com, www.nasdaqomx.com, www.cboe.com*, for the NYSE, Nasdaq, and Cboe exchange groups, respectively, and was obtained from a staff review of information on publicly available exchange websites. The Commission was unable to obtain information from CHX or IEX on their use of XML from information available on their publicly available websites.

[367] This estimate is based on the following, which reflects the Commission's experience with and burden estimates for systems changes to map to an XML schema: [(Programmer Analyst (1 hours) × $232) + (Senior Business Analyst (1 hours) × $265] ≈ $500 per exchange, or $500 × 13 exchanges ≈ $6,500 in aggregate. *See* Securities Exchange Act Release No. 78309 (July 13, 2016), 81 FR 49431, 49475 (July 27, 2016) (''Disclosure of Order Handling Information''). The estimate is lower than that for proposed Rule 606 disclosures because the costs for those disclosures encompassed many additional requirements beyond the mapping to an XML schema.

[368] The Commission acknowledged the use of CAT for future pilots in its Approval Order of the CAT NMS Plan. *See* note 172 *supra.* The Commission is aware that much of the data produced by the CAT are highly sensitive and if not properly anonymized and aggregated could reveal personally identifiable information (PII) at the investor level or proprietary trading strategies at the broker-dealer level. Accordingly, the exchanges would only make public as part of the Transaction Fee Pilot order routing data that are aggregated on a daily basis and anonymized of broker-dealers to minimize the potential for revelation or reverse engineering of proprietary order routing decisions.

[369] This estimate is based on the following, which reflects the Commission's experience with and burden estimates for SRO systems changes: [(Attorney (20 hours) × $401) + (Compliance Manager (20 hours) × $298) + (Programmer Analyst (20 hours) × $232) + (Senior Business Analyst (20 hours) × $265] ≈ $24,000 per exchange, or $24,000 × 13 exchanges ≈ $312,000 in aggregate. The burden hours are obtained from Section IV.J.1, *supra.*

[370] This estimate is based on the following, which reflects the Commission's experience with and burden estimates for SRO systems changes: [(Attorney (10 hours) × $401) + (Compliance Manager (10 hours) × $298) + (Programmer Analyst (10 hours) × $232) + (Senior Business Analyst (10 hours) × $265] ≈ $12,000 per exchange, or $11,960 × 13 exchanges ≈ $156,000 in aggregate. The burden hours are obtained from Section IV.J.1, *supra.*

[371] This estimate is based on the following: [(Compliance Manager (3 hours) × $298) + (Programmer Analyst (3 hours) × $232)] ≈ $1,600 per exchange, or $1,600 × 36 fee changes per exchange ≈ $57,600. The burden hours are obtained from Section IV.J.1, *supra.* The 36 updates to the order routing data for each exchange encompass six updates during the six-month pre-Pilot Period, 24 updates during the two-year Pilot Period, assuming that the Commission determines at the end of the

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to allow the proposed Pilot to automatically sunset at the end of the first year, this would decrease the total number of monthly updates to the order routing data by 12 to 24.[372] Under the automatic sunset, each exchange would have recurring costs of updates to the order routing data of approximately $38,400 per exchange, or $499,200 among the 13 exchanges over a one-year Pilot, and the pre-Pilot and post-Pilot periods.[373]

e. Fee-Related Costs to Exchanges

At the outset of the proposed Pilot, each equities exchange would need to provide to the Commission a comprehensive Form 19b–4 fee filing reflecting all of the applicable fees and rebates relevant to each of the three Pilot Test Groups, as well as the Control Group—to reflect the temporary changes to transaction-based fees and rebates as a result of the proposed Pilot. The Commission anticipates considerable costs associated with and time devoted by each exchange to optimally assign fees and rebates across Test Groups, within the parameters allowed by the proposed Pilot, including any incentives, tiers, caps, and discounts available. The Commission estimates that it would cost $48,400 per-exchange for the initial Form 19b–4 fee filing or $629,200 in aggregate.[374] The Commission further anticipates that exchanges would bear similar costs upon the completion of the proposed Pilot to prepare Form 19b–4 fee filings for the Commission.

In addition to the initial production of the Form 19b–4 fee filing at the outset of the proposed Pilot, exchanges may also choose to make periodic updates to their fee and rebate schedules, and provide Form 19b–4 fee filings to notify the Commission and the public of those updates. As noted in the baseline, the average exchange makes approximately seven changes to its fee schedules per year. While recognizing the possibility that as a result of the proposed Pilot, exchanges may revise their fee schedules more or less often during the proposed Pilot, the Commission has no basis to expect an increase in the number of Form 19b–4 fee filings other than at the beginning or end of the proposed Pilot and has no basis to expect a decrease.

The Commission also recognizes that as an outcome of the proposed Pilot, the complexity of the Form 19b–4 fee filings could increase, thereby increasing the overall costs for exchanges to revise their fee and rebate schedules.[375] As discussed above, the proposed Pilot would require exchanges to design multiple new fee structures for each of the test groups, which would then translate into additional information in each Form 19b–4 fee filing submitted during the proposed Pilot. These costs are likely to increase because the exchanges could take considerably more time to design and describe fee structures in each filing than they do designing fee structures today. As discussed above in the baseline, the average fee schedules of exchanges are complex, with many different categories of fees or rebates assessed to NMS stocks (including ETPs). Assuming the frequency remains constant, then the proposed Pilot could increase the incremental costs incurred by exchanges to file the expected Form 19b–4 fee filings during the proposed Pilot.[376] The additional costs would only be relevant for Form 19b–4 fee filings that occur during the proposed Pilot Period, and would not apply to Form 19b–4 fee filings in the pre-Pilot or post-Pilot Periods, as the Commission does not believe that there will be any incremental costs associated with increased complexity of these filings during these periods. The Commission estimates that each exchange would bear an incremental cost of $10,600 per Form 19b–4 fee filing to account for the increased complexity associated with the requirements of the proposed Pilot, or $1,930,000 for the anticipated 182 Form 19b–4 fee filings for fee and rebate revisions across the 13 U.S. equities exchanges during the two-year pilot duration.[377] If the proposed Pilot were to automatically sunset at the end of the first year, the Commission estimates that exchanges would bear costs of approximately $965,000 for the anticipated 91 Form 19b–4 filings for fee and rebate revisions across the 13 U.S. equities exchanges during the first year of the Pilot duration.

f. Other Costs Associated With the Proposed Transaction Fee Pilot

As discussed in further detail below, the Commission preliminarily believes that many of the other likely costs of this proposal would be temporary in nature and affect markets only for the duration of the proposed Pilot. For instance, more complicated fee structures could also increase an exchange's processing costs of tracking and calculating monthly invoices for its members during the proposed Pilot; however, the Commission does not have any information on the costs to exchanges for tracking and calculating monthly member invoices and therefore cannot provide estimates of quantified costs. The following section includes discussion of implementation costs for broker-dealers, the temporary effect on

first year that it shall continue the proposed Pilot for up to an additional year, and six updates during the six-month post-pilot period. In aggregate, updates to the order routing data are estimated to cost $57,600 × 13 U.S. equities exchanges ≈ $748,800.

[372] This estimate of updates to the order routing data is the aggregation of updates from the pre-Pilot Period (6), the one-year Pilot Period assuming that the Commission allows the Pilot to automatically sunset at the end of the first year (12), and the post-Pilot Period (6), for a total number of 24 updates.

[373] This estimate is based on the following: [(Compliance Manager (3 hours) × $298) + (Programmer Analyst (3 hours) × $232)] ≈ $1,600 per exchange, or $1,600 × 24 fee changes per exchange ≈ $38,400. The burden hours are obtained from Section IV.J.1, *supra.* The 24 updates to the order routing data for each exchange encompass six updates during the six-month pre-Pilot Period, 12 updates during the first year of the Pilot Period, assuming that the Commission determines at the end of the first year that it shall automatically sunset the proposed Pilot, and six updates during the six-month post-pilot period. In aggregate, updates to the order routing data are estimated to cost $38,400 × 13 U.S. equities exchanges ≈ $499,200.

[374] The estimate is based on the following: [(Attorney (40 hours) × $401) + (Compliance Attorney (40 hours) × $352) + (Assistant General Counsel (25 hours) × $449) + (Director of Compliance (15 hours) × $470)] ≈ $48,400, or $48,400 × 13 equities exchanges ≈ $629,200 in aggregate. *See* OMB Control No. 3235–0045 (August 19, 2016), 81 FR 57946 (August 24, 2016) (''Request to OMB for Extension of Rule 19b–4 and Form 19b–4 Filings'').

[375] The Commission preliminarily believes that the inclusion of Linked Pricing prohibitions for Test Group 3 should not increase the complexity of Form 19b–4 filings for exchanges because many exchanges already report non-cash incentives, such as tiered pricing or volume discounts, as part of their standard filings. Further, the Commission does not believe that exchanges currently use Linked Pricing mechanisms and instead most rely on rebates.

[376] Maintaining the current average frequency of 7 19b–4 filings per year would mean that the average exchange would file a total of 14 19b–4 filings during the two-year pilot (7 filings × 2 year duration). If the Commission were to allow the proposed Pilot to automatically sunset at the end of the first year, then the total number of 19b–4 filings could decrease by 7 filings. Annually, across all 13 exchanges, the Commission preliminarily estimates that there will be 91 19b–4 filings (7 filings × 13 exchanges). If the Commission determines that the proposed Pilot shall continue for a second year, in aggregate, the 13 exchanges could file a total of 182 19b–4 filings (91 × two-year Pilot duration).

[377] The estimate is based on the following: [(Attorney (8 hours) × $401) + (Compliance Attorney (8 hours) × $352) + (Assistant General Counsel (6 hours) × $449) + (Director of Compliance (4 hours) × $470)] ≈ $10,600, or $10,600 × 182 fee changes in aggregate across 13 exchanges over the two-year pilot duration ≈ $1,930,000 in aggregate, assuming that the Commission determines that the proposed Pilot shall continue for up to an additional year. If the proposed Pilot were to automatically sunset after the first year, the Commission preliminarily believes that the costs associated with 91 19b–4 filings (13 exchanges × 7 filings) would be approximately $965,000 ($10,600 × 91 filings). *See* Request to OMB for Extension of Rule 19b–4 and Form 19b–4 Filings, *supra* note 374.

brokerage commissions, the effects to exchanges of liquidity externalities and complexity, and costs associated with the overlap with the Tick Size Pilot.

In addition to the compliance costs for exchanges associated with the implementation of the proposed Pilot, exchanges also may experience a change to their revenues associated with transaction-based fees and rebates. As discussed in the baseline, the exchange groups NYSE Group, Nasdaq, and BATS Global Markets, had net transaction-fee revenue of $223 million, $564 million, and $177 million, respectively, in 2016 as obtained from their Form 10–K or Form 10–Q filings. As discussed in more detail below, the margin between fees and rebates ranges from $0.0001 to $0.0005.[378] If the margin were $0.0005, exchanges could have no reduction in their overall net revenues (fees less rebates). If, instead, the margin is less than $0.0005, then exchanges could experience a decline in revenues attributable to securities in Test Group 2, if they continue to provide a nominal rebate to broker-dealers as an inducement to route orders to that exchange. Moreover, because Test Group 3 would prohibit rebates or Linked Pricing without changing the fee cap, exchanges would have incentives to charge higher fees than a competitive equilibrium would suggest, subsidizing any shortfall in revenues arising from Test Group 2. Competitive pressures arising from other market participants, including ATSs, could affect the success of any attempted revenue subsidization by exchanges through increased fees.

As noted above, the Commission preliminarily estimates that the only test group that could result in reduced revenues for exchanges is Test Group 2. Below, the Commission estimates a possible range of effects to the monthly revenues in aggregate across exchanges depending on the magnitude of the rebate that they could pay. Given that fees and rebates are interconnected, the Commission preliminarily assumes that as fees are reduced as a requirement of the proposed Pilot, exchanges will similarly reduce rebates paid; therefore, the Commission preliminarily believes that exchanges are unlikely to pay rebates in excess of the maximum fee permitted in a given test group. The maximum per share revenue for Test Group 2 would then be $0.0005, with a minimum of $0.0000, depending on whether the exchange paid no rebate or a rebate of $0.0005, respectively, which would leave the exchange net revenue neutral before operating costs under the second scenario. Assuming that the share volume in Test Group 2 would be one-sixth of the total share volume across all securities,[379] using data from Table 3 in the baseline, Test Group 2 would have share volume of approximately 15.3 billion each month.[380] Under the scenario where exchanges paid no rebates in Test Group 2, the Commission preliminarily anticipates no change in revenue, assuming that the margin between fee revenue and rebate cost of $0.0005.[381] If, instead, exchanges paid rebates of $0.0005, where the net capture would be zero for Test Group 2, this would lead to a monthly aggregate shortfall in revenues across all exchanges of $7,650,000.[382] At the exchange level, Nasdaq, which has the largest monthly volume percentage (23%), would have a monthly shortfall of $1,760,000.[383] If exchanges are likely to have similar share volume each month, then the annual average shortfall across all exchanges would be $91.8 million. Compared to the margin between fee revenue and the cost of rebates for the publicly traded exchanges, detailed in the baseline, the annual revenue shortfall would be approximately 9.5%.[384] If the net capture on exchanges is less than $0.0005, on average, then exchanges could either maintain their current margin between fees and rebates (*e.g.,* if the net capture is $0.0003, then exchanges could reduce rebates to $0.0002) or could increase the margin by reducing rebates even further (*e.g.,* reduce rebates to $0.0001, and increase net capture to $0.0004).

Although the costs of compliance with the proposed Pilot primarily affect the exchanges, broker-dealers and other market participants are also likely to have implementation costs as a result of the proposed Pilot, if they decide to alter their behavior in response to the Pilot. For instance, many broker-dealers have smart-order routing systems that use algorithms to route orders based on certain criteria, such as fill rates, time to execution, or highest rebates.[385] In response to the proposed Pilot, market participants that use smart-order routers could have a one-time cost at the onset (and the conclusion) of the Pilot to adjust their algorithms to reflect the shocks to transaction-based fees. In the absence of smart-order routers, market participants could still need to adjust the execution determinations to take advantage of the changes implemented during the proposed Pilot. The Commission preliminarily believes that the costs associated with updating the execution algorithms by broker-dealers are likely to be more costly than the periodic adjustments that broker-dealers may make to incorporate changes to fee schedules implemented by exchanges because they are likely to require more complex programming that segments stocks into different fee regimes, rather than just altering codes or inputs.

The Commission preliminarily believes that broker-dealers that are members of exchanges already have in place order routing systems, whether smart order routers or algorithmic trading programs that route orders to exchanges for which they are members. Therefore, the Commission does not expect that broker-dealers would need to bear start-up costs associated with implementing new order routing systems as a result of the proposed Pilot,

[378] *See* Section V.D.2 *infra.*

[379] As designed, the proposed Pilot would allocate an equal number of securities to the three test groups and the control group (*i.e.,* the test groups combined would have 50% of the NMS securities and the control group would have 50%). Each test group would have one-third of the combined test group allocation, thereby, in total leaving each test group with one-sixth of the securities included in the proposed Pilot. Assuming that the allocation of share volume would be similar due to the stratification of the sample discussed above, each test group would have one-sixth of total share volume each month.

[380] Table 3 in the baseline shows aggregate exchange share volume for July 2017 was 91.7 billion shares, of which one-sixth would be 15.3 billion shares. Further, the Commission preliminarily estimates that these volume figures would be similar across all months, assuming no seasonality in share volume.

[381] In addition, an exchange could have no change in net margin if its current margin is between $0.0005 and $0.0010 and the exchange charged for both taking and making liquidity. However, the effect of charging both sides on net revenues is unknown because charging both sides could change the nature of the exchange's order flow.

[382] If Test Group 2 has monthly share volume of 15.3 billion shares, then the revenue shortfall is estimated to be 15.3 billion × $0.0005 ≈ $7,650,000.

[383] As shown in Table 3, Nasdaq's July 2017 shares are 21.2 billion. Nasdaq's overall share is 21.2/91.7 ≈ 23%. The Commission estimates the monthly revenue shortfall for Nasdaq to be 0.23 × $7,650,000 ≈ $1,760,000.

[384] In aggregate, the NYSE Group, Nasdaq, and BATS Global Markets earned a margin between fee revenues and costs of rebates of approximately $960 million in 2016. If the revenue shortfall was $92 million, then the percentage shortfall would be $92 million/$960 million ≈ 9.5%. However, this is likely to be too high since BATS Global Markets only reported financial statements for the first nine months of 2016. In the nine-months ending September 2016, BATS earned a margin between fee revenues and costs of rebates of approximately $177 million. Assuming that BATS earned revenues at a constant rate throughout the year, then the 12-month margin would have been $236 million ($177 million/9 months = $x million/12 months, x = $236 million). In that case, the aggregate margin would have increased from $960 million to $1.023 billion, which would have reduced the percentage shortfall from approximately 9.5% to 9.0% ($92 million/$1.023 billion).

[385] *See* Bacidore, Otero, and Vasa, *supra* note 235, which found that smart-order routers designed to maximize rebates delivered worse execution quality to their clients.

and would only need to make modifications to the existing code to capture changes in fees and rebates associated with each test group of securities. The Commission estimates that the costs to broker-dealers that are members of exchanges to make the initial adjustment to their order routing systems at the outset of the proposed Pilot would be $8,700 per broker-dealer, or $3,741,000 in aggregate across the 430 broker-dealers that are currently members of equities exchanges.[386] The Commission further estimates that broker-dealers would bear a similar cost to alter their order routing systems at the conclusion of the proposed Pilot.

As a result of the proposed Pilot, the Commission expects that broker-dealers would make adjustments to their order routing systems associated with changes to fees or rebates submitted by exchanges through Form 19b–4 fee filings to the Commission. As discussed in the baseline, exchanges, on average, make changes to fees or rebates approximately seven times per year; therefore, broker-dealers are likely to have experience in adjusting the order routing systems to reflect these routine changes to fees and rebates. Although broker-dealers have experience with revisions to exchange fee and rebate schedules, due to the added complexity of having to adjust and update multiple modules within their order routing systems, broker-dealers are likely to face higher costs per adjustment as a result of the proposed Pilot. The Commission preliminarily believes that the per-adjustment costs associated with these changes are likely to be a small fraction of the costs associated with the initial costs of updating the routing systems to reflect the required fee and rebate revisions at the outset of the proposed Pilot. The Commission estimates that the additional costs to broker-dealers that are members of exchanges to make periodic adjustments to their order routing systems to reflect changes in fees and rebates would be $265 per adjustment, or $114,000 in aggregate across the 430 broker-dealers that are members of U.S. equities exchanges.[387]

As shown above, the Commission preliminarily expects that exchanges, if submitting changes to fees and rebates at the same rate as they have in the last five years, would submit 182 total revisions to fees and rebates over the pilot duration, if the Pilot were to automatically sunset at the end of the first year. Therefore, the aggregate costs of updating order routing systems would be $48,200 per broker-dealer, or $20,726,000 in total across all broker-dealers.[388] If the Pilot were to automatically sunset at the end of the first year, the aggregate costs of updating order routing systems would be $24,100 per broker-dealer, or $10,363,000 in total across all broker-dealers. The Commission notes, however, that these estimates may be overstated, as not all broker-dealers are members of all exchanges, which would reduce the total number of changes to the order-routing systems that they would implement. Therefore, the Commission preliminarily believes that the costs to broker-dealers of adjusting their order routing systems as a results of the proposed Pilot are nominal, and each broker-dealer would spend on average approximately $67,000 to update their systems over the entire proposed Pilot Period.[389] If the Commission determined that the proposed Pilot shall automatically sunset at the end of the first year, then the costs associated with these updates would be approximately $42,900 per broker-dealer. Moreover, as noted above, this estimate assumes that broker-dealers are members of all 13 U.S. equities exchanges, whereas many are members of only a subset of exchanges, which would further reduce the costs of updating their order routing systems.

Exchanges and broker-dealers could also bear an increased cost of complexity associated with the exogenous shocks to the fees and rebates as required by the various test groups. As of July 2017, exchanges have 24 fee categories and 21 rebate categories, on average. If exchanges maintain the same level of complexity in their fee schedules during the proposed Pilot, up to a four-fold increase in the number of fee and rebate categories could occur, which would increase complexity for the exchanges, and would also increase complexity for broker-dealers who incorporate fees into their order routing decisions. Although the proposal would require exchanges to report a fee dataset as well as any changes to those fees, the exchanges may not simplify their actual fee schedules. For the duration of the proposed Pilot, however, the exchanges could resort to simplified fee schedules relative to the current baseline to reduce the costs of complying with the proposed Pilot.

Beyond the implementation and compliance costs for exchanges and broker-dealers associated with the proposed Transaction Fee Pilot, a number of temporary costs could be borne by investors as a result of the Pilot. The changes to the transaction-based fee structure could lead to temporary, suboptimal outcomes for market participants, such as short-lived increases in brokerage commissions. It has been shown in several studies that brokerage commissions today are at historically low levels.[390] Brokerage clients seeking simplicity in their overall cost structure may have a preference for low commissions and increased services provided by broker-dealers, and in turn, may allow broker-dealers to capture rebates (and bear the costs of access fees), either through explicit contracts or implicit agreements.[391] As a result, the proposed Pilot could lead to higher overall commissions as rebates obtained by broker-dealers fall, thereby temporarily reducing the overall welfare of retail brokerage clients as a result of increased commissions.[392]

[386] This estimate is based on the following, which reflects the Commission's experiences with and burden estimates for broker-dealer systems changes: [(Attorney (5 hours) × $401) + (Compliance Manager (10 hours) × $298) + (Programmer Analyst (10 hours) × $232) + (Senior Business Analyst (5 hours) × $265)] ≈ $8,700 per broker-dealer that is a member of at least one exchange. As of December 31, 2016, 430 unique broker-dealers were members of exchanges (Form X–17a–5). The aggregate costs of updating order routing systems to reflect the proposed Transaction Fee Pilot requirements would cost $8,700 × 430 ≈ $3,741,000.

[387] This estimate is based on the following, which reflects the Commission's experiences with and burden estimates for broker-dealer systems changes: [(Compliance Manager (0.5 hours) × $298) + (Programmer Analyst (0.5 hours) × $232)] = $265 per broker-dealer that is a member of at least one exchange. The aggregate costs updating order routing systems to reflect the periodic fee and rebate revisions would cost $265 × 430 ≈ $114,000.

[388] If 182 total fee and rebate changes were to occur over the duration of the proposed Pilot (13 equities exchanges × 7 revisions per year × 2 years = 182), each broker-dealer would bear costs of updating its order routing systems of $265 × 182 ≈ $48,200, or $20,726,000 ($48,200 × 430) in aggregate across all broker-dealers over the first year of the proposed Pilot. The Commission estimates that costs would be approximately $10,363,000 ($265 × 13 exchanges × 7 updates × 430 broker-dealers) if the Commission determined that proposed Pilot automatically sunset at the end of the first year.

[389] These costs reflect the costs of approximately $9,000 at the outset of the proposed Pilot to update the order routing system to reflect the changes to the fee structure for securities in the test groups, approximately $49,000 to reflect the incremental costs of the estimated 182 revisions to fee schedules during the proposed Pilot ($530 per revisions × 7 revisions per year × 2 years × 13 exchanges), and $9,000 at the conclusion of the proposed Pilot to unwind changes to the order routing systems, for a total of $67,000 per broker-dealer. If the proposed Pilot were to automatically sunset at the end of one year, then these costs would be approximately $42,900 ($530 × 7 revisions × 13 exchanges) per broker-dealer. *See supra* note 338 and the accompanying text.

[390] *See* Angel, Harris, and Spatt, *supra* notes 106 and 216.

[391] *See supra* note 37. *See also* O'Donoghue, *supra* note 24.

[392] The Commission acknowledges differing effects on brokerage commissions could occur as a result of the proposed Pilot depending on whether the client is a retail customer versus an institutional

For instance, the elimination of rebates or Linked Pricing in Test Group 3 could result in a transfer from broker-dealers to exchanges. Assuming, as discussed above,[393] the margin between fees and rebates is $0.0002 per share, with access fees of $0.0030 per share and rebates of $0.0028 per share, Test Group 3 could result in a transfer of $0.0028 from broker-dealers to the exchanges, particularly because exchanges would be prohibited from offering Linked Pricing mechanisms that could act as substitutes for cash rebates.[394] Following this example, and using the same estimation procedure to calculate costs to exchanges attributable to the reduction in fees in Test Group 2, the estimates of the potential increased revenue to exchanges are as follows. Assuming that the share volume in Test Group 3 would be one-sixth of the total share volume across all securities,[395] using data from Table 3 in the baseline, Test Group 3 would have share volume of approximately 15.3 billion each month.[396] If the margin between fee revenue and rebate cost is $0.0002, as discussed above, then under the assumption that exchanges reduce fees to $0.0002 in Test Group 3, the Commission preliminarily anticipates no change in revenue for exchanges, and no transfer from broker-dealers. If, instead, exchanges charged fees of $0.0030 while prohibited from paying rebates or Linked Pricing in Test Group 3, the Commission preliminarily estimates a monthly aggregate increase in revenues across all exchanges of $42,840,000.[397] If exchanges are likely to have similar share volume each month, then the estimated annual average increase in revenues across all exchanges would be $514.1 million. This transfer of rebates from the broker-dealers to exchanges could feasibly increase exchange revenue by approximately 53.6%.[398] Moreover, these costs could likely fall to investors in the form of higher commissions or fees charged to cover the decrease in broker-dealer revenue due to losses in rebates for securities in Test Group 3.

The Commission further acknowledges that if brokerage commissions were to increase as a result of the proposed Pilot, broker-dealers could continue to charge higher commissions even after the conclusion of the proposed Pilot. However, due to competition among broker-dealers, including the proliferation of low-cost online broker-dealers, the Commission preliminarily believes that broker-dealers would be unlikely to significantly increase brokerage commissions as a result of the proposed Pilot.[399]

As a result of the proposed Pilot, effective bid-ask spreads could temporarily widen for securities in certain test groups due to the elimination or reduction of rebates. According to one study, transaction-based rebates could serve to artificially lower the NBBO, which could lower the trading costs to investors.[400] This reasoning suggests that wider effective bid-ask spreads could temporarily increase transactions costs for internalized order flow or orders routed to ATSs that execute based on the NBBO, which would predominantly impact retail investors, as well as for orders executing on exchanges. However, any potential degradation of the effective bid-ask spread due to lower or reduced rebates could be mitigated by lower access fees.

The reduction or elimination of rebates could also particularly affect smaller exchanges due to the liquidity externality. As liquidity tends to consolidate for reasons discussed in Section V.A.2, the restrictions on rebates as a result of the proposed Pilot could harm smaller exchanges that perhaps compete by paying large rebates rather than by producing better prices or execution quality. In the short run, this could lead to lost revenue for these exchanges, and potentially could have longer-term effects if smaller exchanges consolidate or exit as a result of the proposed Pilot. As discussed above, using available data, the Commission estimates that aggregate revenue shortfalls for exchanges are likely to range between zero and $92 million annually.[401]

Markets may also temporarily become even more complex as a result of the proposed Pilot. Exchanges could promote additional order types and may even initiate new types of markets as a result of the proposed Pilot, which would only serve to further fragment markets and add to their complexity, the costs of which could be borne by investors. The Commission preliminarily believes, however, that a new exchange registered in response to the Pilot would be unlikely to become operational before the conclusion of the proposed Pilot.

Simultaneously subjecting a subset of NMS securities to both the Tick Size Pilot and the proposed Transaction Fee Pilot could increase potential costs to issuers, particularly for small-capitalization issuers, to the extent that any overlap between the pilots could occur. Small issuers that could be subject to both pilots are most likely to face adverse liquidity environments, and therefore, are most likely to have ramifications to their liquidity, such as larger spreads, as a result of the simultaneity of the pilots. Longer term, if the temporary impacts on liquidity acutely affect some firms, it could affect capital formation for these securities and could lead to the potential exit of these issuers from the capital markets, through acquisition or delisting, as these

customer. For instance, some brokerage accounts charge per-transaction commissions to retail clients (*e.g.,* Fidelity charges $4.95 per trade, *www.fidelity.com*, while TD Ameritrade charges $6.95 per trade, *www.tdameritrade.com*). Institutional commissions, on the other hand, are highly negotiated and may be based on something other than a per trade or per share basis, such as a flat fee for use of a broker's order routing algorithm; however, data on the structure or magnitude of institutional commissions is not publicly available.

[393] *See supra* note 28.

[394] Although the Commission preliminarily believes that competition among exchanges would drive access fees down for Test Group 3 as a result of the elimination of rebates, exchanges could charge access fees as high as the current cap of $0.0030.

[395] As designed, the Pilot would allocate an equal number of securities to the three test groups and the control group (*i.e.,* the test groups combined would have 50% of the NMS securities and the control group would have 50%). Each test group would have one-third of the combined test group allocation, thereby, in total leaving each test group with one-sixth of the securities included in the pilot. Assuming that the allocation of share volume would be similar due to the stratification of the sample discussed above, each test group would have one-sixth of total share volume each month.

[396] Table 3 in the baseline shows aggregate exchange share volume for July 2017 was 91.7 billion shares, of which one-sixth would be 15.3 billion shares. Further, the Commission preliminarily estimates that these volume figures would be similar across all months, assuming no seasonality in share volume.

[397] If Test Group 3 has monthly share volume of 15.3 billion shares, and the margin would increase by $0.0028 ($0.0030 − $0.0002), the revenue increase per month is estimated to be 15.3 billion × $0.0028 ≈ $42,840,000.

[398] In aggregate, the NYSE Group, Nasdaq, and BATS Global Markets earned a margin between fee revenues and costs of rebates of approximately $960 million in 2016. If the estimated margin increased by $514.1 million, then the percentage increase in this margin would be $514.1 million/$960 million ≈ 53.6%. However, this is likely to be too high since BATS Global Markets only reported financial statements for the first nine months of 2016. In the nine-months ending September 2016, BATS earned a margin between fee revenues and costs of rebates of approximately $177 million. Assuming that BATS earned revenues at a constant rate throughout the year, then the 12-month margin would have been $236 million ($177 million/9 months = $× million/12 months, × = $236 million). In that case, the aggregate margin would have increased from $960 million to $1.023 billion, which would have reduced the percentage increase from approximately 53.6% to 50.3% ($514.1 million/ $1.023 billion).

[399] *See* Section V.B.2.a *supra,* which discusses the competitive environment for broker-dealer services.

[400] *See* Angel, Harris, and Spatt, *supra* note 106.

[401] *See* Section V.C.2.a *supra,* for the estimates of revenue shortfalls that could occur as a result of the proposed Pilot.

small issuers are least likely to be able to ride out negative liquidity shocks. Instead, the proposed Pilot could lead some issuers to delay entering the capital markets for the duration of the proposed Pilot.[402]

Separately, the implementation costs to exchanges associated with running two pilots on subsets of the same securities could have significant costs related to the complexity of multiple pilots, to the extent that the pilots could overlap. Although the exchanges already have operational experience with implementing the Tick Size Pilot, the costs of implementation provided above could be underestimated because of the complexity of tracking the same issuers within multiple pilots. For instance, the Commission preliminarily estimates that it will cost $3,720 per exchange to construct its initial Pilot Securities Exchange List, and $33,400 annually to update this list daily. Because exchanges may have to identify securities that are in both the Transaction Fee Pilot and the Tick Size Pilot for some period of time, the costs of producing the Pilot Securities Exchange List could exceed these values.[403] The Commission, therefore, preliminarily believes that any excess costs are likely to be proportional to the duration of the overlap between the Tick Size Pilot and the proposed Transaction Fee Pilot.[404]

D. Impact on Efficiency, Competition, and Capital Formation

Exchange Act Section 3(f) requires the Commission when engaging in rulemaking to consider or determine whether an action is necessary or appropriate in the public interest, and to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.[405] As discussed in further detail below, the Commission preliminarily believes that any of the direct effects of this proposal on efficiency, competition and capital formation would likely be temporary in nature and affect markets only for the duration of the proposed Pilot. The Commission preliminarily believes that the information obtained as a result of the proposed Transaction Fee Pilot could improve regulatory efficiency, because analyses of this data are likely to provide a more representative view of the effect of transaction-based fees on order routing decisions than would be available to the Commission in the absence of the proposed Pilot. Further, the proposed Pilot may have a number of temporary effects on price efficiency, the competitive dynamics between exchanges and off-exchange trading venues in the market for trading services, and on capital formation, particularly for small issuers.

As discussed above, a primary benefit of the proposed Pilot is that it would produce data that will be relevant for the Commission's consideration of the economic effects of transaction-based fees. The data obtained from the proposed Transaction Fee Pilot would provide information not currently available to the Commission about the role of transaction-based fees in the market for trading services and how that affects competition between exchanges and with off-exchange trading centers.

1. Efficiency

The proposed Transaction Fee Pilot would provide the Commission with an opportunity to empirically examine the effects of an exogenous shock to transaction fees and rebates order routing behavior, execution quality and market quality. Insofar as the data produced by the proposed Pilot permits the Commission and the public to evaluate and comment upon the potential impacts of alternative policy options, the proposal may promote regulatory efficiency. In the absence of the proposed Pilot, the Commission would have to rely on currently-available data to inform future policy decisions related to transaction-based fees and data limitations may impair the efficiency of policy decisions based on this information.

The temporary efficiency impacts the Commission expects during the proposed Pilot depend on how the proposed Pilot fee and rebate restrictions proposed for the three test groups balance the interests of different groups of market participants. For example, if during the Pilot, the lower fee caps and no-rebate restriction induced by the proposed Pilot cause broker-dealers to be more likely to route customer orders to trading centers with better pricing, higher speed of execution, or higher probability of execution, rather than to trading centers with the largest rebates, the proposed Pilot may temporarily improve the efficiency of capital allocation by lowering execution costs. Efficiency of capital allocation could be reduced if, as a response to the loss in revenue from rebates, broker-dealers increase commissions or fees charged to customers. Higher commissions or fees could reduce customers' willingness to trade or could lead to a lower injection of capital into the markets by investors because a larger fraction of each investable dollar would go to compensate broker-dealers for the lost revenue. However, because rebates are generally accompanied by higher access fees, the overall costs to broker-dealers to route orders to exchanges could decline for some test groups, which could lead to a decrease in commissions or fees and temporarily increase the efficiency of capital allocation.

For the duration of the proposed Transaction Fee Pilot, lower access fees could improve liquidity of stocks and ETPs in some test groups, by reducing the costs to execute marketable orders. As marketable orders become less costly, these orders are likely to be routed to exchanges with lower access fees, improving execution quality and possibly creating a liquidity externality, whereby lower access fee venues will become the preferred trading center for marketable and non-marketable orders.[406] An increase in liquidity could improve informational efficiency by allowing securities prices to adjust more quickly to changes in fundamentals.

As a result of the proposed Pilot, price efficiency might also improve; quoted spreads also may more closely reflect the net cost of trading and could temporarily increase price transparency for securities in certain test groups. Currently, broker-dealers do not relay information about amounts of fees paid or rebates received on trades to their customers, thereby limiting the transparency of the total costs incurred to execute a trade. The proposed Pilot would not mandate disclosure by the exchanges or the broker-dealers of order-level transaction-based fees; and therefore, will not resolve the limitations to transparency of the total fees paid and rebates received by broker-dealers discussed above. As fees decline or rebates are removed in some

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[402] If rebates are associated with increased liquidity, particularly for small issuers, then prohibitions on rebates or Linked Pricing could adversely affect those firms. However, the Commission preliminarily believes that exempting registered market makers from the prohibition on non-rebate incentives could lessen the impact to liquidity for small issuers.

[403] *See supra* note 353.

[404] If such overlap occurred, and was limited to the pre-Pilot data collection period for the proposed Transaction Fee Pilot, the additional costs related to implementation, complexity, and uncertainty could be minimal because the two pilots would not operate simultaneously. As discussed in Section V.C.1.a.i.A, *supra,* the Commission preliminarily believes that any overlap could be minimal. *See also supra* note 342 for a discussion of the potential statistical power of testing the joint effects of the two pilots simultaneously. The Commission is cognizant that a longer overlap could be costly to market participants.

[405] *See* 15 U.S.C. 78c(f).

[406] As discussed in detail above, improvements in execution quality could present as better prices for execution, higher probability of execution, and faster time to execution. *See supra* note 215.

test groups, however, the deviation in the net cost of trading from the quoted spread could shrink, thereby at least partially improving price transparency for the duration of the proposed Pilot, and temporarily improving pricing efficiency and price discovery. Therefore, as an additional benefit of the proposed Pilot, the Commission could also examine the temporary effect of revisions to access fees and rebates on quoted spreads, to better inform future policy recommendations of the effects of transaction-based fees on price efficiency.[407]

Other aspects of the proposed Pilot temporarily may impair efficiency. The proposed Pilot is intended to reduce (and in some cases eliminate) rebates or Linked Pricing for a substantial portion of NMS stocks (including ETPs); however, the loss of rebates or Linked Pricing in Test Group 3 could have a differential effect between large and small capitalization securities.[408] If exchanges use rebates as a mechanism to provide broker-dealers with incentives to post non-marketable orders to exchanges, in the absence of rebates, broker-dealers instead may have incentives to post these orders to off-exchange trading centers, such as ATSs. This may lead to a temporary widening of the NBBO, which could lead to a temporary reduction of liquidity that could be particularly severe for small or mid-cap securities. Thus, the overall informational efficiency of prices, as a result of widening spreads, could temporarily decline with the implementation of the proposed Pilot.

Furthermore, even if broker-dealers do not use ATSs and internalization more intensively, the proposed Pilot may temporarily impair the efficiency of transactions in certain Test Groups, through the impact of Pilot-induced fee and rebate changes on the NBBO. As discussed earlier, one potentially distortive effect of transaction-based fees on maker-taker trading centers is that they provide incentives for market participants to post more aggressive limit orders (*e.g.,* limit orders close to the current market price) because they anticipate receiving rebates if their orders are executed. To the extent that reductions in rebates result in a wider bid-ask spread in certain stocks and ETPs during the proposed Pilot Period, this may increase transaction costs for internalized order flow or orders routed to ATSs that execute based on the NBBO and for orders executing on exchanges.[409] For example, if an ATS offers to execute buy orders at the average of the national best offer and midpoint, rather than at the wider quoted spread, the ATS would execute these orders at higher prices than those available on exchanges. Notably, the impact of less aggressive limit orders is less likely to affect marketable orders on maker-taker trading centers, because lower taker fees could mitigate the impact of a wider quoted spread on total transaction costs for liquidity takers.

Finally, the Commission acknowledges that the fee caps and prohibition on rebates or Linked Pricing imposed on the test groups during the proposed Pilot further constrain the exchanges' abilities to strategically choose fee and rebate schedules and for some NMS stocks may restrict the fees and rebates further beyond the current levels, which could be efficient from the exchanges' perspective, incorporating their beliefs about the trade-off between revenues and costs associated with these transaction-based fees. The proposal could temporarily result in more or less efficient fee and rebate schedules because the exchanges might not be able to optimize their pricing structure for some test groups of securities. While the Commission does not currently have information to determine the current level of efficiency of fees and rebates, the information that the Commission and the public receive from the proposed Pilot could enable the analysis of market impacts stemming from changes to fees, potentially permitting the Commission to assess alternative requirements for transaction-based fees that may be more efficient.

2. Competition

While the Commission preliminarily believes that most of the impacts of the proposed Pilot on the market for trading services would be limited to the duration of the proposed Pilot, some effects may last beyond the end of the proposed Pilot. Certain exchanges could be harmed if a reduction in rebates results in consolidation of orders at other exchanges. This could occur if the proposed Pilot attenuates the potentially distortive impact of transaction-based fees and causes broker-dealers to route orders to trading centers they perceive as more liquid. To the extent that increased order flow in a security directed to a particular venue encourages broker-dealers to route more orders for that security to the venue, a liquidity externality may develop, making the venue the preferred routing destination for all orders. Although these effects would likely last only for the duration of the proposed Pilot, depending on the extent of the liquidity externalities, smaller exchanges could experience long-lasting competitive effects. The proposed Transaction Fee Pilot could also temporarily discourage entry of new exchanges that might otherwise emerge to take advantage of the maker-taker and taker-maker pricing models.[410] Under such circumstances, while the consolidation of liquidity may benefit market participants, it may also make it difficult for trading centers with low volumes in particular securities to compete with trading centers that represent liquidity centers in these securities. This could lead to consolidation or exit by small exchanges as a result of the proposed Pilot, although the Commission preliminarily believes that either of those events is unlikely because the anticipated revenue shortfall, as discussed above, would be for a limited duration and would not be significant enough to cause this result.

The proposed Transaction Fee Pilot may also temporarily alter competition among exchanges that use transaction-based fee pricing models. Exchanges that pay fees and remit rebates frequently revise their fee schedules in order to remain competitive and to attract order flow. The impact of the proposal on competition depends on the extent to which the fee caps and prohibition on rebates or Linked Pricing restrict exchanges' transaction-based fee strategies. On one hand, the proposed Pilot, while changing either access fees or rebates on certain subsets of securities, could leave the margins that exchanges obtain from transaction-based pricing models unchanged and could preserve the current state of competition among exchanges in the market for those securities. Several earlier studies suggest that the average difference between the access fees and rebates is approximately $0.0005; however, the EMSAC NMS Subcommittee observed that the current typical margin per share is $0.0002,[411] and a recent report from 2017 suggests that the spread between fees and rebates is approximately $0.0001.[412] For instance, for stocks in

[407] *See* Section V.C.2.b *supra.*

[408] *See supra* note 402.

[409] *See* Angel, Harris, and Spatt, *supra* note 106.

[410] Academic studies suggest a number of new exchanges emerged specifically to take advantage of maker-taker and taker-maker pricing models. *See, e.g.,* Angel, Harris, and Spatt, *supra* note 106.

[411] *See supra* note 28.

[412] *See, e.g.,* Laura Cardella, Jia Hao, and Ivalina Kalcheva, ''Make and Take Fees in the U.S. Equity Market,'' Working Paper, University of Arizona (2015), *available at: https://www.rhsmith.umd.edu/files/Documents/Centers/CFP/research/cardella_hao_kalcheva.pdf* (''Cardella, et al. study''); Harris, *supra* note 23. Each of these papers indicates the difference between fees and rebates is approximately $0.0005 per share; the Cardella et al.

Continued

Test Group 1, which limits access fees to no greater than $0.0015, it may be possible for exchanges to modify fee structures in a way that leaves margins unchanged and does not impact competition between exchanges. However, this may not be true for all test groups, and some exchanges may be unable to maintain current average margins per share for stocks in Test Group 2.[413] These exchanges may choose to compete less intensively for order flow in this test group, instead focusing on stocks and ETPs in other test groups. Some of the shortfall in the competition for order flow for this subset of securities could be filled by off-exchange trading centers. Alternatively, exchanges may revise pricing strategies for stocks in other groups, choosing to implicitly subsidize rebates for stocks in some test groups using fees from stocks in other test groups. This may increase competition for order flow in some test groups while reducing it in others. In the presence of tighter restrictions on transaction-based fees during the proposed Pilot Period, exchanges could compete in other ways to attract trading volume (*e.g.,* discounts on connectivity fees or increased volume discounts), although the Commission believes that for some test groups the ability to offer meaningful volume discounts would be limited.[414]

The proposed Transaction Fee Pilot may not only affect competition between exchanges, but also could affect broker-dealers' decisions to route orders to off-exchange trading centers for the duration of the proposed Pilot, affecting how exchanges compete with other execution venues in the market for trading services. Lower rebates during the proposed Pilot Period may prompt broker-dealers to internalize a higher proportion of order flow or route a higher proportion of order flow to wholesalers and ATSs. This could alter the current competitive dynamics among trading centers in favor of non-exchange trading centers. Lower access fees, on the other hand, could attract marketable order flow from the ATSs and back to the exchanges, which could tilt the competitive equilibrium in favor of the national securities exchanges.

The proposed Pilot could also temporarily affect the competition for order flow for ATSs and could subsequently alter their market share. As discussed in the baseline, the market share of trading volume on ATSs is approximately 13%. If the prohibition of rebates or Linked Pricing in Test Group 3 leads to increased order flow migrating to off-exchange trading centers, this may increase the fraction of transaction volume to ATSs or other off-exchange venues traditionally captured by exchanges. The reduction in access fees in some of the test groups, however, could lead to exchanges attracting more order flow away from ATSs and other off-exchange trading centers. Similarly, if the equilibrium access fee in Test Group 3 is below $0.0030 in the absence of rebates, exchanges may be able to draw order flow from off-exchange trading centers.

The Commission recognizes that the potential temporary competitive impacts stemming from the proposed Pilot would generally depend on the exposure of each trading center to each test group and the control group of NMS stocks, because the constraints on fees and rebates apply differently to each group. For instance, if a high portion of an exchange's volume was derived from stocks in Test Group 2, it may be at a particular competitive disadvantage relative to an exchange that served markets across all groups, because a substantial reduction in the fee cap applicable to Test Group 2 would apply to a higher proportion of its trading volume. However, the Commission preliminarily believes that, given its aim of producing representative groups of stocks and ETPs for the purposes of the proposed Pilot, trading centers are not likely to be substantially more exposed to NMS stocks in any one group.

3. Capital Formation

The Commission preliminarily does not expect the proposed Pilot to have a substantial permanent impact on capital formation because the proposed Pilot is limited in duration, though many of the implementation costs associated with the proposed Pilot would require exchanges to expend resources related to maintaining the List of Pilot Securities and any changes to that lists, as well as the maintenance of the Exchange Transaction Fee Summary and the order routing data, they may have otherwise invested elsewhere or distributed to shareholders.[415]

As discussed above,[416] the Commission recognizes that the overall temporary impact of the proposed Transaction Fee Pilot on liquidity and total transaction costs could be positive or negative. As a result, the impact of the proposed Pilot on capital formation is uncertain. On one hand, the proposed Pilot could temporarily reduce total transaction costs for many market participants by consolidating liquidity and improving execution quality. To the extent that such cost reductions are realized, they may, for instance, permit market participants to more efficiently deploy financial resources by reducing the cost of hedging financial risks. As a result, the proposed Pilot may marginally and temporarily promote capital formation. Improvements in both liquidity and price efficiency could make capital markets more attractive, at least for the duration of the proposed Pilot. The temporary reduction in rebates to certain test groups as a result of the implementation of the proposed Pilot could widen quoted spreads, thereby potentially leading to worse execution prices and subsequently reducing liquidity for the duration of the proposed Pilot.[417] This would have similar indirect impacts on capital formation but in the opposite direction, by increasing the cost of hedging financial risks.

The proposed Pilot may also affect capital formation through its impact on discretionary accounts. A number of broker-dealers have discretionary agreements with their clients, wherein the broker can transact in the client's account without the client's consent. For the duration of the proposed Transaction Fee Pilot, some broker-dealers may alter the composition of their clients' portfolios to trade and hold greater proportions of the accounts in high-rebate NMS stocks (including ETPs) in the Control Group and Test Group 1. Such revisions to portfolio

study, however, uses data from 2008 to 2010. A recent discussion indicates that the difference between fees and rebates is $0.0001. *See, e.g.,* ''How to Align Broker and Customer Interests to Make Exchanges More Competitive,'' Trillium Management, LLC (June 28, 2017), *available at: https://www.trlm.com/align-broker-customer-interests-make-exchanges-competitive/*.

413 As discussed in Section III.C.2, if the margin between fees and rebates exceeds $0.0005, exchanges theoretically could assess fees to both the make and take sides of the market; however, the Commission preliminarily believes that exchanges are unlikely to do so.

414 For NMS stocks included in Test Group 3, order flow incentives would be substantially reduced, particularly any new inducements that provide a discount or incentive on one side of the market that is linked to activity on the opposite side of the market.

415 The costs associated with implementation and compliance with the proposed Transaction Fee Pilot are discussed in more detail above (Section V.C.2.a, *supra*).

416 Section V.C.1.a.ii, *supra,* provides a discussion of price transparency, which could improve liquidity and total transaction costs, while the liquidity externality is discussed in Section V.A.2, *supra.*

417 *See,* George Chacko, Jakub Jurek, and Erik Stafford, ''The Price of Immediacy,'' *Journal of Finance* 63, 1253–1290 (2008), *available at: http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6261.2008.01357.x/full* (''Chacko et al.''). According to Chacko et al., liquidity has three important dimensions: Price, quantity, and immediacy. A market for a security is considered ''liquid'' if an investor can quickly execute a significant quantity at a price at or near fundamental value.

composition as a result of the proposed Pilot are not necessarily efficient from an investor's perspective and could have a detrimental impact on capital formation insofar as they increase the riskiness of client portfolios or decrease client portfolios' expected returns.[418] This behavior would temporarily distort the market for high-rebate stocks and ETPs, creating a higher demand for these securities and potentially leading to an inefficient allocation of capital based on signals that are unrelated to firm fundamentals.

As discussed above, the proposed Pilot could lead to a temporary reduction of liquidity that could be particularly severe for small or mid-capitalization securities.[419] In addition to reducing the informational efficiency of prices, if the effects of the proposed Pilot are severe enough, longer term, it could affect capital formation for these securities. If the temporary impacts on liquidity acutely impact some firms, it could lead to either the potential exit of these issuers from the capital markets, through acquisition or delisting, as these small issuers are those least likely to ride out negative liquidity shocks. Further, the proposed Pilot could lead to a delay by some issuers to enter the capital markets during the proposed Pilot's duration.

E. Alternatives

Below, the Commission discusses a number of alternatives to the proposed Transaction Fee Pilot. As explained above, the proposed Pilot is designed to collect data on how changes to fees and rebates affect order routing behavior and execution, which could inform the Commission and the public as to any possible conflicts of interest between broker-dealers and their customers. The Commission considers four sets of alternatives: (1) Expansion of the proposed Pilot to include ATSs; (2) inclusion of a trade-at provision; (3) prohibition of overlap with the Tick Size Pilot; and (4) adjustments to the basic pilot structure (*e.g.,* the inclusion of a zero access fee test group). Where appropriate, suggestions attributable to the EMSAC recommendation have been identified within the scope of the alternatives presented below.[420]

1. Expand Proposed Transaction Fee Pilot To Include ATSs

As proposed, the Transaction Fee Pilot would not require ATSs to comply with the requirements on the limits to access fees or rebates imposed by the Pilot. One alternative would be the inclusion of ATSs in the proposed Transaction Fee Pilot proposal. Including ATSs in the proposed Transaction Fee Pilot would increase availability of data for an important segment of trading activity in the NMS securities, would cover a larger portion of the order routing inducements,[421] and could enhance the information regarding possible conflicts of interest available to the Commission. ATSs capture a large fraction of transaction volume for NMS stocks (approximately 13% as of July 2017), indicating that they are important competitors to exchanges and other off-exchange trading centers.[422] Some studies have noted that transaction-based fees and rebates have likely caused some order flow to migrate from exchanges to off-exchange trading centers, such as ATSs, in order to avoid high access fees levied by some exchanges.[423]

An alternative that includes ATSs would be broader than the proposed Pilot and would also include more inducements, besides fees and rebates, that broker-dealers might receive for routing orders to particular trading centers, including ATSs.[424] The Commission has limited information about how ATS fee structures might induce broker-dealers to route orders to ATSs thereby creating potential conflicts of interest between broker-dealers and their clients. If it included trading centers beyond exchanges, the proposed Pilot would provide information to the Commission and the public about a more complete set of order routing decisions by broker-dealers because it would increase the representativeness of the results obtained, and may provide a deeper understanding of how exogenous shocks to fees and rebates affect order routing decisions. Further, because transaction-based fees and rebates are one possible method that exchanges and ATSs use as inducements for order flow, a pilot that was inclusive of these other inducements would further expand our understanding of what drives order routing decisions and might raise possible conflicts of interest.

The Commission preliminarily believes that the inclusion of ATSs and other inducements for order flow into the proposed Transaction Fee Pilot is likely to substantially increase the costs relative to the current proposal and may not be practical. Because broker-dealers that operate ATSs could bundle fees for ATS usage with other broker-dealer fees, the proposal might not practically be able to impose an access fee cap or prohibition on rebates on ATS fees. Further, the Commission currently does not require that ATSs provide periodic public disclosures on their fees, as it does with national securities exchanges, and these fees do not need to be filed with or approved by the Commission. Unlike exchanges, which must report their fees schedules publicly on their websites, and must file Form 19b–4 with the Commission to effect any changes to those fee schedules, ATSs currently have no reporting requirements for their fees. The costs to ATSs of participating in the Pilot would be higher relative to the costs to the exchanges in two ways: (1) The Pilot would require ATSs to report information that is currently not required by regulation for the purpose of the proposed Pilot, and (2) the Pilot would impose significant start-up costs on the ATSs to set up systems to report these fees. Thus, including ATSs in an alternative version of the proposed Pilot would likely increase both the costs and the complexity of the proposed Pilot because it would likely require a shift in the disclosure regime for these trading centers.

Even in the absence of including ATSs in the proposed Pilot, the Commission would be able to obtain information on the proportion of trades going to ATSs from several sources. First, several transaction datasets, including trade reporting facility (TRF) data and TAQ data, provide information on off-exchange trades, including ATS trades. Further, FINRA produces periodic (weekly) data on the total shares of NMS securities executed by individual ATSs.[425] Thus, the Commission would obtain information from the proposed Pilot to identify whether exogenous shocks to

[418] Allocative efficiency in the context of investment choice is optimized when there are no restrictions on the set of investment opportunities available to an investor. *See, e.g.,* Niels Christian Nielsen, ''The Investment Decision of the Firm under Uncertainty and the Allocative Efficiency of Capital Markets,'' *Journal of Finance* 31, 587–602 (1976), *available at: https://www.jstor.org/stable/2326628.* If the proposed Pilot potentially leads some broker-dealers to alter the investment opportunity set to avoid securities that do not pay rebates, then allocative efficiency for those investors would likely be impaired since the opportunity set is restricted.

[419] *See supra* note 402.

[420] *See supra* note 37.

[421] *See supra* note 268.

[422] *See supra* note 298.

[423] *See* Angel, Harris, and Spatt, *supra* note 216.

[424] As discussed above, the proposed rule only prohibits new inducements that provide a discount or incentive on one side of the market that is linked to activity on the opposite side of the market for Test Group 3.

[425] Combining the FINRA volume data executed by ATSs for a given security, with other data, such as TAQ, which would provide total share volume for a given security, a researcher would be able to estimate the fraction of ATS trading as a percentage of total trading in NMS securities over the same time period.

transaction-based fees on exchanges have an effect on order routing decisions, including whether broker-dealers alter their routing of order to ATSs during the proposed Pilot. The inclusion of ATSs into the requirements of the proposed Pilot, however, would likely significantly add to the proposed Pilot's complexity and cost a significant amount of money to implement.

2. Trade-At Test Group

The proposed Transaction Fee Pilot could include a ''trade-at'' provision in conjunction with the changes to the fees and rebates currently proposed in the Pilot.[426] The trade-at provision would require that orders be routed to a market with the best displayed price or are executed at a materially improved price. A trade-at provision could increase incentives to display prices, as off-exchange trading centers would no longer be able to match the best price offered elsewhere, but instead would have to provide significant price improvement or start displaying their quotes at the NBBO. Including the trade-at provision as a component of the proposed Transaction Fee Pilot could potentially increase the level of displayed liquidity across all venues, because off-exchange trading centers, such as ATSs, would have increased incentives to display prices, and could have effects on the order routing decisions of broker-dealers. Orders routed to exchanges that are not posting the best prices could be indicative of potential conflicts of interest between broker-dealers and their customers. Including a trade-at subgroup could provide supplemental information to the Commission about how a combination of trade-at provisions coupled with revisions to transaction-based fees affect broker-dealer order routing decisions.

From an implementation perspective, including a trade-at provision would result in a pilot that is more complex than the proposed Pilot. As proposed, the Pilot has three test groups for different exogenous shocks to fees or rebates; adding a trade-at provision would double the number of test groups, thereby increasing the costs of implementation for exchanges. Such an addition would also likely increase the difficulty of analyses. The Tick Size Pilot includes a trade-at group because exchanges were concerned that, in the current market environment, a larger tick size could induce order flow to go off-exchange.[427] However, unlike the Tick Size Pilot, the Commission preliminarily believes that as a result of the proposed Transaction Fee Pilot, marketable order flow would be less likely to flow to off-exchange trading centers, because as access fees for some test groups would decline, order flow could be drawn back to exchanges. The Commission, therefore, preliminary believes that the inclusion of the trade-at provision would not likely provide much additional information to address the potential conflicts of interest between broker-dealers and their customers beyond that afforded by the proposal.

3. No Overlap With Tick Size Pilot

As proposed, the Transaction Fee Pilot could overlap with the Tick Size Pilot for some portion of the proposed Pilot duration, although the length of that overlap is uncertain, and the Commission preliminarily believes that any anticipated overlap would be minimal and would depend on when the proposed Transaction Fee Pilot would become effective, if adopted. Alternatively, the Commission could consider two separate alternatives that both address the elimination of the overlap of the proposed Transaction Fee Pilot with the Tick Size Pilot: (1) Limiting the sample to securities with market capitalizations of at least $3 billion or (2) delaying the implementation of the Pilot until the Tick Size Pilot is concluded.

The first potential alternative is similar to that recommended by EMSAC, whereby the pilot would include only securities with market capitalizations in excess of $3 billion, in order to avoid the simultaneity of the Tick Size Pilot and the proposed Transaction Fee Pilot for a subset of securities. The advantage to this approach is that the proposed Transaction Fee Pilot could start without consideration for the Tick Size Pilot duration, and could reduce implementation and complexity burdens for exchanges and broker-dealers because no subset of securities would be subject to the two pilots simultaneously. However, this approach of only examining the effects of changes on transaction-based fees for securities with market capitalizations of at least $3 billion would significantly reduce the overall sample representativeness desired by the proposed Pilot, which would limit the usefulness of any data obtained from such a pilot. The Commission preliminarily believes that removing these smaller issuers, for which the potential conflicts of interest could likely be the largest,[428] from the proposed Transaction Fee Pilot would limit the value of the information received, and would be less useful to the Commission for informing future policy recommendations related to these conflicts, as discussed in more detail in Section V.C.1.a.i.A.

Alternatively, the Commission could delay full implementation of the proposed Transaction Fee Pilot until six months after the Tick Size pilot concludes, to the extent that such overlap between the pilots exists. By implementing each pilot sequentially, the Commission would obtain distinct information generated by each pilot, and would reduce the potential costs incurred by exchanges and broker-dealers in implementing simultaneous pilots, as well as the temporary other costs borne by small issuers and other market participants, discussed in detail in Section V.C.2.b. On the other hand, running sequential pilots could delay the benefits of the information the Commission anticipates realizing from the pilot.

The Commission preliminarily believes that the alternative to delay implementing the proposed Transaction Fee Pilot to avoid any overlap (to the extent that such an overlap would otherwise occur) with the Tick Size Pilot would provide minimal cost savings relative to the proposal. As discussed in Section V.C.2.b, the Commission anticipates that the costs associated with overlapping the proposed Transaction Fee Pilot with the Tick Size Pilot could be small. Further, as discussed above, the Commission preliminarily believes the Pilot's design would prevent any overlap, to the extent that overlap between the proposed Transaction Fee Pilot and the Tick Size Pilot occurs, from compromising the Pilot results.

4. Adjustments to the Proposed Transaction Fee Pilot Structure

The alternatives described above provide significant revisions to the approach or the representativeness of the proposed Transaction Fee Pilot. This section discusses a number of alternatives that detail other

[426] Because a ''trade-at'' provision is already a requirement of the Tick Size Pilot, to the extent that there is overlap between the two pilots and sufficient statistical power, the Commission may be able to obtain valuable information from that pilot without the need to include a trade-at provision in the proposed Transaction Fee Pilot.

[427] *See* Tick Size Pilot Approval Order, *supra* note 5, at 27538–42.

[428] *See* Battalio Equity Market Study, *supra* note 22; Harris, *supra* note 23. The negative relationship between access fees and execution quality (realized spreads) increases for low-priced securities, suggesting that low-priced or small capitalization stocks are more likely to have potential conflicts of interest related to transaction-based fees than large capitalization stocks.

adjustments to the basic structure of the Pilot as proposed. These include an alternative time frame for the Pilot duration or the pre- and post-Pilot Periods, a zero access fee test group, alternative access fee caps, and the inclusion of non-displayed liquidity or depth-of-book provisions in Test Groups 1 and 2.

As currently proposed, the Transaction Fee Pilot would be implemented for two years with an automatic sunset at the end of the first year, unless the Commission publishes a notice determining that the proposed Pilot shall continue for up to another year. Alternatively, the Commission could recommend an earlier or later Pilot sunset or a longer or shorter Pilot duration. An earlier Pilot sunset would shorten the anticipated proposed Pilot duration, reducing the time period during which potential negative temporary effects resulting from the proposed Pilot could occur. However, if the anticipated duration of the proposed Pilot were sufficiently short, some broker-dealers could either choose to not alter their current order routing behavior and wait out the length of the Pilot, which would limit the usefulness of the information obtained by the Pilot.[429] A shorter anticipated duration also could reduce the usefulness of the information and the benefits provided by the proposed Pilot, if it reduced the statistical power of any analyses, because it would make it more difficult for researchers to detect whether an effect actually exists.[430]

Conversely, as the anticipated Pilot duration increases so too would the costs for exchanges, as this would extend the duration of the changes to their revenue models and the costs of compliance with the proposed Pilot requirements. However, increasing the duration beyond two years is unlikely to provide any significant increases in the benefits identified above. As discussed in Section V.C.1.a.i, the Commission preliminarily believes that the proposed Pilot duration, even with a one-year sunset would make it economically worthwhile for broker-dealers to alter their order-routing decisions, because it would likely be costly for broker-dealers to sit out the full duration of the proposed Pilot or retain pre-Pilot order routing decisions for its duration. Further, a longer Pilot duration would increase the costs associated with a longer time period in which temporary negative externalities arising from the proposed Pilot would exist. These externalities could have longer-term implications on efficiency, competition, and capital formation, and could reduce overall levels of investor protection.

The Commission could alternatively propose a pilot with a fixed two-year duration. A two-year pilot without the possibility of an automatic sunset at the end of the first year would have the same maximum costs as a pilot with a sunset, but would not have the potential to reduce costs in the event that the sunset occurs. The alternative would also not provide the Commission with the flexibility to efficiently end the proposed Pilot early once the Pilot produced sufficient data to obtain representative results. On the other hand, broker-dealers could perceive higher expected costs of not adapting to the Pilot under the alternative because they could expect the sunset to reduce the anticipated duration of the Pilot. However, the Commission preliminarily believes that broker-dealers that base their order routing decisions on transaction-based fees and rebates will incur sufficient costs from not enacting changes to their order routing decisions in response to the Pilot with an expected one-year sunset such that they are not likely to sit out the Pilot Period; therefore, a mandatory two-year pilot would not likely provide any additional behavioral change that would not already be obtainable from the proposed Pilot.

As currently proposed, the Pilot requires a six-month pre-Pilot Period and a six-month post-Pilot Period, which would allow the Commission and the public to compare order routing decisions in the same stocks both with and without the proposed Pilot restrictions as well as across stocks in different test groups. Alternatively, the Commission could propose shorter pre-Pilot and post-Pilot Periods. Shorter pre- and post-Pilot Periods would reduce costs to exchanges of having to provide the Exchange Transaction Fee Summary and order routing data. These reduced costs come at the trade-off of shorter horizons for data collection that could lead to reduced statistical power and reduce the ability of the proposed Pilot to produce representative results.[431]

If the proposed Pilot included a zero access fee test group, this would effectively serve to temporarily remove a source of revenue for exchanges entirely from a subset of securities. This approach could produce additional information, such as how order routing behavior and execution quality changes in the absence of transaction-based fees (and likely rebates), that could be useful to the Commission to facilitate future policy decisions regarding the transaction-based pricing structures of exchanges. However, any new revenue model created during the proposed Pilot could provide additional incentives for broker-dealers to route order flow from customers in a manner that could make possible conflicts of interest more or less pervasive, complicating analysis of the pilot. If a zero access fee test group were included, exchanges would be unable to charge access fees to market participants that take liquidity from maker-taker markets or make liquidity on taker-maker exchanges. The inclusion of a zero access fee test group would thus completely eliminate the transaction-based fee model for a subset of securities, which could force exchanges to create entirely new revenue models for securities in this test group. Although inclusion of a zero access fee test group could potentially provide expanded information to the Commission and the public about possible conflicts of interest, the Commission notes that these would come at the cost of lost revenue to exchanges for eliminating transaction-based fees entirely or costs associated with the creation of new revenue models only for the duration of the Pilot.

The Pilot, as currently proposed, would have three test groups: (1) One that caps access fees at $0.0015; (2) one that caps access fees at $0.0005; and (3) one that prohibits rebates or Linked Pricing for displayed and non-displayed liquidity and along the entire depth of the limit order book. Alternatively, the Commission could have proposed other test groups with different caps on access fees. For example, the Commission could have proposed only caps to access fees, similar to those in the EMSAC

[429] *See* Section V.C.1.a.iii, which discusses the potential limitations associated with pilots, including a discussion that some market participants could choose to not alter their behavior if the proposed Pilot had a short duration.

[430] The Commission staff estimates that it would require a minimum Pilot duration of six months to achieve sufficient statistical power to detect whether an effect is actually present; therefore, any Pilot duration shorter than six months would have limited benefits for detecting the effect of transaction-based fees and rebates on order routing decisions, execution quality, and market quality.

[431] The Commission staff estimates the pilot would need to produce approximately six months of data to detect changes unique to ETPs, and between 60 and 69 days of data to detect changes unique to small and large NMS stocks, respectively. The methodology employed provided power tests on the distributions of average daily dollar volume data for ETPs and small and large capitalization NMS common stocks obtained from the CRSP U.S. Stock Database. The power tests determined the number of days of data that would be required to detect a 10% change in the daily volume of various subgroups of securities.

recommendation,[432] or could have increased the number of test groups. Only studying exogenous shocks to access fees would have limited the amount and type of information available to the Commission, given that the theoretical literature suggests that potential conflicts of interest are linked to rebates more than to access fees. Any alternative would likely replace the zero rebate test group with another access fee cap group. Thus, without a test group that specifically focuses on the removal of rebates and the corresponding impact on conflicts of interest, the Commission and the public would have a set of information of lower value than it would otherwise. An alternative to increase the number of test groups could produce more gradation in the caps to access fees, this alternative would likely increase the complexity of the proposed Pilot, and would increase the implementations costs to account for the additional test groups. These costs would be borne with little incremental benefit to the quality of information produced from these additional test groups, because these additional groups would only provide minor variations in access fees from those already proposed.

As the Pilot is currently proposed, only Test Group 3, which eliminates rebates or Linked Pricing, would restrict fees or rebates or Linked Pricing in non-displayed liquidity and depth-of-book. As discussed in Section III.C.3, under the proposed Pilot, perverse incentives to move liquidity away from the displayed liquidity or the top-of-book could be created if rebates are not eliminated along the entire book and for displayed and non-displayed liquidity. As an alternative to the current Pilot proposal, the Transaction Fee Pilot could also revise access fees in Test Groups 1 and 2 to cover both non-displayed liquidity and the depth-of-book. Unlike the problem associated with moving away from displayed liquidity that could emerge if rebates or Linked Pricing were not removed from the entire depth of the limit order book, the Commission does not believe that under the proposed Pilot incentives would emerge for exchanges to charge more to access non-displayed interest or depth-of-book quotes. Such differing fees across displayed and non-displayed liquidity as well as the depth of the limit order book would lead to increased uncertainty for market participants that take liquidity, as they would not be able to control whether their executions are with displayed or non-displayed liquidity. If the fees differed between displayed and non-displayed liquidity, broker-dealers would face cost uncertainty when making routing decisions over what access fees they would incur. From the exchanges' perspective, having differing fees for posting or interacting with displayed and non-displayed liquidity would be burdensome to track and more costly to administer and, to the extent the uncertainty it creates dissuades market participants from routing to their market, could ultimately cause them to lose order flow. Accordingly, the Commission preliminarily believes that it is unnecessary to mandate transaction-based fee caps for the non-displayed liquidity.

Under the current proposal, Test Group 3 would prohibit rebates or Linked Pricing on NMS stocks (including ETPs). Alternatively, the Commission could instead prohibit only rebates, without any extension to other similar inducements that an exchange might use to attract order flow. The Commission, however, believes that an alternative that excludes like inducements from Test Group 3 would provide opportunities for exchanges to work around the rebate prohibition, which would likely reduce the effectiveness of the information received about NMS stocks (including ETPs) in Test Group 3.

The Commission alternatively could propose a limitation on Linked Pricing across all Test Groups, not just Test Group 3. Given that Test Groups 1 and 2 would undergo a reduction in fees due to the lower caps in each of those groups, which likely would lead to a corresponding reduction in rebates, exchanges may choose to alter other like incentives, which would allow them to supplement the incentive they provide for activity in securities in Test Groups 1 and 2, and could distort the information obtained from the Pilot. However, from the exchanges' perspective, enhancing like inducements would further erode margins related to transaction activity. Therefore, the Commission preliminarily believes that it is unnecessary to prohibit like inducements for Test Groups 1 and 2.

As currently proposed, the Transaction Fee Pilot does not require the exchanges to produce much additional information on order execution quality statistics. As an alternative, the Commission could require that the exchanges produce daily Rule 605 data similar to that required in Appendix B.1 of the Tick Size Pilot Plan. Providing daily order execution quality statistics are important for the Tick Size Pilot, because order size is influenced by tick size, and is an important determinant of execution quality. As a result, trade-based measures of the effect of the Tick Size Pilot might not yield the same results as order-based measures of the Tick Size Pilot, such as that in data required in Appendix B.1 of the Tick Size Pilot Plan. However, the proposed Transaction Fee Pilot might not alter order sizes nearly as dramatically as in the Tick Size Pilot, or might not alter them at all. Therefore, the Commission preliminarily does not expect that results of the proposed Transaction Fee Pilot using trade-based execution quality measures to differ from results using order-based execution quality measures. Even though exchanges have systems in place to capture some elements of daily data as required by the Tick Size Pilot, including this data could be costly for the exchanges to provide with limited benefit for the proposed Transaction Fee Pilot. As currently proposed, the Transaction Fee Pilot would provide daily information on shares submitted, executed, and cancelled to an exchange, and would provide some limit order execution quality information, such as time to execution and likelihood of execution, that are not currently available from other existing data sources.[433]

As the Pilot is currently proposed, downloadable files containing the Exchange Transaction Fee Summary would need to be publicly posted on each exchange's website using an XML schema to be published on the Commission's website. Alternatively, similar to the List of Pilot Securities, the Exchange Transaction Fee Summary could be reported in pipe-delimited ASCII format. However, the pipe-delimited ASCII format does not support validations. As discussed earlier, validations help ensure that comparable data are formatted consistently and reported completely. Validations also help the exchanges to test whether the data are complete and formatted correctly before posting the data. Because the pipe-delimited ASCII format does not support validations, exchanges have to manually review data completeness and correct formatting. In the case that an exchange was to post incorrectly formatted or incomplete data, the exchange would have to incur the burden of reviewing the data again to identify the problem and reposting

[432] The maximum access fee caps under the EMSAC recommendation would be $0.0020 (Test Group 1), $0.0010 (Test Group 2), and $0.0002 (Test Group 3).

[433] For example, existing studies often incorporate execution quality statistics estimated from TAQ data. *See, e.g.,* Battalio Equity Market Study, *supra* note 22.

the data. Validations help ensure that any inconsistencies in data completeness or formatting can be automatically tested for and identified before posting. And because some fields in the data may be manually entered (*i.e.,* the Exchange Transaction Fee Summary), having validations would help ensure the quality of this data. Requiring a format that incorporates validations would also best enhance data users' abilities to normalize, aggregate, compare, and analyze the Exchange Transaction Fee Summary data because the data is assured to be complete and consistently formatted. Therefore, the Commission does not believe that the Exchange Transaction Fee Summary should be reported in pipe-delimited ASCII format as that would limit both the data's accessibility and ease of use.

F. Request for Comment

The Commission seeks commenters' views and suggestions on all aspects of its economic analysis of the proposed rule. In particular, the Commission asks commenters to consider the following questions:

71. Is the proposed Pilot, in the form of a temporary Commission rule, necessary to achieve the objectives of this Pilot? Are there other approaches that would achieve these objectives? Has the Commission appropriately evaluated the benefits and costs of conducting successive (or potentially simultaneous) pilots?

72. Is there existing data that could yield the same information, with respect to sample representativeness and causality, on the relation between transaction-based fees and rebates on order routing behavior, execution quality and market quality that could be obtained by the Commission in place of the proposed Transaction Fee Pilot? Please explain in detail.

73. Is there additional data that the Commission should gather from the proposed Pilot? Please be specific as to what this data would be and how it could inform the Commission about possible conflicts of interest related to access fees and rebates.

74. Do you believe the Commission's assessment of the baseline for economic analysis is reasonable? Why or why not? Please explain in detail.

75. Do you believe that the proposing release accurately describes the baseline and how those current practices could change under the proposed Pilot? Why or why not? Please explain in detail.

76. Do you believe that the Commission has accurately described how market participants would be affected by the proposed Transaction Fee Pilot? Why or why not? Please explain in detail.

77. Do you believe that the Commission has accurately described the benefits of the information that would be received from the proposed Transaction Fee Pilot? Why or why not? Please explain in detail.

78. Is the Commission's analysis of the costs and benefits of the proposed Transaction Fee Pilot accurate and complete? Why or why not? Please explain in detail.

79. Do you believe that there are costs or benefits that would accrue to investors likely as a result of the proposed Pilot? If so, please explain in detail.

80. Do you believe that there are additional costs that may arise from the proposed Transaction Fee Pilot? If so, do you believe there are methods by which the Commission could reduce the costs imposed by the proposed Pilot while still achieving its goals? Please explain in detail.

81. Do you believe that the order routing data could facilitate the reverse engineering of proprietary order routing strategies despite the daily aggregation and anonymization of the data at the broker-dealer level? Why or why not? If so, do you believe that there are alternative, safer methods of providing the order routing data that would still allow the Pilot to achieve its goals? Please explain in detail.

82. Do you believe that there are additional benefits or costs that could be quantified or otherwise monetized? Why or why not? If so, please identify the categories, and if possible, provide specific estimates or data.

a. Given that the Tick Size Pilot requires exchanges to compile a daily list of pilot securities and to identify changes to those pilot securities due to name changes, mergers, and other corporate events, are the costs estimated for compliance with reporting of the daily pilot list for the proposed Transaction Fee Pilot reasonable?

b. Given that exchanges submit Form 19b–4 fee filings to the Commission regularly, are the costs estimated for Form 19b–4 fee filings associated with the commencement of the proposed Pilot or for periodic revisions to transaction-based fees and rebates reasonable?

c. As exchanges frequently update their transaction-based fees and rebates, can market participants provide estimates of the costs associated with updating order routing systems as a result of fee changes?

83. Are there any effects on efficiency, competition, and capital formation that are not identified or are misidentified in the above analysis? Please be specific and provide data and analysis to support your views.

84. Do you believe that the Commission has accurately described how the competitive landscape for the market for trading services for NMS securities would be temporarily affected by the proposed Transaction Fee Pilot? Why or why not? Please explain in detail. Does the release discuss all relevant forms of competition and whether the proposal could alter them? If not, which additional forms of competition could the proposed Pilot impact and how? Please explain in detail.

85. Are there alternative approaches to reporting fee data in XML format that would facilitate ease of use? What are the likely costs of compliance of the proposed requirements? Please explain in detail.

86. Would any alternative approaches outlined above better achieve the objectives articulated by the Commission? Which approach and why? What would be the costs and benefits of these approaches? Please explain in detail.

87. Would the inclusion of ATSs in the proposed Transaction Fee Pilot better achieve the objectives articulated by the Commission? What would be the costs and benefits of including these venues? Please explain in detail.

88. What should be the appropriate length of the pre-Pilot Period and post-Pilot Period in terms of achieving sufficient statistical power?

89. What other economic effects are likely to be associated with the proposed Transaction Fee Pilot?

VI. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (''SBREFA''),[434] the Commission requests comment on the potential effect of the proposed rule on the United States economy on an annual basis. The Commission also requests comment on any potential increases in costs or prices for consumers or individual industries, and any potential effect on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

VII. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (''RFA'') [435] requires Federal agencies, in

[434] Public Law 104–121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

[435] 5 U.S.C. 601 *et seq.*

promulgating rules, to consider the impact of those rules on small entities. Section 603(a) [436] of the Administrative Procedure Act,[437] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on ''small entities.'' [438] Section 605(b) of the RFA states that this requirement shall not apply ''to any proposed or final rule if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities'' [439]

The proposed rule would apply to national securities exchanges registered with the Commission under Section 6 of the Exchange Act.[440] With regard to a national securities exchange, the Commission's definition of a small entity is an exchange that has been exempt from the reporting requirements of Rule 601 of Regulation NMS, and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[441] None of the national securities exchanges registered under Section 6 of the Exchange Act that would be subject to the proposed Pilot are ''small entities'' for purposes of the RFA. In particular, none of the equities exchanges are exempt from Rule 601 of Regulation NMS.

As discussed above, the proposed rule will not apply to any ''small entities.'' Therefore, for the purposes of the RFA, the Commission certifies that the proposed rule would not have a significant economic impact on a substantial number of small entities.

The Commission requests comment regarding this certification. In particular, the Commission solicits comment on the following:

90. Do commenters agree with the Commission's certification? If not, please describe the nature of any impact on small entities and provide empirical data to illustrate the extent of the impact.

[436] 5 U.S.C. 603(a).

[437] 5 U.S.C. 551 *et seq.*

[438] The Commission has adopted definitions for the term ''small entity'' for purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this proposed rulemaking, are set forth in Rule 0–10, 17 CFR 240.0–10. *See* Securities Exchange Act Release No. 18451 (January 28, 1982), 47 FR 5215 (February 4, 1982) (File No. AS–305).

[439] 5 U.S.C. 605(b).

[440] *See supra* Sections IV (Paperwork Reduction Act) and V (Economic Analysis) (discussing, among other things, the current market environment and compliance obligations for national securities exchanges).

[441] *See* 17 CFR 240.0–10(e).

VIII. Statutory Authority and Text of the Proposed Rule

Pursuant to the Exchange Act, and particularly Sections 3(b), 5, 6, 11A, 15, 17, and 23(a) thereof, 15 U.S.C. 78c, 78e, 78f, 78k–1, 78o, 78q, and 78w(a), the Commission proposes to amend Title 17 of the Code of Federal Regulations in the manner set forth below.

List of Subjects

17 CFR Part 200

Administrative practice and procedure, Authority delegations (Government agencies), Organization and functions (Government agencies).

17 CFR Part 242

Brokers, Reporting and recordkeeping requirements, Securities.

For the reasons set out in the preamble, the Commission is proposing to amend Title 17, Chapter II of the Code of Federal Regulations as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

■ 1. The authority citation for part 200 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77o, 77s, 77z–3, 77sss, 78d, 78d–1, 78d–2, 78o–4, 78w, 78*ll*(d), 78mm, 80a–37, 80b–11, 7202, and 7211 *et seq.,* unless otherwise noted.

■ 2. Amend Section 200.30–3 by adding paragraph (a)(84) to read as follows:

§ 200.30–3 Delegation of Authority to Director of Division of Trading and Markets.

* * * * *

(a) * * *

(84) To issue notices pursuant to Rule 610T(b)(1)(i) and (c) (17 CFR 242.610T(b)(1)(i) and (c)).

* * * * *

PART 242—REGULATIONS M, SHO, ATS, AC, NMS AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 3. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78*l,* 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

■ 4. Add Section 242.610T to read as follows:

§ 242. 610T Equity transaction fee pilot.

(a) *Pilot Pricing Restrictions.* Notwithstanding Rule 610(c), on a pilot basis for the period specified in paragraph (c) of this section, in connection with a transaction in an NMS stock, a national securities exchange may not:

(1) For *Test Group 1,* impose, or permit to be imposed, any fee or fees for the display of, or execution against, the displayed best bid or offer of such market that exceed or accumulate to more than *$0.0015* per share;

(2) For *Test Group 2,* impose, or permit to be imposed, any fee or fees for the display of, or execution against, the displayed best bid or offer of such market that exceed or accumulate to more than *$0.0005* per share;

(3) For *Test Group 3,* provide to any person, or permit to be provided to any person, a rebate or other remuneration in connection with an execution, or offer, or permit to be offered, any linked pricing that provides a discount or incentive on transaction fees applicable to removing (providing) liquidity that is linked to providing (removing) liquidity, except to the extent the exchange has a rule to provide non-rebate linked pricing to its registered market makers in consideration for meeting market quality metrics; and

(4) For the *Control Group,* impose, or permit to be imposed, any fee or fees in contravention of the limits specified in 17 CFR 242.610(c).

(b) *Pilot Securities.*

(1) Initial List of Pilot Securities.

(i) The Commission shall designate by notice the initial List of Pilot Securities, and shall assign each Pilot Security to one Test Group or the Control Group.

(ii) For purposes of Rule 610T, ''Pilot Securities'' means the NMS stocks designated by the Commission on the initial List of Pilot Securities pursuant to paragraph (b)(1)(i) and any successors to such NMS stocks. At the time of selection by the Commission, an NMS stock must have a minimum initial share price of at least $2 to be included in the Pilot and must have an unlimited duration or a duration beyond the end of the post-Pilot Period. If the share price of a Pilot Security in one of the Test Groups or the Control Group closes below $1 at the end of a trading day, it shall be removed from the Test Group or the Control Group and will no longer be subject to the pricing restrictions set forth in (a)(1)–(3) of this section.

(iii) For purposes of Rule 610T, ''primary listing exchange'' means the national securities exchange on which the NMS stock is listed. If an NMS stock is listed on more than one national securities exchange, the national securities exchange upon which the NMS stock has been listed the longest shall be the primary listing exchange.

(2) Pilot Securities Exchange Lists.

(i) After the Commission selects the initial List of Pilot Securities and prior to the beginning of trading on the first day of the Pilot Period each primary listing exchange shall publicly post on its website downloadable files containing a list, in pipe-delimited ASCII format, of the Pilot Securities for which the exchange serves as the primary listing exchange. Each primary listing exchange shall maintain and update this list as necessary prior to the beginning of trading on each business day that the U.S. equities markets are open for trading through the end of the post-Pilot Period.

(ii) The Pilot Securities Exchange Lists shall contain the following fields:

(A) Ticker Symbol;

(B) Security Name;

(C) Primary Listing Exchange;

(D) Security Type:

(1) Common Stock;

(2) ETP;

(3) Preferred Stock;

(4) Warrant;

(5) Closed-End Fund;

(6) Structured Product;

(7) ADR;

(8) Other;

(E) Test Group:

(1) Control Group;

(2) Test Group 1;

(3) Test Group 2;

(4) Test Group 3;

(F) Date the Entry Was Last Updated.

(3) Pilot Securities Change Lists.

(i) Prior to the beginning of trading on each trading day the U.S. equities markets are open for trading throughout the duration of the Pilot, including the post-Pilot Period, each primary listing exchange shall publicly post on its website downloadable files containing a Pilot Securities Change List, in pipe-delimited ASCII format, that lists each separate change applicable to any Pilot Securities for which it serves or has served as the primary listing exchange. The Pilot Securities Change List will provide a cumulative list of all changes to the Pilot Securities that the primary listing exchange has made to the Pilot Securities Exchange List published pursuant to (b)(2).

(ii) In addition to the fields required for the Pilot Securities Exchange List, the Pilot Securities Change Lists shall contain the following fields:

(A) New Ticker Symbol (if applicable);

(B) New Security Name (if applicable);

(C) Deleted Date (if applicable);

(D) Date Security Closed Below $1 (if applicable);

(E) Effective Date of Change; and

(F) Reason for the Change.

(4) Posting Requirement. All information publicly posted in downloadable files pursuant to 610T(b)(2) and (3) shall be and remain freely and persistently available and easily accessible by the general public on the primary listing exchange's website for a period of not less than five years from the conclusion of the post-Pilot Period. In addition, the information shall be presented in a manner that facilitates access by machines without encumbrance, and shall not be subject to any restrictions, including restrictions on access, retrieval, distribution and reuse.

(c) *Pilot Duration.*

(1) The Pilot shall include a six-month ''pre-Pilot Period;''

(2) A two-year ''Pilot Period'' with an automatic sunset at the end of the first year unless, no later than thirty days prior to that time, the Commission publishes a notice that the Pilot shall continue for up to another year; and

(3) A six-month ''post-Pilot Period.''

(4) The Commission shall designate by notice the commencement and termination dates of the pre-Pilot Period, Pilot Period, and post-Pilot Period, including any suspension of the one-year sunset of the Pilot Period.

(d) *Order Routing Datasets.* Throughout the duration of the Pilot, including the pre-Pilot Period and post-Pilot Period, each national securities exchange that trades NMS stocks shall publicly post on its website downloadable files, in pipe-delimited ASCII format, no later than the last day of each month, containing sets of order routing data, for the prior month, in accordance with the specifications below. For the pre-Pilot Period, order routing datasets shall include each NMS stock. For the Pilot Period and post-Pilot Period, order routing datasets shall include each Pilot Security. All information publicly posted pursuant to this paragraph (d) shall be and remain freely and persistently available and easily accessible by the general public on the national securities exchange's website for a period of not less than five years from the conclusion of the post-Pilot Period. In addition, the information shall be presented in a manner that facilitates access by machines without encumbrance, and shall not be subject to any restrictions, including restrictions on access, retrieval, distribution, and reuse. Each national securities exchange shall treat the identities of broker-dealers contained in the Order Routing Datasets, including the broker-dealer anonymization key, as regulatory information and shall not access or use that information for any commercial or non-regulatory purpose.

(1) Dataset of daily volume statistics include the following specifications of liquidity-providing orders by security and separating held and not-held orders in pipe-delimited ASCII format with field names as the first record and a consistent naming convention that indicates the exchange and date of the file:

(i) Code identifying the submitting exchange.

(ii) Eight-digit code identifying the date of the calendar day of trading in the format ''yyyymmdd.''

(iii) Symbol assigned to an NMS stock (including ETPs) under the national market system plan to which the consolidated best bid and offer for such a security are disseminated.

(iv) Unique, anonymized broker-dealer identification code.

(v) Order type code

(A) Inside-the-quote orders;

(B) At-the-quote limit orders; and

(C) Near-the-quote limit orders.

(vi) Order size codes

(A) <100 share bucket;

(B) 100–499 share bucket;

(C) 500–1,999 share bucket;

(D) 2,000–4,999 share bucket;

(E) 5,000–9,999 share bucket; and

(F) > 10,000 share bucket.

(vii) Number of orders received.

(viii) Cumulative number of shares of orders received.

(ix) Cumulative number of shares of orders cancelled prior to execution.

(x) Cumulative number of shares of orders executed at receiving market center.

(xi) Cumulative number of shares of orders routed to another execution venue.

(xii) Cumulative number of shares of orders executed within

(A) 0 to <100 microseconds of order receipt;

(B) 100 microseconds to <100 milliseconds of order receipt;

(C) 100 milliseconds to <1 second of order receipt;

(D) 1 second to <30 seconds of order receipt;

(E) 30 seconds to <60 seconds of order receipt;

(F) 60 seconds to <5 minutes of order receipt;

(G) 5 minutes to <30 minutes of order receipt; and

(H) >30 minutes of order receipt.

(2) Dataset of daily volume statistics include the following specifications of liquidity-taking orders by security and separating held and not-held orders in pipe-delimited ASCII format with field names as the first record and a consistent naming convention that indicates the exchange and date of the file:

(i) Code identifying the submitting exchange.

(ii) Eight-digit code identifying the date of the calendar day of trading in the format ''yyyymmdd.''

(iii) Symbol assigned to an NMS stock (including ETPs) under the national market system plan to which the consolidated best bid and offer for such a security are disseminated.

(iv) Unique, anonymized broker-dealer identification code.

(v) Order type code

(A) Market orders; and

(B) Marketable limit orders.

(vi) Order size codes

(A) <100 share bucket;

(B) 100–499 share bucket;

(C) 500–1,999 share bucket;

(D) 2,000–4,999 share bucket;

(E) 5,000–9,999 share bucket; and

(F) >10,000 share bucket.

(vii) Number of orders received.

(viii) Cumulative number of shares of orders received.

(ix) Cumulative number of shares of orders cancelled prior to execution.

(x) Cumulative number of shares of orders executed at receiving market center.

(xi) Cumulative number of shares of orders routed to another execution venue.

(e) *Exchange Transaction Fee Summary.* Throughout the duration of the Pilot, including the pre-Pilot Period and post-Pilot Period, each national securities exchange that trades NMS stocks shall publicly post on its website downloadable files containing information relating to transaction fees and rebates and changes thereto (applicable to securities having a price greater than $1). Each national securities exchange shall post its initial Exchange Transaction Fee Summary prior to the start of trading on the first day of the pre-Pilot Period and update its Exchange Transaction Fee Summary on a monthly basis within 10 business days of the first day of each calendar month, to reflect data collected for the prior month. The information prescribed by this section shall be made available using the most recent version of the XML schema published on the Commission's website. All information publicly posted pursuant to this paragraph (e) shall be and remain freely and persistently available and easily accessible on the national securities exchange's website for a period of not less than five years from the conclusion of the post-Pilot Period. In addition, the information shall be presented in a manner that facilitates access by machines without encumbrance, and shall not be subject to any restrictions, including restrictions on access, retrieval, distribution, and reuse. The Exchange Transaction Fee Summary shall contain the following fields:

(1) SRO Name;

(2) Record Type Indicator:

(i) Reported Fee is the Monthly Average;

(ii) Reported Fee is the Median;

(iii) Reported Fee is the Spot Monthly;

(3) Participant Type:

(i) Registered Market Maker;

(ii) All Others;

(4) Test Group:

(i) Control Group;

(ii) Test Group 1;

(iii) Test Group 2;

(iv) Test Group 3;

(5) Applicability to Displayed and Non-Displayed Interest:

(i) Displayed only;

(ii) Non-displayed only;

(iii) Both displayed and non-displayed;

(6) Applicability to Top and Depth of Book Interest:

(i) Top of book only;

(ii) Depth of book only;

(iii) Both top and depth of book;

(7) Effective Date of Fee or Rebate;

(8) End Date of Currently Reported Fee or Rebate (if applicable);

(9) Month and Year of the monthly realized reported average and median per share fees;

(10) Pre/Post Fee Changes Indicator (if applicable) denoting implementation of a new fee or rebate on a day other than the first day of the month;

(11) Base and Top Tier Fee or Rebate:

(i) Take (to remove):

(A) Base Fee/Rebate reflecting the standard amount assessed or rebated before any applicable discounts, tiers, caps, or other incentives are applied;

(B) Top Tier Fee/Rebate reflecting the amount assessed or rebated after any applicable discounts, tiers, caps, or other incentives are applied;

(ii) Make (to provide):

(A) Base Fee/Rebate reflecting the standard amount assessed or rebated before any applicable discounts, tiers, caps, or other incentives are applied;

(B) Top Tier Fee/Rebate reflecting the amount assessed or rebated after any applicable discounts, tiers, caps, or other incentives are applied;

(12) Average Take Fee (Rebate)/ Average Make Rebate (Fee), by Participant Type, Test Group, Displayed/Non-Displayed, and Top/ Depth of Book; and

(13) Median Take Fee (Rebate)/ Median Make Fee (Rebate), by Participant Type, Test Group, Displayed/Non-Displayed, and Top/ Depth of Book.

The following will not appear in the Code of Federal Regulations.

Exhibit 1: Data Definitions for the Exchange Transaction Fee Summary

The table below represents the data model for the reporting requirements of an Exchange Transaction Fee Summary. This data model reflects the disclosures required by proposed 17 CFR 242.610T(e) and the logical representation of those disclosures to a corresponding XML element. The Commission's proposed XML schema is the formal electronic representation of this data model.

- Concept—the information content as described in proposed 17 CFR 242.610T(e) items 1 through 12.
- Element—a name for the XML element.
- Type—the XML data type, either a list of possible values or a general type such as ''number''.
- Spot, Monthly—How the element appears in a record of that type.
  - R—Required. The XML file is not valid unless this element is present.
  - NA—Not applicable. The element may appear in the record but its value is not to be used.
  - O—Optional. The XML file is valid without that element; whether it appears for a particular SRO, record type, test group, etc., depends on the actual fee being described. XML validation by itself cannot determine this.
- When Absent—If the element is absent, its value is interpreted as if it had been present with the value shown.
- Definition—Text to be included in the XML definition file (''schema'').

Concept	Element	Type	Spot	Monthly	When absent	Definition
SRO	sro	Non-empty Text	R	R	....	A required unique code to identify each SRO in the Transaction Fee Pilot.
Record Type	rt	S or M	R	R	....	A required record type indicator. M, if the fee type reported is the monthly realized fee (average or median fee); S, if the fee type reported is a spot fee schedule (base or top tier fee).

Concept	Element	Type	Spot	Monthly	When absent	Definition
Participant Type	ptcpt	MM, Other or Blank	O	O	Blank	MM, if the fees are for market makers, or else Other. Required for spot records if the exchange charged market makers and others different base and top tier fees. Required for monthly fee records if the exchange charged different average or median fees or pays different average or median fees. Otherwise blank or absent.
Test Group	grp	1, 2, 3, or C	R	R		A required indicator that identifies the test or control group during the Pilot and post-Pilot Period. 1, 2, 3—Test Groups 1, 2, 3; C—Control group.
Displayed	disp	D, N, or B	R	R		D—Displayed, N—Not displayed, B—Both. For spot fee type records, if the fees are the same between displayed and non-displayed liquidity, then the exchange may report both in a single ''B'' record. For monthly records, this should be segmented into the average and median fee per share for displayed liquidity, and the average and median fee for non-displayed liquidity unless there are no differences between the average and median fees for displayed and non-displayed liquidity, in which case the exchange can report the average and median fee in a single ''B'' record.
Top/Depth	topOrDepth	T, D, or B	R	R		T—Fees for top-of-book liquidity; D—Fees for depth-of-book liquidity; B—Both. For spot records, if the fees are the same between top-of-book and depth-of-book liquidity, then the exchange may report both fees in a single ''B'' record. For monthly records, if there are no differences between the fees for top-of-book and depth-of-book liquidity, then the exchange may include only the average and median fees in a single ''B'' record.
Start Date	start	YYYY–MM–DD	R	O		The start date element must be present for a spot fee record, and the end element cannot appear alone. The effective date for any fee changes. This should correspond to the effective date referenced in the Form 19b–4 fee filings submitted to the Commission. This is needed in a monthly record only if fees changed on a day other than the first of the month; otherwise blank or absent.
End Date	end	YYYY–MM–DD or Blank	O	O	Blank	The last date that a given fee is viable prior to any fee changes. This column will be blank unless a mid-month change to fees is made. This should correspond to the last date that a given fee is applicable prior to the effective date of the new fee reflected in Form 19b–4 fee filings submitted to the Commission to capture any revisions to transaction-based fees and rebates. This is needed in a monthly record only if fees changed on a day other than the first of the month.
Month and Year	YearMonth	YYYY–MM	NA	R		The year and month of the monthly realized reported average and median per share fees.
Pre/Post	preOrPost	1, 2, or Blank	O	O	Blank	An indicator variable needed only if the exchange changed fees on a day other than the first day of the month. Blank—there were no fee changes other than on the first day of the month. 1—The average and median are the pre-change average and median for the part of the month prior to the change. 2—The average and median are the post-change average and median for the part of the month after the change.
Base Taker Fee	baseTakeFee	Number	R	NA		The Base Taker Fee is the standard per share fee assessed or rebate offered before any applicable discounts, tiers, caps, or other incentives are applied. Fees have a positive sign; rebates have a negative sign.
Top Tier Taker Fee	topTierTakeFee	Number	R	NA		The Top Tier Taker Fee is the per share fee assessed or rebate offered after all applicable discounts, tiers, caps, or other incentives are applied. Fees have a positive sign; rebates have a negative sign.
Average Taker Fee	avgTakeFee	Number	NA	R		The monthly average realized Taker fee assessed or rebate offered per share by category (*i.e.*, test group, participant type, displayed vs. non-displayed, and top-of-book vs. depth-of-book). Fees have a positive sign; rebates have a negative sign.

Concept	Element	Type	Spot	Monthly	When absent	Definition
Median Taker Fee	medianTakeFee	Number	NA	R	....	The monthly median realized Taker fee assessed or rebate offered per share by category (*i.e.*, test group, participant type, displayed vs. non-displayed, and top-of-book vs. depth-of-book), across broker-dealers. Fees have a positive sign; rebates have a negative sign.
Base Maker Fee	baseMakeFee	Number	R	NA	....	The Base Maker Fee is the standard per share fee assessed or rebate offered before any applicable discounts, tiers, caps, or other incentives are applied. Fees have a positive sign; rebates have a negative sign.
Top Tier Maker Fee	topTierMakeFee	Number	R	NA	....	The Top Tier Maker Fee is the per share fee assessed or rebate offered all applicable discounts, tiers, caps, or other incentives are applied per share. Fees have a positive sign; rebates have a negative sign.
Average Maker Fee	avgMakeFee	Number	NA	R	....	The monthly average realized Maker fee assessed or rebate offered per share by category (*i.e.*, test group, participant type, displayed vs. non-displayed, and top-of-book vs. depth-of-book). Fees have a positive sign; rebates have a negative sign.
Median Maker Fee	medianMakeFee	Number	NA	R	....	The monthly median realized Maker fee assessed or rebate offered per share by category (*i.e.*, test group, participant type, displayed vs. non-displayed, or top-of-book vs. depth-of-book), across broker-dealers. Fees have a positive sign; rebates have a negative sign.

By the Commission.

Dated: March 14, 2018.

Brent J. Fields,

Secretary.

[FR Doc. 2018–05545 Filed 3–23–18; 8:45 am]

BILLING CODE 8011–01–P

FEDERAL REGISTER

Vol. 83 Monday,

No. 58 March 26, 2018

Part III

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 300

Pacific Halibut Fisheries; Pacific Halibut Catch Limits for Area 2A Fisheries in 2018; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 180207136–8136–01]

RIN 0648–BH71

Pacific Halibut Fisheries; Pacific Halibut Catch Limits for Area 2A Fisheries in 2018

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

ACTION: Interim final rule.

SUMMARY: This interim final rule sets the 2018 Pacific halibut catch limit in the International Pacific Halibut Commission's Regulatory Area 2A off Washington, Oregon, and California. The International Pacific Halibut Commission, at its annual meeting, did not recommend 2018 catch limits for any of its regulatory areas, including Area 2A. The best available scientific information indicates the Pacific halibut stock is declining. Without NMFS action, a higher Area 2A catch limit would remain in place for 2018. The Secretary of Commerce has authority to establish regulations that are more restrictive than those adopted by the International Pacific Halibut Commission. An interim final rule is necessary to ensure that lower 2018 halibut catch limits are in place at the start of the tribal fishery March 24, 2018, and before incidental halibut retention in the sablefish and salmon fisheries begins on April 1, 2018. This action is intended to enhance the conservation of Pacific halibut.

DATES: This rule is effective from March 24, 2018, through December 31, 2018. Comments must be received by April 25, 2018.

ADDRESSES: Submit your comments, identified by NOAA–NMFS–2018–0025, by either of the following methods:

- *Federal e-Rulemaking Portal:* Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2018-0025,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Barry A. Thom, Regional Administrator, West Coast Region, NMFS, 7600 Sand Point Way NE, Seattle, WA 98115–0070.

Instructions: NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the comment period ends. All comments received are a part of the public record and NMFS will post for public viewing on *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 is publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Additional information regarding this action may be obtained by contacting the Sustainable Fisheries Division, NMFS West Coast Region, 7600 Sand Point Way NE, Seattle, WA 98115–0070. For information regarding all halibut fisheries and general regulations not contained in this rule contact the International Pacific Halibut Commission, 2320 W Commodore Way, Suite 300, Seattle, WA 98199–1287. Electronic copies of the Environmental Assessment (EA) prepared for this action may be obtained by contacting Kathryn Blair, phone: 206–526–6140, email: *kathryn.blair@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Kathryn Blair, phone: 206–526–6140, fax: 206–526–6736, or email: *kathryn.blair@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The International Pacific Halibut Commission (IPHC) can recommend regulations that govern the Pacific halibut fishery pursuant to the Convention between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, Mar. 2, 1953, 5 U.S.T. 5, and the Protocol Amending the Convention Between the United States of America and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea (Convention), Mar. 29, 1979, 32 U.S.T. 2483. The IPHC's regulatory areas are: Area 2A (U.S. West Coast); Area 2B (Canada); Area 2C (Southeast Alaska), Area 3A (Central Gulf of Alaska), Area 3B (Western Gulf of Alaska), and Area 4 (subdivided into 5 areas, 4A through 4E, in the Bering Sea and Aleutian Islands of Western Alaska). These regulatory areas are described in 50 CFR part 679, Figure 15.

Figure 1. Regulatory Areas for the Pacific Halibut Fishery

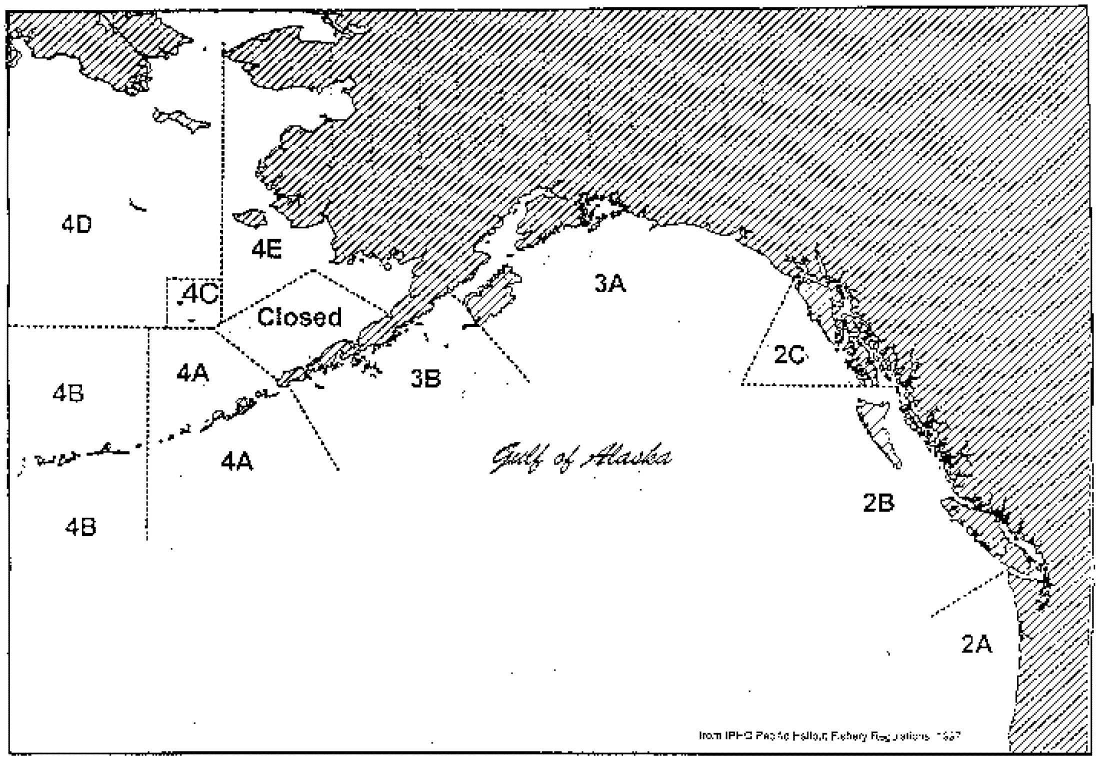

Figure 15 to Part 679. Regulatory Areas for the Pacific Halibut Fishery
a. Map

As provided by the Northern Pacific Halibut Act of 1982 (Halibut Act) at 16 U.S.C. 773b, the Secretary of State, with the concurrence of the Secretary of Commerce, may accept or reject, on behalf of the United States, regulations recommended by the IPHC in accordance with the Convention (Halibut Act, Sections 773–773k). The Secretary of State, with the concurrence of the Secretary of Commerce, accepted the 2017 IPHC regulations as provided by the Halibut Act at 16 U.S.C. 773–773k. Pacific Halibut Fisheries; Catch Sharing Plan, 82 FR 12730, Mar. 7, 2017.

The Halibut Act provides the Secretary of Commerce with the authority and general responsibility to carry out the requirements of the Convention and the Halibut Act. 16 U.S.C. 773(c). The Regional Fishery Management Councils may develop, and the Secretary of Commerce may implement regulations governing harvesting privileges among U.S. fishermen in U.S. waters that are in addition to, and not in conflict with, approved IPHC regulations. *Id.;* Convention, Article I. The Pacific Fishery Management Council (Council) has exercised this authority to develop a catch sharing plan that governs the allocation of halibut and management of sport fisheries on the U.S. West Coast. The Pacific Halibut Catch Sharing Plan for Area 2A is available on the Council website at *http://www.pcouncil.org.*

Independent of the Council, the Secretary of Commerce may implement regulations governing harvesting privileges among U.S. fishermen in U.S. waters that are more restrictive than those adopted by the IPHC under Article I of the Convention and section 773c of the Halibut Act. The Secretary exercised this authority in 1990 to implement regulations on commercial and sport catch limits that were more restrictive than the IPHC regulations published in 1989 because the IPHC, at its annual meeting in 1990, did not approve new management measures for 1990 (55 FR 11929, Mar. 30, 1990).

Specific to this interim final rule under the Halibut Act, the Secretary is implementing catch limits for Area 2A that are more restrictive than approved IPHC catch limits from 2017 that would otherwise remain in effect. The IPHC held its annual meeting to recommend halibut catch limits and management measures from January 22–26, 2018. At the meeting, IPHC scientists presented biological information showing that the total biomass, and specifically the total exploitable biomass, of Pacific halibut is projected to decline substantially over the next several years. Although the United States and Canadian Commissioners voiced consensus that some reduction in catch limits relative to 2017 in all regulatory areas was appropriate, the Commissioners could not reach agreement on specific catch limit recommendations for 2018. Therefore, the IPHC did not make a recommendation to the Secretary of State to revise the catch limits that were implemented in 2017. The United States and Canadian Commissioners did suggest specific catch limits for their respective waters, all of which would reduce catch limits compared with 2017.[1]

In this interim final rule, NMFS is implementing an Area 2A catch limit of 1,190,000 lb (539.78 metric tons) for 2018. This catch limit[2] is derived from the total constant exploitation yield (TCEY), which includes commercial discards and bycatch estimates

[1] The United States and Canadian Commissioners did agree on and formally recommend season dates, catch sharing plans, and certain management measures, which the United States adopted (83 FR 10390, Mar. 9, 2018).

[2] The term ''catch limit'' is equivalent to the IPHC's term fishery constant exploitation yield (FCEY).

calculated by a formula developed by the IPHC. Though NMFS independently determined this catch limit is supported by the best available scientific information, the catch limit was also suggested by the United States Commissioners as necessary to meet the conservation and management objectives of the Convention and the Halibut Act. This 2018 catch limit represents approximately an 11 percent reduction from the 2017 Area 2A catch limit. NMFS is setting catch limits for all other IPHC regulatory areas in the United States in a separate interim final rule. The following sections of this preamble describe NMFS's rationale for the Area 2A catch limit implemented in this interim final rule.

Summary of Biological and Economic Impacts of Coastwide Halibut Catch Limits

In 2017, the IPHC conducted its annual stock assessment using a range of updated data sources as described in detail in the 2017 IPHC Report of Assessment and Research Activities (2017 RARA; available at *www.iphc.int*). The IPHC used an ''ensemble'' of four equally weighted models, comprised of two long time-series models, and two short time-series models that use data series either divided by geographical region (IPHC Regulatory Area) or aggregated into coastwide summaries, to evaluate the Pacific halibut stock. These models incorporate data from the 2017 IPHC setline survey, the most recent NMFS trawl survey, weight-at-age estimates by region, and age distribution information for bycatch, sport, and sublegal discard removals. As has been the case since 2012, the results of the ensemble models are integrated, and incorporate uncertainty in natural mortality rates, environmental effects on recruitment, and other model parameters. The data and assessment models used by the IPHC are also reviewed by the IPHC's Scientific Review Board, a group comprised of non-IPHC scientists who provide an independent scientific review of the stock assessment data and models and provide recommendations to IPHC staff. The Scientific Review Board did not identify any substantive errors in the data or methods used in the 2017 stock assessment. NMFS has determined the IPHC's data and assessment models constitute best available science on the status of the Pacific halibut resource.

The IPHC's data, including the setline survey, indicates that the Pacific halibut stock declined continuously from the late 1990s to around 2010, as a result of decreasing size at a given age (size-at-age), as well as somewhat weaker recruitment strengths than those observed during the 1980s. The biomass of spawning females is estimated to have stabilized near 200,000,000 lb (90,718 mt) in 2010, and since then the stock is estimated to have increased two million pounds, but is still at relatively low levels.

The 2017 stock assessment projects that the biomass of spawning females at the beginning of 2018 is estimated to be 202,000,000 lb (91,600 mt). Data from the 2017 stock assessment indicate that all estimates of recruitment (year classes or cohorts) from 2006 onwards of Pacific halibut are estimated to be smaller than those from 1999 through 2005. This indicates a high probability of decline in both the stock and future fishery yield as recent recruitments become increasingly important to the age range over which much of the harvest and spawning takes place.

IPHC scientists presented at the interim and annual IPHC meetings, and in the Report of the 2018 annual meeting, biological information analyzing the possible effects of a range of different TCEYs and resulting catch limits on the spawning stock biomass and the harvestable yield over the period from 2019 through 2021, including the potential implications of the three alternative catch limits NMFS considered for this rule: Alternative 1—maintain the catch limits the IPHC adopted in 2017; Alternative 2—reduce catch limits as suggested by the United States Commissioners, but not recommended by the IPHC; and Alternative 3—reduce catch limits consistent with the IPHC's interim management procedure (Table 1). The IPHC's interim management procedure maintains the total mortality of halibut across its range from all sources based on a reference level of fishing intensity so that the Spawning Potential Ratio (SPR) is equal to 46 percent (F46% SPR). The catch limits that correspond to the reference fishing intensity of F46% SPR should result in in a fish achieving 46 percent of its spawning potential over the course of its lifetime relative to what it would have achieved as part of an unfished stock. Lower SPR values result in higher fishing intensity. Additional information on the status of the halibut resource under these catch limit alternatives is provided in the environmental assessment (EA) and finding of no significant impact (FONSI) (see **ADDRESSES**). The table below describes the coastwide and Area 2A TCEYs and catch limits that would result from the considered alternatives.

TABLE 1—COASTWIDE AND AREA 2A CATCH LIMITS UNDER ALTERNATIVES 1–3

[Weight in pounds]

	Coastwide catch limits (lb)	Area 2A TCEY (lb)	Area 2A catch limit (lb)
Alternative 1—2017 limits (F38%)	31,480,000	1,470,000	1,340,000
Alternative 2—United States Commissioner-suggested (F41%)	28,040,000	1,320,000	1,190,000
Alternative 3—IPHC Interim management procedure (F46%)	21,960,000	590,000	470,000

The following sections of this preamble provide a comparison of the relative risk of a decrease in both coastwide stock abundance and fishery yield for a range of alternative harvest levels for 2018 under each of these three alternative catch limit scenarios. This comparison assumes that other sources of removal that are not accounted for in the TCEY calculations are similar to those observed in 2017. This interim final rule refers to halibut catch limits, allocations, and removals in net pounds or net metric tons. Net pounds and net metric tons are defined as the weight of halibut from which the gills, entrails, head, and ice and slime have been removed. NMFS uses this terminology in this interim final rule to be consistent with the IPHC, which establishes catch limits and calculates mortality in net pounds.

This interim final rule addresses the TCEY and overall catch limit in Area 2A, but also describes and discusses the impacts of this decision on the halibut resource on a coastwide basis, consistent with the current management and known biological distribution of the halibut resource.

Alternative 1—Maintain the Catch Limits the IPHC Adopted in 2017

In 2017, the IPHC recommended halibut catch limits to the governments of Canada and the United States with a coastwide TCEY of 31,400,000 lb (14,242.80 mt). For Area 2A, this alternative would result in a TCEY of 1,470,000 lb (666.78 mt) and a catch limit of 1,340,000 lb (607.81 mt). Maintaining 2017 catch limits in all IPHC regulatory areas, including Area 2A, would have several short-term and long-term adverse impacts on the halibut resource.

If the 2017 catch limits were maintained in all Areas in 2018, the spawning stock biomass is projected to decrease over the next three years (2019 through 2021). The IPHC analysis projected that 2017 catch limits would result in a greater than 99 percent chance that the spawning stock biomass would be lower in 2019 than in 2018, and a 34 percent chance that it would be more than 5 percent lower than the current level of 202,000,000 lb (91,626 mt). The analysis of maintaining 2017 catch limits also projected a 99 percent chance that the spawning biomass would be lower than current levels in 2021, and an 89 percent chance that it would be more than 5 percent lower than the current level of 202,000,000 lb (91,626 mt) in 2021. The analysis also predicted a 23 percent chance that the 2021 spawning stock biomass would decline below the threshold reference point (30 percent of the spawning stock biomass remains) that the IPHC uses to indicate stock conditions that would trigger a substantial reduction in the halibut catch limits under the interim IPHC management procedure. Overall, the IPHC assessment predicts a 95 percent chance of decrease for the stock between 2019–21 under this catch limit alternative, and a greater decline than it would under Alternatives 2 or 3 (see Section 4 of the EA).

The analysis of the effects of maintaining the 2017 catch limits in all regulatory areas in 2018 also projects a chance of decrease in fishery yield over the next three years. Fishery yield is the amount of halibut available for harvest by commercial, recreational, and subsistence users. To maintain the 2017 F38% SPR, the coastwide TCEY would be 40,800,000 lb (18,506.57 mt). Maintaining the 2017 catch limits in all regulatory areas is predicted to result in an 80 percent chance that the fishery yield would be lower than the coastwide TCEY of 40,800,000 lb (18,506.57 mt) in 2019, and a 76 percent chance that it would be more than 10 percent lower. Under this alternative, the IPHC estimates at least an 81 percent chance that the coastwide fishery yield would be lower than the coastwide TCEY of 40,800,000 lb (18,506 mt) in 2020 and 2021, and at least a 77 percent chance that it would be more than 10 percent lower in 2020 and 2021. This alternative would provide the highest catch limits for 2018 of the three alternative catch limit scenarios described in this preamble, but also has the greatest risk of future low fishery yields. Section 4 of the EA summarizes the biological and economic impacts of this alternative.

Alternative 2—Reduce Catch Limits as Suggested by the United States Commissioners, but Not Recommended by the IPHC

After considering the stock assessment, commercial fishery data, and other biological information at the 2018 IPHC annual meeting, the United States Commissioners stated that maintaining 2018 catch limits in Area 2A at the same level as those implemented in 2017 would not be consistent with the IPHC's conservation objectives for the halibut stock and its management objectives for the halibut fisheries. Specifically, the Convention in Article III states that the Commission may limit the quantity of the catch for the purpose of developing the stocks of halibut to levels which will permit the optimum yield from that fishery, and of maintaining the stocks at those levels.

The United States Commissioners examined a catch limit using the survey WPUE for Area 2A from 2016, due to some uncertainty in the 2017 Area 2A survey, discussed in more detail below. Following the IPHC's interim management policy of an F46% SPR level for a coastwide TCEY of 31,000,000 lb (14,061.35 mt), and utilizing the 2016 data for Area 2A and 2017 data for the remainder of the Regulatory Areas, the 2018 Area 2A TCEY was calculated to be 1,060,000 lb (480.81 mt). This value considered the data collected in Alaska and Canada in 2017 that projects a coastwide stock decline. NMFS understands that the United States Commissioners used 1,060,000 lb (480.81 mt) as a baseline for the Area 2A catch limits they suggested, instead of the TCEY of 590,000 lb (267.62 mt) that was presented by the IPHC under its interim management procedure. The United States Commissioners suggested a TCEY of 1,320,000 lb (598.74 mt) and resulting catch limit of 1,190,000 lb (539.75 mt), approximately an 11 percent decrease from 2017 catch limits. The United States Commissioners provided rationale that supported the catch limits recommended under this alternative and implemented by this rule, including the following:

- The IPHC survey, IPHC coastwide stock assessment, and supporting information from NMFS trawl and longline surveys indicated substantial reductions in halibut spawning stock biomass and potential fishery yield in 2018 compared to 2017;
- The IPHC stock assessment identified poor recruitment in the size classes targeted by commercial, recreational, and subsistence users for the foreseeable future. These declining recruitment trends are worsened with higher harvest rates; and
- The results from the IPHC survey are further substantiated by declining halibut trends in Bering Sea and Gulf of Alaska trawl surveys, and declining trends in commercial fishery weight-per-unit-effort (WPUE) in most areas, though not in 2A. The IPHC survey indicates a 10 percent reduction in survey WPUE, and a 24 percent reduction in survey numbers-per-unit-effort (NPUE) coastwide compared to last year.

The United States Commissioners were presented information indicating that commercial WPUE in some regulatory areas was higher in 2017 relative to 2016. These commercial data have led some fishery participants to suggest that the surveys and IPHC stock assessment do not adequately reflect the abundance of harvestable halibut. The United States Commissioners were also presented with information describing the timing of the IPHC survey in Area 2A, which took place later than in previous years, and data showing survey stations with consistent historic halibut catch had reduced landings within a hypoxic area. These topics are further addressed below. The United States Commissioners noted that there is no indication that the surveys or assessment are inaccurate to any significant degree and that they are the best scientific information available for estimating halibut abundance (see Section 3 of the EA for additional detail).

If the 2018 catch limits suggested by United States Commissioners were applied in all Areas in 2018, the spawning stock biomass is still projected to decrease over the next three years (2019 through 2021). Under this harvest alternative there is an estimated 93 percent chance that the spawning biomass would be lower than the current level in 2019, and a 19 percent chance that it would be more than 5 percent lower than the current level of 202,000,000 lb (91,626 mt). Under this alternative catch limit, there is a 92 percent chance that the spawning biomass would be lower in 2021, and a 72 percent chance that it would be more than 5 percent lower than the current level of 202,000,000 lb (91,626 mt). In 2021, there is a 17 percent chance that the spawning biomass would decline below the threshold reference point (30 percent of the spawning stock biomass remains) used by the IPHC to indicate stock conditions that would trigger a substantial reduction in the commercial halibut fishery under the interim management procedure.

Implementing the 2018 catch limits suggested by United States Commissioners is also projected to result in decreases in fishery yield over the next three years, but less so than under Alternative 1. To achieve the catch limits suggested by the United States Commissioners at F41% SPR, the coastwide TCEY would be 37,200,000 lb (16,874 mt). Under this alternative, the IPHC estimates a 73 percent chance that the coastwide fishery yield would be lower than a coastwide TCEY of 37,200,000 lb (16,874 mt) in 2019, and a 63 percent chance that it would be more than 10 percent lower. Under this alternative, the IPHC estimates at least a 75 percent chance that the coastwide fishery yield would be lower than a coastwide TCEY of 37,200,000 lb (16,874 mt) in 2020 and 2021, and at least a 67 percent chance that it would be more than 10 percent lower in 2020 and 2021. Sections 3 and 4 of the EA summarize the biological and economic impacts of this alternative.

Overall, the catch limit suggested by the U.S. Commissioners in Area 2A would result in a decrease of approximately 11 percent relative to 2017 and is consistent with the best scientific information available on the abundance of harvestable halibut within this Area.

Alternative 3—Reduce Catch Limits Consistent With the IPHC's Interim Management Procedure

The United States and Canadian Commissioners also considered an alternative catch limit that would establish catch limits in all regulatory areas consistent with the IPHC's interim management procedure, though neither group suggested these catch limits. For Area 2A, this would mean a TCEY of 590,000 lb (267.62 mt) and resulting catch limit of 470,000 lb (213.19 mt). The United States Commissioners heard public comment that establishing catch limits at the IPHC's F46% SPR reference level would impose significant economic costs on fishery participants in Area 2A (see Section 4.3 of the EA for additional detail).

If the catch limits consistent with the IPHC's interim harvest policy were implemented in all regulatory areas in 2018, the spawning stock biomass is still projected to decrease gradually over the next three years, but less than under Alternatives 1 and 2 (See Section 4.2 of the EA). Under this harvest alternative, there is an estimated 78 percent chance that the spawning stock biomass would be lower than the current level in 2019, and a 5 percent chance that it would be more than 5 percent lower than the current level of 202,000,000 lb (91,626 mt). Under this alternative catch limit, there is a 76 percent chance that the spawning stock biomass would be lower than the current level in 2021, and a 46 percent chance that it would be more than 5 percent lower than the current level of 202,000,000 lb (91,626 mt). In 2021, there is a 10 percent chance that the spawning biomass would decline below the threshold reference point (30 percent of the spawning stock biomass remains) that the IPHC uses to indicate stock conditions that would trigger a substantial reduction in the commercial halibut fishery under the interim management procedure.

Implementing 2018 catch limits consistent with the IPHC's interim harvest policy in all regulatory areas is still projected to gradually decrease fishery yield over the next three years (2019 through 2021), but less so than under Alternatives 1 and 2 (see Section 4.2 of the EA). Under this alternative, the IPHC estimates there is a 55 percent chance that the fishery yield would be lower than a coastwide TCEY of 31,000,000 lb (14,061 mt) under the F46% fishing intensity recommended by the IPHC, in 2019, and a 38 percent chance that it would be more than 10 percent lower. Under this alternative, there is at least a 59 percent chance that the fishery yield would be lower than a coastwide TCEY of 31,000,000 lb (14,061 mt) in 2020 and 2021, and at least a 45 percent chance that it would be more than 10 percent lower in 2020 and 2021. Section 4 of the EA summarizes the biological and economic impacts of this alternative.

Rationale for Area 2A Catch Limit

After considering the best available scientific information, the Convention, and the status of the halibut resource, NMFS sets an Area 2A TCEY of 1,320,000 lb (598.74 mt) and resulting catch limit of 1,190,000 lb (539.75 mt) through this interim final rule (Table 2). This Area 2A catch limit is consistent with catch limits as suggested by the United States Commissioners but not recommended by the IPHC.

TABLE 2—AREA 2A TCEY AND CATCH LIMIT FOR 2018

[lb]

Area 2A TCEY	1,320,000
Area 2A Catch Limit	1,190,000

As discussed above, the coastwide stock assessment predicts a decline in spawning stock biomass even under the most precautionary catch limit under Alternative 3. Recruitment has been poor since 2006 and these cohorts are displaying smaller size-at-age relative to the 1970s.

In addition to concerns about the status of the stock coastwide, the best available scientific information, including IPHC's suite of models, NMFS Alaska and West Coast trawl surveys, commercial WPUE in most regulatory areas, and the fishery-independent setline survey, supports setting 2018 catch limits for Area 2A lower than the 2017 catch limits.

The IPHC's 2017 fishery-independent setline survey indicated a 10 percent decrease from the 2016 survey in the coastwide aggregate legal (over 32 inches) WPUE, while Area 2A decreased by 22 percent from 2016 to 2017. The 2017 setline survey had the lowest Area 2A survey legal WPUE since 2011, at 19.6 pounds per skate, and has been declining since 2015. The 2017 Area 2A WPUE is low when compared to historical values since 1993. Only four years (2007–10) had a lower WPUE than 2017. Furthermore, while the coastwide setline survey numbers-per-unit effort (NPUE) for all-sizes decreased by 24 percent from 2016 to 2017, Area 2A decreased 44 percent from 2016 to 2017, the highest relative decrease of all the IPHC areas. This information was presented in the IPHC's annual meeting documents, available on their website. NMFS has determined that the recent declines in the Area 2A WPUE are the best available science and support the need for conservative catch limits for 2018 in Area 2A.

Although the setline survey data supports coastwide and extensive Area 2A halibut declines, IPHC staff acknowledged some concerns with the setline survey and the uncertainty in the magnitude of the estimated decline in Area 2A. These sources of uncertainty include: (1) The timing of the setline survey in Area 2A and (2) halibut catch in a hypoxic area that covered a large portion of the Area 2A setline survey stations.

From 2013 to 2016, the Area 2A setline survey began in late May in Washington waters and proceeded south, ending in either Oregon (2015 and 2016) or California waters (2013 and 2014) in the last half of July or first half of August. In 2017, the setline survey began in late May, but began in California and ended in Washington. Additionally, the 2017 survey off the Washington coast was performed in August through mid-September, rather than in July through mid-August as in 2013–16. The setline survey is performed annually, along regular intervals at predetermined stations of consistent size and gear. Although it is generally best practice to conduct surveys that contribute to a time series of data at similar times and locations each year, the timing for the 2017 survey does not lead NMFS to discount the overall trend of decline. A small decrease from 2015 to 2016 was also recorded.

In addition to changes to the timing of the Area 2A setline survey, there was also a large area of low dissolved oxygen off the coasts of Washington and Oregon in the summer of 2017. Hypoxic events are not uncommon off the U.S. west coast. However, the geographic extent and severity of the hypoxia in 2017 was unusual. The Washington portion of the setline survey corresponded spatially and temporally with the region of low dissolved oxygen. Historically, the setline survey stations in Washington waters have had among the highest WPUE of the Area 2A stations. In 2016, survey stations off the north Washington coast totaled 33 pounds per skate, where the same survey stations in 2017 had a WPUE of 9.9 pounds per skate. Most survey stations located in the hypoxic area in 2017 had a WPUE of zero.

Any conclusions on the impact of the hypoxic area to the setline survey are confounded by the change in survey timing. A change in either the timing or the presence of hypoxia still may have resulted in an accurate measure of the halibut stock in Area 2A. The 2017 survey data was compared to previous years, and there were no unexpected values outside of the low WPUE in the hypoxic area off the coast of Washington. Pacific halibut are believed to be able to swim out of hypoxic zones. If this was the case in 2017, the survey would have likely recorded higher halibut WPUE at stations surrounding the hypoxic zone. Because the data did not show higher halibut WPUE at the stations surrounding the hypoxic zone, NMFS concludes that the reductions seen in the setline survey may represent an actual reduction of biomass.

Separate from concerns about the 2017 setline survey, industry and treaty tribe representatives have also noted that Area 2A commercial weight per unit effort (WPUE) increased in recent years, which has led some members of the public, and treaty tribe representatives, to speculate that the Area 2A stock is increasing rather than declining. The IPHC calculations of WPUE indicate that Area 2A tribal commercial fishery WPUE has been increasing since 2014. In addition, there was a small WPUE increase of 5 percent from 2016 to 2017 in the non-tribal commercial fishery. Although the IPHC uses fishery-dependent data to support determinations about Pacific halibut stock status, this type of data is typically not a reliable indicator of biomass and the IPHC takes this into account in its interpretation of these data. There are several examples of overfished stocks for which WPUE remained fairly stable even though the stock biomass had substantially declined. While the best available science shows increases in WPUE since 2014 in the tribal fishery and in 2017 for the non-tribal directed fishery, this factor alone does not lead NMFS to dismiss the IPHC's conclusion that the Area 2A population is declining.

Some industry and treaty tribe representatives have also expressed their opinion that, because the Area 2A catch limit represents less than 2 percent of the coastwide Pacific halibut catch limit, maintaining the Area 2A catch limit at the 2017 level will not harm the coastwide stock. They assert that their position is supported by an IPHC analysis showing that additional mortality equivalent to maintaining the Area 2A catch limit at the 2017 level (150,000 lb or 75 mt greater that NMFS's selected alternative) does not increase the level of risk of coastwide stock decline presented under the discussion of alternatives in this preamble.

NMFS considered how the Pacific halibut in Area 2A contribute and relate to the coastwide stock, and the potential impacts of maintaining the 2017 catch limit in Area 2A on the health of the resource given the evidence of stock decline. Little is known about the exact interplay between geographic regions and spawning success within the Pacific halibut population, and there may be differences in discrete spawning components of the population that make choosing a more precautionary catch limit preferable. Fisheries management recognizes the benefits of distributing harvest in proportion to stock size for stocks managed at a coastwide level. The IPHC currently uses area-specific survey information to apportion stock biomass, and ultimately catch limits, across the regulatory areas. This approach recognizes the value of biocomplexity across the geographic range of the halibut stock. Distributing removals across the current stock distribution is likely to protect against localized depletion of the various stock components. This is particularly important because different stock components may have different recruitment success under changing environmental conditions. This concept of using a ''portfolio effect'' by distributing harvest in proportion to stock distribution is widely recognized in fisheries management, particularly among salmon stocks (see EA at 3.2.1). NMFS uses this harvest distribution approach for North Pacific stocks, such as Pacific cod sablefish, to manage across a broad spatial distribution. This method has several advantages in that it is based on a standardized annual assessment of stock (survey), is not reliant on commercial fishery data that can mask changes in underlying stock dynamics, and is a precautionary buffer against local depletion and spatial recruitment overfishing. The IPHC continues to discuss and refine apportionment methods; however, the current method represents the best available scientific method for apportioning coastwide catch.

NMFS recognizes the value of maintaining diversity across the geographic range of Pacific halibut and supports reducing the Area 2A catch limit consistent with the current understanding of coastwide stock health to protect against potential localized depletion. If there is a relatively distinct spawning component of the population in Area 2A, then the evidence of stock decline in Area 2A supports reducing the catch limit compared to 2017 in order to maintain that component. Conversely, if halibut in Area 2A interrelate with the coastwide spawning population, then the evidence of coastwide declines supports reducing the Area 2A catch limit to contribute to the sustainability of the coastwide stock. Regardless of the true relationship of the Area 2A population to the coastwide stock, maintaining the Area 2A catch limit at 2017 level, particularly in light of the catch limit decreases the Alaska Region will implement for other IPHC regulatory areas in a separate interim final rule, would be inconsistent with the IPHC's current stock apportionment approach. Overall, NMFS determined that the projected coastwide declines in stock biomass warrants distributing stock removals across all regulatory areas, including Area 2A.

NMFS reviewed the information presented by IPHC on the coastwide and Area 2A-specific decline of Pacific halibut and sources of uncertainty. The best available science supports the conclusion that the coastwide halibut population and the Area 2A component of the halibut population is declining, and NMFS believes that it is appropriate to reduce 2018 catch limit in Area 2A relative to 2017. There is enough uncertainty about the magnitude of the expected decline and concerns with the 2017 setline survey to influence NMFS's decision on a final catch limit for Area 2A. Due to the timing of the survey and hypoxic event, NMFS examined a catch limit using the survey WPUE for Area 2A from 2016, thus removing the uncertainty from the 2017 setline survey from this decision. NMFS believes this approach constitutes the best available science. Following the IPHC's interim management policy of an F46% SPR level for a coastwide TCEY of 31,000,000 lb (14,061.36 mt), the 2018 Area 2A TCEY was calculated to be 1,060,000 lb (480.81 mt). This compares with the IPHC's interim management recommendation of a 590,000 lb (267.62 mt) TCEY for Area 2A based on the 2017 setline survey data.

A decline in the halibut stock is expected under all alternatives, even under Alternative 3 with the lowest catch limits. The IPHC stock projections provided risk estimates up through 2021 with a higher level of certainty, but declines may occur over a period longer than three years. The stock will continue to be evaluated in annual stock assessments, and lower catch limits may be necessary in the coming years. Given the potential economic impacts of a large reduction from the 2017 TCEY of 1,470,000 lb (666.78 mt) to a TCEY for Area 2A that corresponds to a coastwide reference fishing intensity level of F46%, NMFS has determined that it is appropriate to reduce catch limits over a period greater than one year. Gradually reducing the level of harvest over a number of years balances a precautionary approach to coastwide decline of the stock shown in the survey with the severity of the economic impacts from a large reduction. Furthermore, a small reduction for 2018 provides a transition period if further reductions are necessary in the coming years, and allows the IPHC to re-evaluate the Area 2A biomass estimate after the 2018 survey. NMFS understands that the IPHC intends to follow the survey location and timing used in surveys prior to 2017, which may reduce the overlap of any summer hypoxia in future years.

Comments and Responses

On January 30, 2018, NMFS published a proposed rule for the 2018 Pacific halibut Catch Sharing Plan and annual management measures for Area 2A off Washington, Oregon, and California (83 FR 4175). NMFS accepted public comments on the Council's recommended modifications to the Plan and the resulting proposed domestic fishing regulations through March 1, 2018. When the January 2018 proposed rule was published, NMFS anticipated that the IPHC would determine catch limits for Area 2A at its annual meeting; however, the IPHC did not agree on 2018 Pacific halibut catch limits. Although specific 2018 catch limits were not proposed under the January 2018 proposed rule, NMFS accepted comments regarding any potential changes to the catch limits for 2018. Comments relating to the 2018 catch limits are addressed here. As stated above, NMFS is also requesting post-promulgation comments on the 2018 catch limits set under this rule.

Comment 1: Oregon Department of Fish and Wildlife and California Department of Fish and Wildlife support the United States Commissioner suggested TCEY of 1,320,000 lb (598.74 mt) and resulting catch limit of 1,190,000 lb (539.75 mt).

Response: NMFS acknowledges the importance of transparency and the data and staff experience used in the IPHC process for setting coastwide halibut catch limits. After an independent review of the best available science, NMFS is setting a catch limit of 1,190,000 lb (538.75 mt), consistent with the United States Commissioners' suggestion. NMFS's rationale in support of this catch limit is included in the preamble, and is not repeated here.

Comment 2: The Northwest Indian Fisheries Commission supported leaving 2017 catch limit in place for 2018, Alternative 1, which was also supported by IPHC advisory bodies at the annual meeting. Washington Department of Fish and Wildlife initially supported the United States Commissioners' suggestion, but later changed its position to state that 2017 levels are appropriate. The Northwest Indian Fisheries Commission further commented that the IPHC 2017 setline survey does not form a basis for a reduction in the Area 2A quota and that tribal and non-tribal commercial WPUE point to an increased Area 2A abundance.

Response: NMFS acknowledges the concerns with the setline survey, but disagrees that the 2017 setline survey does not provide any basis for Area 2A catch limit reductions. NMFS's consideration of the issues with the setline survey is discussed in detail in the preamble to this rule. Using the data from the 2017 setline survey that took place later than in previous years and coincided with a hypoxic area would result in a 2018 catch limit of 590,000 lb (267.62 mt) for Area 2A, discussed under Alternative 3. However, because of the concern with the 2017 survey, NMFS supports using the WPUE from the 2016 setline survey that provides a more appropriate starting point for determining the final Area 2A catch limit. Applying the 2016 setline survey data to the 2017 stock assessment was calculated to result in a 2018 TCEY of 1,060,000 pounds (480.81 mt) for Area 2A. NMFS concurs with statements by the United States Commissioners that adopting a TCEY for Area 2A that corresponds to a coastwide reference fishing intensity level of F46% without any transition period would lead to extensive economic harm to the tribes, fishery participants, and coastal communities in Area 2A. Setting the catch limit at 1,190,000 lbs (539.75 mt) reduces the immediate economic harm to fishery participants, but still reduces the catch limit to support the sustainability of the halibut stock. NMFS considered commercial WPUE when making its decision, but opted for a precautionary lower catch limit for the health of the halibut stock until the IPHC reports new information.

Classification

The Administrator of the NMFS West Coast Region determined that this interim final rule is necessary for the conservation and management of the Pacific halibut fishery and that it is consistent with the Convention, the Halibut Act, and other applicable laws. Halibut annual management measures are a product of an agreement between the United States and Canada and are published in the **Federal Register** to provide notice of their effectiveness and content. However, for 2018, because the United States and Canada were not able to reach agreement on all management measures, additional halibut annual management measures will be promulgated by the Secretary of Commerce pursuant to Northern Pacific Halibut Act of 1982, 16 U.S.C. 773c(a) and (b).

This interim final rule is consistent with the objective of the Convention to develop the stocks of halibut of the Northern Pacific Ocean and Bering Sea to levels which will permit the optimum yield from that fishery, and to maintain the stocks at those levels. NMFS considered the best available science when selecting the Area 2A catch limit implemented in this interim final rule. Specifically, NMFS considered the most recent stock assessments conducted by the IPHC, surveys, and the EA and FONSI completed for this interim final rule.

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

There are no relevant federal rules that may duplicate, overlap, or conflict with this action.

Pursuant to Executive Order 13175, the Secretary recognizes the sovereign status and co-manager role of Indian tribes over shared federal and tribal fishery resources. Section 302(b)(5) of the Magnuson-Stevens Fishery Conservation and Management Act establishes a seat on the Pacific Council for a representative of an Indian tribe with federally recognized fishing rights from California, Oregon, Washington, or Idaho.

The U.S. Government formally recognizes that the 13 Washington Tribes have treaty rights to fish for Pacific halibut. In general terms, the quantification of those rights is 50 percent of the harvestable surplus of Pacific halibut available in the tribes' usual and accustomed fishing areas (described at 50 CFR 300.64). Each of the treaty tribes has the discretion to administer its fisheries and to establish its own policies to achieve program objectives. Accordingly, tribal allocations and regulations have been developed in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus. The treaty tribes requested consultation with NMFS on this rule and NMFS met with representatives from the Makah Tribe on February 9, 2018, and the Northwest Indian Fisheries Commission on February 12, 2018, to discuss the rule.

Without adoption of this interim final rule, the Pacific halibut stocks would be harvested at a rate NMFS has determined to be unacceptably high based on the best available science. Further, it is imperative to publish these regulations prior to the opening of the season under the 2018 IPHC annual management measures (83 FR 10390, Mar. 3, 2018) to avoid confusion to the affected public regarding legal behavior while conducting Pacific halibut fisheries in Convention waters off the United States. Therefore, pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest. Because of the timing of the start of the Pacific halibut fishery, which begins on March 24, 2018, it is impracticable to complete rulemaking before the start of the fishery with a public review and comment period. However, the opportunity for public comment on the halibut stock and catch limits was available at the interim and annual IPHC meetings, through the proposed rule for changes to the Catch Sharing Plan, and at the Council meeting held in March 2018. This interim final rule implements commercial catch limit for Area 2A consistent with the suggestions made by United States Commissioners to the IPHC at the annual meeting of the IPHC that concluded on January 26, 2018. With the fishery scheduled to open on March 24, 2018, NMFS must ensure that the prosecution of a fishery would not result in substantial harm to the Pacific halibut resource that could occur if the additional time necessary to provide for prior notice and comment and agency processing delayed the effectiveness of this action beyond March 24, 2018.

There also is good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness. These management measures must be effective by March 24, 2018, when the Pacific halibut fishery is scheduled to open by regulations adopted by the IPHC. These management measures are necessary to prevent substantial harm to the Pacific halibut resource. Their immediate effectiveness avoids confusion that could occur if these management measures are not effective on March 24, 2018. Accordingly, it is impracticable to delay for 30 days the effective date of this rule. Therefore, good cause exists to waive the 30-day delay in effectiveness pursuant to 5 U.S.C. 553(b)(3), and to make the rule effective upon filing with the Office of the **Federal Register**.

Although we are waiving prior notice and opportunity for public comment, we are requesting post-promulgation comments until April 25, 2018. Please see **ADDRESSES** for more information on the ways to submit comments.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Antarctica, Canada, Exports, Fish, Fisheries, Fishing, Imports, Indians, Labeling, Marine resources, Reporting and recordkeeping requirements, Russian Federation, Transportation, Treaties, Wildlife.

Authority: 16 U.S.C. 951 *et seq.*, 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 5501 *et seq.*, 16 U.S.C. 2431 *et seq.*, 31 U.S.C. 9701 *et seq.*

Dated: March 21, 2018.

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 300 is amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart E—Pacific Halibut Fisheries

■ 1. The authority citation for part 300, subpart E, continues to read as follows:

Authority: 16 U.S.C. 773–773k.

■ 2. Add § 300.69 to read as follows:

§ 300.69 2018 Catch limits for Area 2A.

This section establishes catch limits for Area 2A, effective March 24, 2018, through December 31, 2018.

(a) This section establishes catch limits for Area 2A as follows:

	Pounds	Metric tons
Area 2A TCEY	1,320,000	598.74
Area 2A Catch Limit	1,190,000	538.78
Tribal commercial	389,500	176.67
Incidental commercial during sablefish fishery	50,000	22.68
Non-tribal directed commercial	201,845	91.56
Incidental commercial catch during salmon troll fishery	35,620	16.16

(b) [Reserved]

[FR Doc. 2018–06048 Filed 3–23–18; 8:45 am]

BILLING CODE 3510–22–P

FEDERAL REGISTER

Vol. 83 Monday,
No. 58 March 26, 2018

Part IV

Department of Commerce

National Oceanic and Atmospheric Administration

50 CFR Part 300

Pacific Halibut Fisheries; Catch Sharing Plan; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 171205999–8274–02]

RIN 0648–BH45

Pacific Halibut Fisheries; Catch Sharing Plan

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

ACTION: Final rule.

SUMMARY: This final rule implements the Pacific Halibut Catch Sharing Plan and codified regulations for the International Pacific Halibut Commission's Regulatory Area 2A (Area 2A), located off Washington, Oregon, and California. In addition, this final rule implements portions of the Catch Sharing Plan that are not implemented through the International Pacific Halibut Commission, specifically sport fishery allocations and management measures for Area 2A. These actions are intended to conserve Pacific halibut, provide angler opportunity where available, and minimize bycatch of overfished groundfish species.

DATES: This rule is effective on March 24, 2018.

ADDRESSES: Additional information regarding this action may be obtained by contacting the Sustainable Fisheries Division, NMFS West Coast Region, 7600 Sand Point Way NE, Seattle, WA 98115. For information regarding all halibut fisheries and general regulations not contained in this rule contact the International Pacific Halibut Commission, 2320 W. Commodore Way, Suite 300, Seattle, WA 98199–1287. Electronic copies of the Regulatory Impact Review (RIR) and Final Regulatory Flexibility Analysis (FRFA) prepared for this action may be obtained by contacting Kathryn Blair, phone: 206–526–6140, email: *kathryn.blair@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Kathryn Blair, phone: 206–526–6140, fax: 206–526–6736, or email: *kathryn.blair@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Northern Pacific Halibut Act (Halibut Act) of 1982 gives the Secretary of Commerce responsibility for implementing the provisions of the Halibut Convention between the United States and Canada. The Halibut Act requires that the Secretary adopt regulations to carry out the purposes and objectives of the Halibut Convention and Halibut Act. The Halibut Act also authorizes the regional fishery management councils to develop regulations in addition to, but not in conflict with, regulations of the International Pacific Halibut Commission (IPHC) to govern the Pacific halibut catch in their corresponding U.S. Convention waters.

Since 1988, NMFS has implemented annual Catch Sharing Plans that allocate the IPHC Regulatory Area 2A Pacific halibut catch limit between treaty Indian and non-Indian harvesters, and among non-Indian commercial and sport fisheries. The Pacific Fishery Management Council (Council) develops Catch Sharing Plans in accordance with the Halibut Act. In 1995, the Council recommended, and NMFS implemented a long-term Area 2A Catch Sharing Plan (60 FR 14651; March 20, 1995). NMFS has been implementing adjustments to the Area 2A Catch Sharing Plan based on Council recommendations each year to address the changing needs of these fisheries.

For 2018, the Council recommended minor modifications to sport fisheries to better match the needs of the fishery, and changes to the incidental retention of halibut in the sablefish fishery. On January 30, 2018, NMFS published a proposed rule to approve the Council's recommended changes to the 2018 Catch Sharing Plan and recreational management measures for Area 2A (83 FR 4175). In the Area 2A proposed rule, NMFS also proposed changing the codified regulations to make them consistent with the current allocation threshold for incidental halibut caught in the sablefish fishery. This final rule includes these components of the proposed rule, as well as dates for the sport fisheries based on dates submitted by the states of California and Oregon following publication of the proposed rule (see Comments and Responses section).

In past years, NMFS has published the catch limits for the IPHC's Regulatory Areas, which were included in the IPHC's annual regulations. The IPHC did not reach consensus on 2018 Pacific halibut catch limits for any of the IPHC Regulatory Areas at its annual meeting held January 22–26, 2018. NMFS is implementing 2018 catch limits for all U.S. IPHC Regulatory Areas in separate rulemakings. Specifically, this final rule will implement Area 2A subarea allocations within the annual management measures that are based on the catch limits described in a separate interim final rule for Area 2A and the framework set forth in the Catch Sharing Plan published elsewhere in this same issue of the **Federal Register**. The IPHC did reach agreement on annual regulations for matters other than the catch limits. On February 26, 2018, the Secretary of State, with the concurrence of the Secretary of Commerce, accepted the 2018 IPHC regulations. NMFS published a final rule to implement the 2018 management measures and season dates for all IPHC Regulatory Areas on March 9, 2018 (83 FR 10390).

Incidental Halibut Retention in the Sablefish Primary Fishery North of Pt. Chehalis, WA

The 2018 Area 2A Catch Sharing Plan allows incidental halibut retention in the sablefish primary fishery north of Pt. Chehalis, WA, when the Washington recreational TAC is 224,110 lb (101.7 mt) or greater, provided that a minimum of 10,000 lb (4.5 mt) is available. Because the IPHC was not able to reach consensus on an Area 2A catch limit for 2018, NMFS determined the catch limit, as described in a concurrent interim final rule published elsewhere in this same issue of the **Federal Register**. The Area 2A catch limit is great enough to allow the full allocation of 50,000 pounds for incidental halibut retention in the sablefish primary fishery. NMFS intends to publish the incidental halibut landing restrictions for the sablefish fishery in the **Federal Register** as an inseason action by April 1, 2018, or as soon as possible thereafter.

2018 Sport Fishery Management Measures

The sport fishing regulations for Area 2A, included in section 27 (referring to the relevant section of the IPHC regulations) below, are consistent with the measures adopted by the IPHC and approved by the Secretary of State, but were developed by the Council and promulgated by the United States under the Halibut Act. Section 27 corresponds to the numbering in the IPHC regulations published on March 9, 2018 (83 FR 10390).[1] The changes to the Catch Sharing Plan are published in the **Federal Register**, but are not codified in the Code of Federal Regulations.

In section 27 of the annual domestic management measures, ''Sport Fishing for Halibut—IPHC Regulatory Area 2A''

[1] In the proposed rule (83 FR 4175, Jan. 30, 2018), sport fishing regulations were listed under section 26, corresponding to the 2017 IPHC regulations (82 FR 12730, Mar. 7, 2017). Area 2A sport fishing regulations have been updated to section 27 in this final rule following publication of IPHC regulations for 2018.

paragraph (8) is revised to read as follows:

(8) * * *

(a) The quota for the area in Puget Sound and the U.S. waters in the Strait of Juan de Fuca, east of a line extending from 48°17.30′ N lat., 124°23.70′ W long., north to 48°24.10′ N. lat., 124°23.70′ W long., is 60,995 pounds.

(i) The fishing seasons are:

(A) Depending on available quota, fishing is open May 11, 13, 25, and 27; June 7, 9, 16, 21, 23, 28, and 30, or until there is not sufficient quota for another full day of fishing and the area is closed by the Commission. Any fishery opening will be announced on the NMFS hotline at 800–662–9825. No halibut fishing will be allowed unless the date is announced on the NMFS hotline.

(ii) The daily bag limit is one halibut of any size per day per person.

(b) The quota for landings into ports in the area off the north Washington coast, west of the line described in paragraph (2)(a) of section 26 and north of the Queets River (47°31.70′ N. lat.) (North Coast subarea), is 111,632 pounds.

(i) The fishing seasons are:

(A) Depending on available quota, fishing is open May 11, 13, 25, and 27; June 7, 9, 16, 21, 23, 28, and 30, or until there is not sufficient quota for another full day of fishing and the area is closed by the Commission. Any fishery opening will be announced on the NMFS hotline at 800–662–9825. No halibut fishing will be allowed unless the date is announced on the NMFS hotline.

(ii) The daily bag limit is one halibut of any size per day per person.

(iii) Recreational fishing for groundfish and halibut is prohibited within the North Coast Recreational Yelloweye Rockfish Conservation Area (YRCA). It is unlawful for recreational fishing vessels to take and retain, possess, or land halibut taken with recreational gear within the North Coast Recreational YRCA. A vessel fishing with recreational gear in the North Coast Recreational YRCA may not be in possession of any halibut. Recreational vessels may transit through the North Coast Recreational YRCA with or without halibut on board. The North Coast Recreational YRCA is a C-shaped area off the northern Washington coast intended to protect yelloweye rockfish. The North Coast Recreational YRCA is defined in groundfish regulations at 50 CFR 660.70(a).

(c) The quota for landings into ports in the area between the Queets River, WA (47°31.70′ N lat.), and Leadbetter Point, WA (46°38.17′ N lat.) (South Coast subarea), is 46, 341 pounds.

(i) This subarea is divided between the all-waters fishery (the Washington South coast primary fishery), and the incidental nearshore fishery in the area from 47°31.70′ N lat. south to 46°58.00′ N lat. and east of a boundary line approximating the 30 fm depth contour. This area is defined by straight lines connecting all of the following points in the order stated as described by the following coordinates (the Washington South coast, northern nearshore area):

(1) 47°31.70′ N lat., 124°37.03′ W. long,;

(2) 47°25.67′ N lat., 124°34.79′ W. long,;

(3) 47°12.82′ N lat., 124°29.12′ W. long,;

(4) 46°58.00′ N lat., 124°24.24′ W. long.

The south coast subarea quota will be allocated as follows: 44,341 pounds for the primary fishery and 2,000 pounds to the nearshore fishery. Depending on available quota, the primary fishery season dates are May 11, 13, 25, and 27; June 7, 9, 16, 21, 23, 28, and 30, or until there is not sufficient quota for another full day of fishing and the area is closed by the Commission. Any fishery opening will be announced on the NMFS hotline at 800–662–9825. No halibut fishing will be allowed unless the date is announced on the NMFS hotline. The fishing season in the nearshore area commences the Saturday subsequent to the closure of the primary fishery, and continues 7 days per week until 46,341 pounds is projected to be taken by the two fisheries combined and the fishery is closed by the Commission or September 30, whichever is earlier. If the fishery is closed prior to September 30, and there is insufficient quota remaining to reopen the northern nearshore area for another fishing day, then any remaining quota may be transferred in-season to another Washington coastal subarea by NMFS via an update to the recreational halibut hotline.

(ii) The daily bag limit is one halibut of any size per day per person.

(iii) Seaward of the boundary line approximating the 30-fm depth contour and during days open to the primary fishery, lingcod may be taken, retained and possessed when allowed by groundfish regulations at 50 CFR 660.360, subpart G.

(iv) Recreational fishing for groundfish and halibut is prohibited within the South Coast Recreational YRCA and Westport Offshore YRCA. It is unlawful for recreational fishing vessels to take and retain, possess, or land halibut taken with recreational gear within the South Coast Recreational YRCA and Westport Offshore YRCA. A vessel fishing in the South Coast Recreational YRCA and/or Westport Offshore YRCA may not be in possession of any halibut. Recreational vessels may transit through the South Coast Recreational YRCA and Westport Offshore YRCA with or without halibut on board. The South Coast Recreational YRCA and Westport Offshore YRCA are areas off the southern Washington coast established to protect yelloweye rockfish. The South Coast Recreational YRCA is defined at 50 CFR 660.70(d). The Westport Offshore YRCA is defined at 50 CFR 660.70(e).

(d) The quota for landings into ports in the area between Leadbetter Point, WA (46°38.17′ N lat.), and Cape Falcon, OR (45°46.00′ N lat.) (Columbia River subarea), is 11,682 pounds.

(i) This subarea is divided into an all-depth fishery and a nearshore fishery. The nearshore fishery is allocated 500 pounds of the subarea allocation. The nearshore fishery extends from Leadbetter Point (46°38.17′ N lat., 124°15.88′ W long.) to the Columbia River (46°16.00′ N lat., 124°15.88′ W long.) by connecting the following coordinates in Washington 46°38.17′ N lat., 124°15.88′ W long. 46°16.00′ N lat., 124°15.88′ W long. and connecting to the boundary line approximating the 40 fm (73 m) depth contour in Oregon. The nearshore fishery opens May 7, and continues on Monday, Tuesday, and Wednesday each week until the nearshore allocation is taken, or September 30, whichever is earlier. The all-depth fishing season commences on May 3, and continues on Thursday, Friday and Sunday each week until 11,182 pounds are estimated to have been taken and the season is closed by the Commission, or September 30, whichever is earlier. Subsequent to this closure, if there is insufficient quota remaining in the Columbia River subarea for another fishing day, then any remaining quota may be transferred inseason to another Washington and/or Oregon subarea by NMFS via an update to the recreational halibut hotline. Any remaining quota would be transferred to each state in proportion to its contribution.

(ii) The daily bag limit is one halibut of any size per day per person.

(iii) Pacific Coast groundfish may not be taken and retained, possessed or landed when halibut are on board the vessel, except sablefish, Pacific cod, flatfish species, and lingcod caught north of the Washington-Oregon border during the month of May, when allowed by Pacific Coast groundfish regulations, during days open to the all-depth fishery only.

(iv) Taking, retaining, possessing, or landing halibut on groundfish trips is only allowed in the nearshore area on days not open to all-depth Pacific halibut fisheries.

(e) The quota for landings into ports in the area off Oregon between Cape Falcon (45°46.00′ N lat.) and Humbug Mountain (42°40.50′ N lat.) (Oregon Central Coast subarea), is 215,463 pounds.

(i) The fishing seasons are:

(A) The first season (the ''inside 40-fm'' fishery) commences June 1, and continues 7 days a week, in the area shoreward of a boundary line approximating the 40-fm (73-m) depth contour, or until the sub-quota for the central Oregon ''inside 40-fm'' fishery of 25,856 pounds, or any in-season revised subquota, is estimated to have been taken and the season is closed by the Commission, whichever is earlier. The boundary line approximating the 40-fm (73-m) depth contour between 45°46.00′ N lat. and 42°40.50′ N lat. is defined at § 660.71(k).

(B) The second season (spring season), which is for the ''all-depth'' fishery, is open May 10, 11, 12; 24, 25, 26; June 7, 8, 9; and 21, 22, 23. The allocation to the all-depth fishery is 135,742 pounds. If sufficient unharvested quota remains for additional fishing days, the season will re-open July 5, 6, 7; and 19, 20, 21. Notice of the re-opening will be announced on the NMFS hotline (206) 526–6667 or (800) 662–9825. No halibut fishing will be allowed on the re-opening dates unless the date is announced on the NMFS hotline.

(C) If sufficient unharvested quota remains, the third season (summer season), which is for the ''all-depth'' fishery, will be open August 3, 4; 17, 18; 31; September 1; 14, 15; 28, 29; October 12, 13; and 26, 27; or until the combined spring season and summer season quotas in the area between Cape Falcon and Humbug Mountain, OR, are estimated to have been taken and the area is closed by the Commission. NMFS will announce on the NMFS hotline in July whether the fishery will re-open for the summer season in August. No halibut fishing will be allowed in the summer season fishery unless the dates are announced on the NMFS hotline. Additional fishing days may be opened if sufficient quota remains after the last day of the first scheduled open period. If, after this date, an amount greater than or equal to 60,000 lb (27.2 mt) remains in the combined all-depth and inside 40-fm (73-m) quota, the fishery may re-open every other Friday and Saturday, beginning August 3 and 4 and ending when there is insufficient quota remaining, whichever is earlier. If after September 1, an amount greater than or equal to 30,000 lb (13.6 mt) remains in the combined all-depth and inside 40-fm (73-m) quota, and the fishery is not already open every Friday and Saturday, the fishery may re-open every Friday and Saturday, beginning September 7 and 8, and ending October 31. After September 1, the bag limit may be increased to two fish of any size per person, per day. NMFS will announce on the NMFS hotline whether the summer all-depth fishery will be open on such additional fishing days, what days the fishery will be open and what the bag limit is.

(ii) The daily bag limit is one halibut of any size per day per person, unless otherwise specified. NMFS will announce on the NMFS hotline any bag limit changes.

(iii) During days open to all-depth halibut fishing when the groundfish fishery is restricted by depth, no groundfish may be taken and retained, possessed or landed, when halibut are on board the vessel, except sablefish, Pacific cod, and flatfish species, when allowed by groundfish regulations, if halibut are onboard the vessel. During days open to all-depth halibut fishing when the groundfish fishery is open to all depths, any groundfish species permitted under the groundfish regulations may be retained, possessed or landed if halibut are on aboard the vessel. During days open to nearshore halibut fishing, flatfish species may be taken and retained seaward of the seasonal groundfish depths restrictions, if halibut are on board the vessel.

(iv) When the all-depth halibut fishery is closed and halibut fishing is permitted only shoreward of a boundary line approximating the 40-fm (73-m) depth contour, halibut possession and retention by vessels operating seaward of a boundary line approximating the 40-fm (73-m) depth contour is prohibited.

(v) Recreational fishing for groundfish and halibut is prohibited within the Stonewall Bank YRCA. It is unlawful for recreational fishing vessels to take and retain, possess, or land halibut taken with recreational gear within the Stonewall Bank YRCA. A vessel fishing in the Stonewall Bank YRCA may not possess any halibut. Recreational vessels may transit through the Stonewall Bank YRCA with or without halibut on board. The Stonewall Bank YRCA is an area off central Oregon, near Stonewall Bank, intended to protect yelloweye rockfish. The Stonewall Bank YRCA is defined at § 660.70(f).

(f) The quota for landings into ports in the area south of Humbug Mountain, OR (42°40.50′ N lat.) to the Oregon/California Border (42°00.00′ N lat.) (Southern Oregon subarea) is 8,982 pounds.

(i) The fishing season commences on May 1, and continues 7 days per week until the subquota is taken, or October 31, whichever is earlier.

(ii) The daily bag limit is one halibut per person with no size limit.

(iii) No Pacific Coast groundfish may be taken and retained, possessed or landed, except sablefish, Pacific cod, and flatfish species, in areas closed to groundfish, if halibut are on board the vessel.

(g) The quota for landings into ports south of the Oregon/California Border (42°00.00′ N lat.) and along the California coast is 30,940 pounds.

(i) The fishing season will be open May 1 through June 15, July 1 through July 15, August 1 through August 15, and September 1 through October 31, or until the subarea quota is estimated to have been taken and the season is closed by the Commission, whichever is earlier. NMFS will announce any closure by the Commission on the NMFS hotline (206) 526–6667 or (800) 662–9825.

(ii) The daily bag limit is one halibut of any size per day per person.

Comments and Responses

NMFS accepted public comments on the Council's recommended modifications to the 2018 Area 2A Catch Sharing Plan and the resulting proposed domestic fishing regulations through March 1, 2018. NMFS also accepted comments regarding the 2018 catch limit for Area 2A, since the IPHC did not come to an agreement on catch limits for the IPHC Regulatory Areas at its annual meeting. NMFS responded to public comments on the Area 2A catch limits in the concurrent interim final rule published elsewhere in this same issue of the **Federal Register**.

Comment 1: Oregon Department of Fish and Wildlife (ODFW) submitted a comment that included final recreational season dates for the 2018 season. ODFW held a public meeting and hosted an online survey following the IPHC annual meeting. Based on public comments received on Oregon halibut fisheries, ODFW recommended the following days for the Spring fishery in the Central Oregon Coast subarea, within this subarea's parameters for a Thursday–Saturday season and with weeks of adverse tidal conditions skipped: Regular open days May 10, 11, 12; 24, 25, 26; June 7, 8, 9; and 21, 22, 23. Recommended backup dates for the

Spring fishery are July 5, 6, 7; and 19, 20, 21. For the summer all-depth fishery in this subarea, ODFW recommended following the Area 2A Catch Sharing Plan's parameters of opening the first Friday in August, with open days to occur every other Friday–Saturday, unless modified in-season within the parameters of the Catch Sharing Plan. Therefore, the ODFW recommended the 2018 summer all-depth fishery in Oregon's Central Coast Subarea to occur: August 3, 4; 17, 18; 31; September 1; 14, 15; 28, 29; October 12, 13; and 26, 27; or until the total 2018 all-depth quota for the subarea has been attained.

Response: NMFS concurs that the ODFW-recommended season dates are appropriate, and has updated the Oregon Central Coast sport fishery season dates in this final rule.

Comment 2: California Department of Fish and Wildlife (CDFW) submitted a comment recommending final recreational fishing season dates for the 2018 season. Based on public comment and fishing performance in recent years, CDFW recommended season dates of May 1–June 15, July 1–July 15, August 1–August 15, and September 1–October 31, or until quota has been attained, whichever comes first.

Response: NMFS concurs that the CDFW-recommended season dates are appropriate, and has updated California sport fishery season dates in this final rule.

Comment 3: Washington Department of Fish and Wildlife (WDFW) recommended adding a four fish Pacific halibut bag limit to the Catch Sharing Plan. This change was developed through the state and Council stakeholder process, and approved at the November 2017 Council meeting.

Response: Because of ambiguity in the proposed changes to the Catch Sharing Plan and regulations NMFS received, NMFS did not include the four fish bag limit in the Catch Sharing Plan or in the regulations in the proposed rule. To ensure that the Catch Sharing Plan is in place for the start of the 2018 fishing year, and because this proposed change was not clearly identified for the public in the proposed rule, NMFS will not include the Washington state bag limit in the Catch Sharing Plan or federal regulations for 2018. However, NMFS will work with Washington as necessary to implement the bag limits in state regulations, rather than in federal regulations.

Changes From the Proposed Rule

NMFS implemented the total Area 2A catch limit of 1,190,000 pounds in a separate interim final rule published elsewhere in this same issue of the **Federal Register**, and is publishing the Area 2A subarea allocations for the first time in this final rule, as the total Area 2A catch limit was not available when the proposed rule was published. The allocations in this rule are consistent with the 2018 Area 2A Catch Sharing Plan as recommended by the Council. In addition, NMFS included CDFW and ODFW's recommended season dates (as described in the Comments and Responses section) in this final rule.

Classification

Regulations governing the U.S. fisheries for Pacific halibut are developed by the IPHC, the Council, the North Pacific Fishery Management Council, and the Secretary. Section 5 of the Halibut Act (16 U.S.C. 773c) provides the Secretary with the general responsibility to carry out the Halibut Convention between Canada and the United States for the management of Pacific halibut, including the authority to adopt regulations as may be necessary to carry out the purposes and objectives of the Halibut Convention and the Halibut Act. This action is consistent with the Secretary's authority under the Halibut Act.

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

This final rule is not expected to be an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

This final rule does not contain policies with federalism or ''takings'' implications as those terms are defined in E.O. 13132 and E.O. 12630, respectively.

NMFS finds good cause to waive the 30-day delay in effectiveness and make this rule effective on March 24, 2018, in time for the start of incidental Pacific halibut fisheries, pursuant to 5 U.S.C. 553(d)(3). The 2018 Catch Sharing Plan provides the framework for the annual management measures and subarea allocations based on the 2018 Area 2A catch limit for Pacific halibut. This rule would implement a change to the Catch Sharing Plan allocation for the sablefish primary fishery, which starts on April 1, 2018.

Allowing the 2017 measures to remain in place could harm the halibut stock because those measures are based on the 2017 catch limit for Area 2A, which does not reflect the most current scientific information. The 2018 Area 2A catch limit is lower than the 2017 catch limit. Because of the overall reduction in the 2018 Area 2A catch limit, halibut allocations for all of the halibut fisheries in Area 2A are reduced in 2018 compared to 2017. Maintaining the 2017 Catch Sharing Plan and management measures could necessitate management changes later in the year to prevent exceeding the lower 2018 allocations once the 2018 Catch Sharing Plan is effective. Those management changes may reduce revenue for fishery participants by causing them to curtail effort or change business plans. For all of these reasons, a delay in effectiveness could ultimately cause economic harm to the fishing industry and associated fishing communities by reducing fishing opportunity later in the year to keep catch within the lower 2018 allocations, or could result in halibut catch greater than the level supported by best available scientific information. To prevent the potential harm to the halibut stock and fishing communities that could result from delaying the effectiveness of this final rule, NMFS finds good cause to waive the 30-day delay in the date of effectiveness and make this rule effective on March 24, 2018.

Final Regulatory Flexibility Analysis

Section 604 of the RFA, 5 U.S.C. 604, requires Federal agencies to prepare a Final Regulatory Flexibility Analysis (FRFA) for each final rule. The FRFA describes the economic impact of this action on small entities. The FRFA includes a summary of significant issues raised by public comments, the analyses contained in the accompanying Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (IRFA), the IRFA summary in the proposed rule, as well as the summary provided below. A statement of the necessity for, and the objectives of this action are contained in proposed rule and in the preamble to this final rule, and is not repeated here. A copy of the FRFA is available on request (see **ADDRESSES**), and a summary of the FRFA is provided below.

A Summary of the Significant Issues Raised by the Public in Response to the IRFA, a Summary of the Agency's Assessment of Such Issues, and a Statement of Any Changes Made in the Final Rule as a Result of Such Comments

There were no issues raised about the IRFA in the public comments.

Description and Estimate of the Number of Small Entities to Which the Rule Applies

The SBA defines a small business as one that is:

• Independently owned and operated;

• Not dominant in its field of operation;

• Has annual receipts that do not exceed—
  ○ $20.5 million in the case of commercial finfish harvesting entities (NAIC [2] 114111);
  ○ $5.5 million in the case of commercial shellfish harvesting entities (NAIC 114112);
  ○ $7.5 million in the case of for-hire fishing entities (NAIC 114119); or
• Has fewer than—
  ○ 750 employees in the case of fish processors; or
  ○ 100 employees in the case of fish dealers.

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 its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide.

This rule may affect some charterboat operations in Area 2A and participants in the incidental sablefish fishery off the coast of Washington. Previous analyses determined that charterboats and the non-treaty directed commercial fishing vessels are small businesses (see 77 FR 5477; February 3, 2012, and 76 FR 2876; January 18, 2011).

In 2017, 574 vessels were issued IPHC licenses to retain halibut. IPHC issues licenses for: The 2A directed commercial fishery (192 licenses in 2017), the incidental fishery in the sablefish primary fishery in Area 2A (8 licenses in 2017), incidental halibut caught in the salmon troll fishery (222 licenses in 2017) and the charterboat fleet (136 licenses in 2017). A number of vessels were issued IPHC licenses for both the 2A directed commercial fishery and the incidental fishery in the sablefish primary fishery (16 licenses in 2017). These license estimates overstate the number of vessels that participate in the fishery. IPHC estimates that only half of the licensed vessels participated in the directed commercial fishery, 100 vessels participated in the incidental commercial (salmon) fishery, and 13 vessels participated in the incidental commercial (sablefish) fishery. Recent information on charterboat activity is not available, but prior analysis indicated that 60 percent of the IPHC charterboat license holders may be affected by these regulations.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements

The changes to the Catch Sharing Plan and domestic management measures do not include any new reporting or recordkeeping requirements. These changes will also not duplicate, overlap or conflict with other laws or regulations.

Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes

There were no significant alternatives to the final rule that would minimize any significant impact on small entities. The effects of the rule are minimal, and there are no other additional significant alternatives that would further minimize the impact of the rule on small entities while achieving the goals and objectives of the Convention and Halibut Act. The minor changes, including updates to sport fishery season dates, modification of the quota for incidental halibut in the sablefish fishery, and changes to the open days in the Columbia River subarea, were proposed by stakeholders and recommended by the Council to address the needs of the fishery. Commercial opportunities may be fewer with the incidental sablefish maximum allocation lowering to 50,000 pounds. However, even when the maximum of 70,000 pounds has been allocated, attainment greater than 50,000 pounds has not occurred since 2006. Reducing the number of open days in the Columbia River subarea from four open days (status quo—open Thursday through Sunday), to three open days (open Thursday, Friday, and Sunday), is expected to allow the season to stay open through the summer. Allowing the season to remain open for four days could result in the season ending at an earlier date, which would ultimately decrease sport fishing opportunities.

The changes to the Catch Sharing Plan are expected to slightly increase fishing opportunities in some areas at some times, and to slightly decrease fishing opportunities in other areas at other times. None of these changes are controversial, and none are expected to result in substantial environmental or economic impacts. These actions are intended to enhance the conservation of Pacific halibut, and to provide angler opportunity where available.

NMFS does not consider that the changes to the Catch Sharing Plan considered by the Council constituted significant alternatives, therefore NMFS did not analyze alternatives to those changes to the Catch Sharing Plan, other than the proposed changes and the status quo, for purposes of the FRFA. Effects of the status quo and the final changes are similar, because the changes to the Catch Sharing Plan for 2018 are not substantially different from the 2017 Catch Sharing Plan. For these reasons, the changes to the Catch Sharing Plan are not expected to have a significant economic impact.

Pursuant to Executive Order 13175, the Secretary recognizes the sovereign status and co-manager role of Indian tribes over shared Federal and tribal fishery resources. Section 302(b)(5) of the Magnuson-Stevens Fishery Conservation and Management Act establishes a seat on the Pacific Council for a representative of an Indian tribe with federally recognized fishing rights from California, Oregon, Washington, or Idaho.

The U.S. Government formally recognizes that the 13 Washington Tribes have treaty rights to fish for Pacific halibut. In general terms, the quantification of those rights is 50 percent of the harvestable surplus of Pacific halibut available in the tribes' usual and accustomed fishing areas (described at 50 CFR 300.64). Each of the treaty tribes has the discretion to administer their fisheries and to establish their own policies to achieve program objectives. Accordingly, tribal allocations and regulations, including the proposed changes to the Catch Sharing Plan, have been developed in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Antarctica, Canada, Exports, Fish, Fisheries, Fishing, Imports, Indians, Labeling, Marine resources, Reporting and recordkeeping requirements, Russian Federation, Transportation, Treaties, Wildlife.

Authority: 16 U.S.C. 951 *et seq.,* 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 5501 *et seq.,* 16 U.S.C. 2431 *et seq.,* 31 U.S.C. 9701 *et seq.*

Dated: March 21, 2018.

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 300 is amended as follows:

[2] The North American Industry Classification System (NAICS) is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.

PART 300—INTERNATIONAL FISHERIES REGULATIONS

Subpart E—Pacific Halibut Fisheries

■ 1. The authority citation for part 300, subpart E, continues to read as follows:

Authority: 16 U.S.C. 773–773k.

■ 2. In § 300.63, revise the introductory text of paragraph (b)(3) to read as follows:

§ 300.63 Catch sharing plan and domestic management measures in area 2A.

* * * * *

(b) * * *

(3) A portion of the Area 2A Washington recreational TAC is allocated as incidental catch in the sablefish primary fishery north of 46°53.30′ N lat. (Pt. Chehalis, Washington), which is regulated under 50 CFR 660.231. This fishing opportunity is only available in years in which the Washington recreational TAC is 214, 110 lb (97.1 mt) or greater, provided that a minimum of 10,000 lb (4.5 mt) is available to the sablefish fishery. Each year that this harvest is available, the landing restrictions necessary to keep this fishery within its allocation will be recommended by the Pacific Fishery Management Council at its spring meetings, and will be published in the **Federal Register**. These restrictions will be designed to ensure the halibut harvest is incidental to the sablefish harvest and will be based on the amounts of halibut and sablefish available to this fishery, and other pertinent factors. The restrictions may include catch or landing ratios, landing limits, or other means to control the rate of halibut landings.

* * * * *

[FR Doc. 2018–06049 Filed 3–23–18; 8:45 am]

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FEDERAL REGISTER PAGES AND DATE, MARCH

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